



TEXAS ETHICS COMMISSION



****Overruled, Modified, Clarified, or Superseded****

ETHICS ADVISORY OPINION NO. 540

August 15, 2016

Whether a political advertising disclosure statement is required to be included in political advertising broadcast by radio. (AOR-613)

The Texas Ethics Commission (“commission”) has been asked whether a political advertising disclosure statement is required to be included in a particular communication broadcast by radio.

According to the facts presented by the requestor of this opinion, a non-profit corporation seeks to contract, in return for valuable consideration, for the broadcast of advertisements by radio in certain legislative districts to influence the outcome of elections in Texas. The advertisements would be intended to inform voters of positions taken by certain members of the Texas House of Representatives. The advertisements would state in pertinent part “Don’t trust _____ to protect you if you’re sick,” and “Protect your loved ones and vote for _____.” The advertisements would also state the date of the election and the dates for early voting.

Title 15 of the Election Code includes certain disclosure requirements for political advertising. Section 251.001 states:

“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:

(i) in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication; or

(ii) on an Internet website.

Id. § 251.001(16) (emphasis added).

The disclosure requirement applicable to political advertising under section 255.001 of the Election Code states, in relevant part:

(a) A person may not knowingly cause to be published, distributed, or *broadcast* political advertising containing express advocacy that does not indicate in the advertising:

(1) that it is political advertising; and

(2) the full name of:

- (A) the person who paid for the political advertising;
- (B) the political committee authorizing the political advertising; or
- (C) the candidate or specific-purpose committee supporting the candidate, if the political advertising is authorized by the candidate.

(b) Political advertising that is authorized by a candidate, an agent of a candidate, or a political committee filing reports under this title shall be deemed to contain express advocacy.

...

(d) This section does not apply to:

- (1) tickets or invitations to political fund-raising events;
- (2) campaign buttons, pins, hats, or similar campaign materials; or
- (3) circulars or flyers that cost in the aggregate less than \$500 to publish and distribute.

(e) A person who violates this section is liable to the state for a civil penalty in an amount determined by the commission not to exceed \$4,000.

Elec. Code § 255.001 (emphasis added).

In determining whether a particular communication must include a disclosure statement, the first issue is whether the communication meets the definition of “political advertising.” The proposed communication is a statement that supports and opposes candidates for election to a public office. Additionally, the communication would be broadcast by radio in return for consideration. Thus, the communication would constitute political advertising.

The second issue is whether the communication contains express advocacy. The communication expressly advocates a “vote for” an identified candidate in an election for public office.¹ Thus, the communication would constitute political advertising containing express advocacy and there is no exception provided by section 255.001 of the Election Code that would otherwise apply. Therefore, the plain language of section 255.001 of the Election Code would require the communication to include a disclosure statement.

However, section 26.1(a) of the commission’s rules states:

The disclosure statement required by Section 255.001, Election Code, must contain the words “political advertising” or any recognizable abbreviation, and *must appear on one line of text or on successive lines of text on the face of the political advertising.*

1 T.A.C. § 26.1(a) (emphasis added). A circular, sign, or Internet website, or a television broadcast containing visual images, can generally be understood as having a “face” on which “lines of text” can appear. Thus, the requirement for a disclosure statement on such political advertising is met by including the statement as provided by rule 26.1. However, a radio broadcast does not have a “face” on which “lines of text” can appear, and it thus appears impossible for a radio broadcast to comply with the disclosure requirement as expressed by the plain language of the rule. Consequently, a reasonable interpretation of the rule is that a disclosure statement is not required for political advertising in the form of a radio broadcast. We therefore cannot, at this time, require political advertising that is broadcast by radio to include a disclosure statement. See Ethics Advisory Opinion No. 202 (1994) (a person reasonably relying upon a commission rule is entitled to the same defense as reasonable reliance upon an advisory opinion). Such a result is an unintended consequence of the rule, as it is

clear that the legislature intended for the disclosure requirements to apply to political advertising that is broadcast by radio. We will amend rule 26.1 to clarify the manner in which a disclosure statement, when required by section 255.001 of the Election Code, must appear in political advertising that is broadcast by radio.²

SUMMARY

Based on section 26.1 of the Texas Ethics Commission's rules, political advertising that is broadcast by radio is not required to include a disclosure statement. Such a result is an unintended consequence of the rule, and the commission will amend rule 26.1 to clarify the manner in which a disclosure statement, when required by section 255.001 of the Election Code, must appear in political advertising that is broadcast by radio.

¹ See Ethics Advisory Opinion No. 198 (1994) (providing examples of express advocacy).

²The requestor of this opinion has also suggested that section 255.001 is no longer enforceable, based on a 2003 opinion in which the Texas Court of Criminal Appeals held that a precursor to the current statute was facially unconstitutional under the First Amendment. *Doe v. State*, 112 S.W.3d 532 (Tex. Crim. App. 2003). The statute at issue in *Doe* required a disclosure statement that: (1) included the statement that it is political advertising; (2) the name of the individual who personally entered into the contract or agreement with the printer, publisher, or broadcaster or the person that individual represents; and (3) in the case of printed or published political advertising, the address of either the individual who personally entered into the agreement with the printer or publisher or the person that individual represents. *Id.* at 533. An offense was a Class A misdemeanor. *Id.* The Court relied heavily on the United States Supreme Court's decision of *McIntyre v. Ohio Elections Commission*, which found unconstitutional a disclosure requirement as applied to an individual who spent her own money to distribute anonymous leaflets regarding a local school tax measure. *McIntyre v. Ohio*, 514 U.S. 334 (1995). In response to the *Doe* opinion, the Texas legislature amended the statute in the 2003 regular legislative session to bring the law into compliance with the First Amendment and implemented several significant changes: (1) it applies only to political advertising that contains express advocacy; (2) it requires the name of the person who paid for it or the candidate or political committee that authorized it and does not require an address; (3) it does not apply to circulars or flyers that cost less than \$500 to publish and distribute; and (4) there is no criminal penalty. We must presume that the present statute is constitutional. Gov't Code § 311.021(1) (in enacting a statute, it is presumed that compliance with the constitutions of this state and the United States is intended). See also *Citizens United v. Federal Election Commission*, 558 U.S. 310, 367-68 (2010) (upholding disclaimer requirements for federal electioneering communications)..