



# TEXAS ETHICS COMMISSION



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## ETHICS ADVISORY OPINION NO. 561

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*June 17, 2021*

### ISSUE

*May a judicial officer create—or coordinate the creation of—photographs of his courtroom for use in political advertisements? Does it make a difference if the photographs are taken from the gallery, the area in front of the bench, or behind the bench?*

*May a judicial officer use, for political advertisements, photographs that are created without his cooperation or coordination, even if they show the officer behind the bench? (AOR-639)*

### SUMMARY

Section 255.003(a) of the Texas Election Code does not apply to district judges because they are not officers or employees of political subdivisions.

Section 39.02(a)(2) of the Penal Code prohibits judges from using their courtrooms to create political advertisements, but not from repurposing material that is created lawfully.

### FACTS

The requestor is a judicial officer who seeks clarification of Ethics Advisory Opinion (“EAO”) No. 550 as it applies to a judge’s use of photographs taken in his courtroom.

Specifically, the requestor asks whether he may use, for political purposes, photographs that are taken in different parts of the courtroom, such as the gallery, the area in front of the bench, or behind the bench. The requestor states that his courtroom is open anytime the building is open, but that he typically restricts the public to the gallery, permits attorneys into the area in front of the bench, and allows no one but himself behind his bench. Exceptions are made for ceremonies like weddings or adoptions, or for public tours of the courthouse, when the requestor allows the public into the area in front of the bench, and, if requested, even behind his bench.

Separately, the requestor asks whether he is permitted to use, for political purposes, photographs that are published in the public domain, even if they show him behind the bench. He specifically identifies multiple sources of public-domain photographs, including “local media outlets (print, TV, and Internet)” and “social media (from ZOOM hearings).”

## ANALYSIS

Section 255.003(a) of the Election Code does not apply to the requestor because he is not an officer or employee of a political subdivision.

Unlike section 39.02(a)(2) of the Penal Code—which applies to all “public servant[s]”—section 255.003(a) of the Election Code applies only to officers and employees of “political subdivisions.” Tex. Elec. Code § 255.003(a). For the following reasons, the requestor is neither an officer nor employee of a political subdivision, and thus section 255.003(a) does not apply to his use of his courtroom.

The Texas Election Code defines “political subdivision” to mean a county, city, or school district or any other governmental entity that (1) embraces a geographic area with a defined boundary, (2) exists for the purpose of discharging functions of government, and (3) possesses authority for subordinate self-government through officers selected by it. Tex. Elec. Code § 1.005(13). The Texas Supreme Court has further defined “political subdivisions” as having “the power to assess and collect taxes ...” *Guaranty Petroleum Corp. v. Armstrong*, 609 S.W.2d 529, 531 (Tex. 1980).

The requestor in this case is a judge of a Texas judicial district, also known as a district court. District courts are created by the Texas Constitution, and they are the trial courts of general jurisdiction of the state of Texas. Tex. Const. art. V. §§ 7-8. Each county of Texas must be served by at least one district court, but in sparsely populated areas of the state, several counties may be served by a single district court. In other words, judicial districts satisfy the first two elements of the definition of political subdivision because they embrace a geographic area within a defined boundary, and they exist for the purpose of discharging functions of government.

But district courts neither possess the authority for subordinate self-government through officers selected by it, nor do they have the power to assess and collect taxes. Instead, they are part of the state government’s judicial branch. *See* Tex. Const. art. V. §§ 7-8. Consequently, district judges are not officers or employees of political subdivisions, they are officers of state government. *See* Tex. Elec. Code § 1.005(18-1) (defining “state judge” to include district court judges). Therefore, section 255.003(a) does not apply to the requestor, and no use of his courtroom would constitute a violation of that section.

The Penal Code prohibits judges from using their courtrooms to create political advertisements, but not from repurposing material that is created lawfully.

Ethics Advisory Opinion No. 550 concludes that a public officer’s “use of a government office, which is restricted to the custody or possession of that officer, for political advertising would confer a benefit to the individual public servant for private campaign purposes and would violate section 39.02(a)(2) of the Penal Code.” Tex. Ethics Comm’n Op. No. 550 (2019).<sup>1</sup> Conversely, a

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<sup>1</sup> Section 39.02(a)(2) of the Penal Code states that a public servant may not, with intent to obtain a benefit or harm or defraud another, intentionally or knowingly “misuse” government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant’s custody or possession by virtue

“public area of a government facility” that is “equally accessible” to everyone is not in the “custody or possession” of a public officer for purposes of the Penal Code, and thus may be used for political advertisements. *Id.*

Courtrooms are not “equally accessible” to judges and the general public. *See* Tex. Ethics Comm’n Op. No. 550 (2019). Judges may exclude the public from their courtrooms when no proceedings are taking place and even during certain official business.<sup>2</sup> The law requires judges to allow the public to access their courtrooms during other proceedings, but even then, it affords them significant discretion to control the behavior of visitors.<sup>3</sup> In short, a judge nearly always has more access to, and more rights within, his own courtroom than anyone else.

The requestor says that he invites the public to tour his courtroom when it is not in session and even occasionally allows members of the public to sit behind his bench. However, the fact that he has the authority to grant or deny that permission is evidence of his “custody or possession” of the courtroom. *See* Tex. Penal Code § 39.02(a)(2). To put it plainly, the requestor’s opponent would need permission to take a photograph from behind the requestor’s bench, but the requestor himself would not need anyone’s permission, much less his political opponent’s.

