



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 533

November 30, 2015

Whether a judicial candidate or officeholder may receive free legal services from an attorney to defend a defamation lawsuit arising from the candidate's or officeholder's activities as a candidate, and whether a judicial candidate may be represented by an attorney on a contingent fee basis to prosecute and pursue a defamation lawsuit arising from the candidate's activities as a candidate.
(AOR-603)

The Texas Ethics Commission ("commission") has been asked to consider whether a judge, who is also a candidate, may receive free or "pro bono" legal services from an attorney to defend a defamation lawsuit arising from the judge's activities as a candidate. The commission has also been asked whether the judge, as a judicial candidate, may be represented by an attorney on a contingent fee basis to prosecute and pursue a defamation lawsuit arising from the judge's activities as a candidate.

The laws under the commission's authority that are at issue are the campaign finance law (title 15 of the Election Code) and the benefit restrictions in section 36.08 of the Penal Code.¹ It is important to review the relevant restrictions in these laws because what is permissible under one area of law may not be permissible under another.

Free Legal Services

Title 15 of the Election Code: Regarding the free legal services, the first issue is whether the arrangement between the judge and the attorney results in a political contribution to the judge under title 15 of the Election Code. A political contribution is defined, in part, as a direct or indirect transfer of money, goods, services, or any other thing of value 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), (5).² Thus, free legal services provided to candidate with the intent that they be used in connection with a campaign for elective office would constitute a campaign contribution.³

The judge states that the defamation lawsuit would arise from the judge's activities as a candidate.⁴ Assuming that is the case, then the value of the free legal services would be a campaign contribution. *See* Ethics Advisory Opinion Nos. 329 (1996) (free legal services to a candidate to pursue a lawsuit to recover damages under section 253.131 of the Election Code⁵ is an in-kind campaign contribution);⁶ 433, n.3 (2001) (contributions to an officeholder to defray expenses incurred in defending against charges of official misconduct are officeholder contributions). Title 15 imposes certain restrictions on political contributions to judicial candidates and officeholders, including a moratorium on accepting political contributions (Elec. Code § 253.153), contribution limits (*Id.* §§ 253.155-.1601), and prohibitions on campaign contributions from corporations and labor organizations (subch. D, ch. 253, Elec. Code). For a political contribution to a judicial candidate or officeholder to be permissible, the acceptance must comply with those restrictions.

Penal Code: The next issue regarding the free legal services is whether it is permissible under section 36.08 of the Penal Code, which includes several restrictions on benefits to public servants, including a judicial officeholder or a candidate for nomination or election to public office.⁷ The restriction that is most likely to

apply in these circumstances is section 36.08(e), which, in relevant part, prohibits a public servant who has judicial or administrative authority from soliciting, accepting, or agreeing to accept any “benefit” from a person the public servant knows is interested in or likely to become interested in any matter before the public servant. Penal Code § 36.08(e). A “benefit” is “anything reasonably regarded as pecuniary gain or advantage.” *Id.* § 36.01(3).

Free legal services provided to a judge are a benefit. Ethics Advisory Opinion No. 363 (1997) (EAO 363) (free legal services to a legislator to defend against two lawsuits alleging misconduct in a private capacity is a benefit). Therefore, section 36.08 of the Penal Code would prohibit the judge from accepting the free legal services if the judge knows that the person providing the services is interested in or likely to become interested in any matter before the judge, unless it is covered by one of the exceptions to that prohibition under section 36.10 of the Penal Code.⁸ One of the exceptions is a political contribution. Penal Code § 36.10(a)(4). Assuming that the free legal services are a political contribution to the judge made and accepted in compliance with the restrictions under title 15, the free legal services would not be prohibited.

Legal Services for a Contingent Fee

The next question is whether the judge may hire an attorney for legal services on a contingent fee basis. We assume that the judge and the attorney would agree that the judge would only pay the attorney if the judge prevails in his defamation lawsuit by obtaining a monetary award or settlement.⁹

Title 15 of the Election Code: Whether the contingent fee arrangement results in a political contribution to the judge depends upon the specific facts. Under title 15, a contribution “does not include a transfer for consideration¹⁰ of any thing of value pursuant to a contract that reflects the usual and normal business practice of the vendor.” 1 T.A.C. § 20.1(3). In such a case, the terms of the transaction must also be typical of the terms the commercial party offers to political and non-political entities alike.¹¹ Additionally, a discount to a candidate, officeholder, or political committee is an in-kind political contribution unless the terms of the transaction reflect the usual and normal practice of the industry and are typical of the terms that are offered to political and non-political persons alike, or unless the discount is given solely in order to comply with section 253.041 of the Election Code. *Id.* §§ 20.1(22), 20.66(a). We cannot determine in this opinion whether it is the usual and normal practice of the industry for an attorney to pursue a defamation lawsuit for a client on a contingent fee basis. However, if the terms of the transaction constitute an exchange of consideration and reflect the usual and normal practice of the industry, and the attorney offers the same terms to political and non-political entities alike, then the transaction would be permissible under title 15. Conversely, if the transaction does not meet those standards, then the legal services provided to the judge would be a campaign contribution that the judge can only accept if it complies with the title 15 restrictions applicable to campaign contributions to a judicial candidate.¹²

Penal Code: The remaining issue is whether the contingent fee arrangement would be a prohibited benefit to the judge under section 36.08 of the Penal Code. Legal services provided to a judge to pursue a lawsuit in which the judge may receive monetary damages, a payment under a settlement agreement, or any other payment would constitute a benefit. A benefit to the judge covered by the benefit prohibitions under section 36.08 is prohibited unless an exception in section 36.10 applies. As we have stated previously, section 36.10 exempts a benefit in the form of a political contribution. Penal Code § 36.10(a)(4). If the legal services are not a political contribution, then the legal services are only permissible if another exception applies. Based on the minimal facts available, an exception that may apply is for a benefit for which a public servant “gives legitimate consideration in a capacity other than as a public servant.” Penal Code § 36.10(a)(1).