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of the public servant’s office or employment.” A public servant, as defined in the Penal Code, includes a public officer. Tex. Penal Code §1.07(a)(7).

<sup>2</sup> Under both state and federal law, criminal defendants have a constitutional right to a “public trial.” *Levine v. United States*, 362 U.S. 610, 616 (1960). However, the public’s right to access criminal trials is not absolute. *See Hernandez v. State*, 914 S.W.2d 219, 221-22 (Tex. App.—El Paso 1996), pet. ref’d (“[r]easonable limitations on public attendance may be imposed where they are necessary to protect a state interest that outweighs the defendant’s right to public scrutiny.”).

The public’s right to access civil proceedings is even more limited. In what is called the “open-courts” provision, the Texas Constitution states that “[a]ll courts shall be open, and every person for an injury done to him, in his lands, goods, person or reputation, shall have remedy by due course of law.” Tex. Const. art. 1 § 13. However, the Supreme Court of Texas has refused to construe the open-courts provision as guaranteeing the public a right to access court proceedings, and has permitted, for example, excluding the public to preserve the trade secrets of litigants. *In re M-I L.L.C.*, 505 S.W.3d 569, 577-78 (2016) (“To the extent the open-courts provision might confer a right of public access, this right clearly would not be absolute, but instead would be subject to reasonable limitations imposed to protect countervailing interests, such as the preservation of trade secrets.”).

State law also permits judges to conduct certain proceedings privately, at their discretion. For example, the Texas Family Code allows judges to exclude the public from certain hearings involving juveniles, and presumes that hearings involving a child under the age of 14 would be closed to the public unless the judge “finds that the interest of the child or the interests of the public would be better served by opening the hearing to the public.” Tex. Fam. Code § 54.08.

<sup>3</sup> *See, e.g., Garcia v. State*, 2005 Tex. App. LEXIS 5405, \*8 (Tex. App.—San Antonio 2005, pet. denied); *see also In re Bell*, 894 S.W.2d 119, 127-131 (Tex. 1995) (judges are given “wide latitude” to use their contempt powers to enforce order and decorum in the courtroom). This authority extends not only to attorneys appearing before the court, but to spectators as well. *See, e.g., Batiste v. State*, 2013 Tex. Crim. App. Unpub. LEXIS 657, \*29 (Tex. Crim. App. June 5, 2013) (not designated for publication). And a failure to comply with this authority can result in a finding of contempt and possible imprisonment. *See Ex. Parte Gonzalez*, 238 S.W. 635, 636 (Tex. 1922) (orig. proceeding) (the purpose of contempt is to “compel due decorum and respect in [the judge’s] presence”).

The requestor also says that his personal policy is to keep his courtroom open to the public whenever the courthouse itself is open. However, he confirmed that there is nothing preventing him from changing that policy and using the key given to him as a judicial officeholder to lock his courtroom when it is not in use. Again, judge's authority to adopt a policy that determines when the public may enter their courtrooms when not in use demonstrates their custody or possession of the space. *See* Tex. Penal Code § 39.02(a)(2).

Consequently, and in response to the requestor's first question, if a judge were to personally create—or coordinate with a third party to create—a photograph anywhere in his courtroom for use in a political advertisement, then he or she would derive a private benefit from the use of a government resource that is in his or her custody or possession, in violation of Section 39.02(a)(2).

However, the Penal Code does not prohibit public servants from repurposing an image that is created for a separate, lawful purpose. For example, if a journalist attends an open court proceeding, sits in the gallery as a member of the general public, and takes a photograph that is published in a newspaper or periodical, a judge may repurpose that photograph for his campaign. Under these circumstances, the judge does not “misuse” the government property in his custody for private benefit. Tex. Penal Code § 39.02(a)(2). Rather, the judge uses his courtroom for its proper governmental purpose, and a journalist independently uses his rights as a member of the general public to take and publish a photograph from inside the room.

Whether a judge may play a part in the creation of the images himself is another matter, and the answer depends on the circumstances. For example, the requestor asks whether he may repurpose the official video of his court's proceedings—recorded and posted to the internet with government-owned equipment—for use in political advertisements. In our opinion, such use is permissible because the video's intended purpose is to fulfil a proper governmental function and would be recorded regardless of whether the judge later repurposes it for a political advertisement. In other words, the use is “incidental,” and “does not result in additional costs or damage to the state” or “impede agency functions.” *See* Tex. Ethics Comm'n Op. Nos. 134 (1993) (state employee's use of state telephones to place personal local calls), 372 (1997) (state employee's use of state cellular phones, email, and Internet); 395 (1998) (state employee's use of state telephones to place long-distance personal calls).

On the other hand, a judicial officer would violate section 39.02(a)(2) if he were to coordinate the creation of photographs or video in his courtroom that would not otherwise be taken for official purposes and use them for political advertising. *See* Tex. Ethics Comm'n Op. No. 550 (2019). Because courtrooms are government property placed in the custody or possession of judicial officers that are not “equally accessible” to the public, their use for political advertising constitutes a “misuse[]” for purposes of section 39.02(a)(2). *Id.*