We have generally said that a public servant gives “legitimate consideration” if the public servant provides services to another in exchange for a payment that is commensurate with the actual value of those services. Ethics Advisory Opinion Nos. 524 (2015); 508 (2013); 416 (1999); 374, n.2. (1997); 358 (1997); 41, n.1 (1992). *See also* Ethics Advisory Opinion No. 325 (1996) (a legislator may receive payment for a piece of real estate without violating the general benefit prohibitions as long as the payment reflects the fair market value of the land). We have also said that a public servant who receives payment for services rendered acts “in a capacity

other than as a public servant” if it is the services, and not the public servant’s official status, that is of value to the person paying for the services. Ethics Advisory Opinion Nos. 524 (2015), 508 (2013), 416 (1999), 358 (1997).¹³ That restriction assures that a business transaction is not used to avoid the prohibitions on the acceptance of benefits under section 36.08. Ethics Advisory Opinion No. 325 (1996).

Similarly, section 36.08 would not prohibit the judge from receiving legal services provided by an attorney pursuant to a binding contract under which the judge must pay the attorney a contingent fee that is commensurate with the actual value of the services. If the judge does not prevail in his defamation lawsuit or obtain a payment under a settlement agreement and, as a result, the judge is not required to pay the attorney for the services, then the services would not constitute a prohibited benefit under section 36.08.

SUMMARY

Free legal services provided by an attorney to a judge to defend a lawsuit arising from the judge’s activities as a candidate are a campaign contribution subject to the restrictions under title 15 of the Election Code and section 36.08 of the Penal Code. Legal services provided to a judge by an attorney on a contingent fee basis would not be a political contribution or a prohibited benefit to the judge if the services are provided pursuant to a binding contract described in this opinion.

1 We assume for purposes of this opinion that the prohibitions on bribery and honoraria do not apply. *See* Penal Code §§ 36.02, .07.

2 A political contribution also includes an officeholder contribution, which is a contribution to an officeholder that is offered or given with the intent that it be used by the officeholder to defray expenses that are not reimbursable with public money and that are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office. Elec. Code § 251.001(2), (4), (5). The requestor of this opinion presents no facts to indicate that the lawsuit was brought against the judge in his status as an officeholder.

3 Similarly, a discount provided to a candidate is generally a campaign contribution. *See* Ethics Advisory Opinion No. 398 (1998). A discount is the provision of any goods or services without charge or at a charge which is less than fair market value. 1 T.A.C. § 20.1(22). A discount is an in-kind political contribution unless the terms of the transaction reflect the usual and normal practice of the industry and are typical of the terms that are offered to political and non-political persons alike, or unless the discount is given solely in order to comply with section 253.041 of the Election Code. *Id.* The value of an in-kind contribution in the form of a discount is the difference between the fair market value of the goods or services at the time of the contribution and the amount charged. *Id.*

4 Whether a lawsuit is brought against the judge in his status as a candidate depends upon the specific facts. In a previous advisory opinion, we stated that legal expenses incurred by a former candidate for and former holder of a judicial office regarding a particular defamation lawsuit would arise directly from his activities as a candidate and that the use of political contributions to pay such expenses would not be a prohibited conversion of political contributions to personal use under section 253.035 of the Election Code. Ethics Advisory Opinion No. 498 (2011). If political contributions are used for lawsuit expenses, any proceeds from the lawsuit would be subject to the restrictions that apply to political contributions as provided by title 15 of the Election Code and must be paid into political funds. *Id.* *See also* Ethics Advisory Opinion No. 499 (2011) (if political contributions are used to pay legal expenses for a defamation lawsuit, the proceeds subject to personal use restrictions are proportional to the amount of legal expenses paid with political contributions).

5 A person who knowingly makes or accepts a campaign contribution or makes a campaign expenditure in violation of chapter 253 of the Election Code is potentially liable to other candidates for certain damages. Elec. Code § 253.131.

6 Title 15 does not require a political contribution consisting of an individual’s personal service to be reported if the individual receives no compensation for the service. *Id.* § 254.033.

7 A public servant includes a person elected, selected, appointed, employed, or otherwise designated as an officer, employee, or agent of government or a candidate for nomination or election to public office. Penal Code § 1.07(a)(41).

8 See EAO 363 (whether section 36.08(f) of the Penal Code prohibits a legislator from accepting free legal services depends on whether an exception under section 36.10 is applicable).

9 A “contingent fee” is defined as a fee charged for a lawyer’s services only if the lawsuit is successful or is favorably settled out of court. Black’s Law Dictionary 387 (10th ed. 2014). Contingent fees are usually calculated as a percentage of the client’s net recovery. *Id.*

10 Under contract law, “consideration” generally means “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act.” *Id.* at 370.

11 See Ethics Advisory Opinion No. 143 (1993) (a transaction between a candidate and a corporation that includes an exchange of consideration is not a campaign contribution if the terms of the transaction reflect the usual and normal practice of the industry and are typical of the terms the commercial party offers to political and non-political entities alike).

12 We recommend that such a contingent fee agreement be in writing.

13 Our prior opinions addressing this exception in the Penal Code have considered a public servant receiving payment for services rendered outside of the public servant’s official capacity. In that context, the public servant’s services are “of value to the person paying for the services” if the amount of the payment reflects the actual value of the services and is not paid for something that the public servant provides in his or her official capacity, such as an official act.