

Political Advertising

Texas Ethics Commission – October 2021

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Political Advertising

For comprehensive review of political advertising requirements, please refer to the *Political Advertising Guide: What You Need to Know* or to the *Political Advertising Requirements: Frequently Asked Questions*.

For questions about the use of public funds for political advertising, please refer to the Political Subdivision guide and/or the School District guide.

For examples of sentences/phrases that the Texas Ethics Commission has determined advocate passage or defeat of a measure then see *Phrases Advocating Passage or Defeat of a Measure*.

For questions about communications that support, oppose, or propose legislation, please refer to the Legislative Advertising guide.

Contents of Presentation

- What is political advertising?
- What does political advertising HAVE to include:
 - Disclosure Statement
 - Highway notice (if it can be seen from a road)
 - The word “for” in certain circumstances
- What can political advertising NOT include:
 - Misrepresentation of true source of communication
 - Misrepresentation of identity
 - Misrepresentation of title

Political Advertising

- No form of speech is entitled to greater constitutional protection than political speech.
- Disclosure is the primary interest justifying political advertising regulations.
- Sunlight is said to be the best of disinfectants.

Doe v. State, 112 S.W.3d 532 (Tex. Crim. App. 2003); *Buckley v. Valeo*, 424 U.S. 1 (1976)

Political Advertising Defined

Communication supporting/opposing:

- ⦿ Candidate for public office,
- ⦿ Candidate for political party office,
- ⦿ Public officer,
- ⦿ Political party, or a
- ⦿ Measure

Tex. Elec. Code § 251.001(16); 1 Tex. Admin. Code § 20.1(11)

Political Advertising Defined

- Written form
 - Pamphlets, circulars, flyers, business cards
 - Billboards, yard signs and bumper stickers
 - Door hangers, or
 - Internet website; or
- In return for consideration, is published or broadcast by:
 - Newspaper, Magazine, Periodical, or
 - Radio/TV

Tex. Elec. Code § 251.001(16); 1 Tex. Admin. Code § 20.1(11); Tex. Ethics Comm'n Op. No. 435 (2001)

Express Advocacy

- Expressly advocates election/defeat of
 - An identified candidate; or
 - A Measure
- Magic Words: include, but are not limited to:
 - Vote for / Elect
 - Support / Reject
 - Defeat
 - Smith for Senate
 - Cast your ballot for X

McConnell v. FEC, 540 U.S. 93 (2003)

Express Advocacy, cont'd

Functional equivalent of express advocacy:

Political advertising is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007); see also *Citizens United v. FEC*, 558 U.S. 310 (2010)

Express Advocacy, cont'd

- ⦿ Case-by-case determination
- ⦿ If unsure, include disclosure statement
- ⦿ Political advertising without express advocacy:
 - Disclosure statement not necessary
 - But other laws apply

Political Advertising

- DOES NOT include:
 - Individual communication by e-mail or text message

- DOES include:
 - Mass e-mails or texts involving expenditure of funds beyond the basic cost of hardware messaging software and bandwidth

1 Tex. Admin. Rules § 20.1(11)(B)

Disclosure Statement

- Required if political advertising contains express advocacy

- Political advertising is deemed to contain express advocacy if:
 - Authorized by candidate (or agent) or
 - Authorized by a PAC filing reports

Tex. Elec. Code § 255.001(b), (c)

Disclosure Statement, cont'd

Must Include:

- ⦿ “Political advertising” or recognizable abbreviation, such as “Pol. Adv.”; and
- ⦿ Include full name of the:
 - person who paid for it;
 - PAC authorizing it; **or**
 - candidate or supporting SPAC, if authorized by candidate
- ⦿ Must be on the face of the political advertising

Tex. Elec. Code § 255.001; 1 Tex. Admin. Code § 26.1

Disclosure Statement, cont'd

- No size requirement, but must be legible
- No requirement to put address, campaign treasurer's name, or campaign treasurer's address
- If your signs are double sided, it must appear on both sides
- No exact phrase.

Disclosure Statement, cont'd

- ◎ For written communications:
 - Appear on one line of text or successive lines of text on the face of the political advertising (i.e. not the back).

- ◎ For communications that do not contain written text (audio only):
 - Be clearly spoken

1 Tex. Admin. Code § 26.1

Disclosure Statement Exceptions

Items that are worn, including:



- ⦿ T-shirts
- ⦿ Buttons
- ⦿ Pins
- ⦿ Lapel Stickers
- ⦿ Hats



Tex. Elec. Code § 255.001(d)

Disclosure Statement Exceptions

Novelty items such as:

- ⦿ Balloons
- ⦿ Emery Boards
- ⦿ Small Magnets
- ⦿ Pencils, Pens
- ⦿ Wooden Nickels
- ⦿ Candy Wrappers

Tex. Ethics Comm'n Op. No. 435 (2001)

Disclosure Statement Exceptions

- Invitations/tickets to fundraisers
- Circulars or flyers costing less than \$500 to both publish and distribute
- Letterhead stationery, if
 - Authorized by the candidate or their supporting SPAC, and
 - Letterhead includes name of either:
 - Person who paid for it; or
 - PAC authorizing it
- Envelope use to send political advertising, if political advertising inside it contains disclosure statement
- Text messages, as of 7-6-21

Tex. Elec. Code § 255.001(d); 1 Tex. Admin. Code §§ 20.1(11), 26.1

Disclosure Statement Exceptions

- ⦿ postings or re-postings on an Internet website if the person posting or re-posting is not an officeholder, candidate, or political committee and did not make an expenditure exceeding \$100 in a reporting period for political advertising beyond the basic cost of hardware messaging software and bandwidth;
- ⦿ an Internet social media profile webpage of a candidate or officeholder, if the webpage clearly and conspicuously displays the full name of the candidate or officeholder; and
- ⦿ postings or re-postings on an Internet website if the advertising is posted with a link to a publicly viewable Internet webpage that either contains the disclosure statement or is an Internet social media profile webpage of a candidate or officeholder that clearly and conspicuously displays the candidate's or officeholder's full name

1 Tex. Admin. Code § 26.1(c), (d)

What if I Forget the Disclosure Statement?

- ◎ Someone could file a sworn complaint
- ◎ Cannot use, or continue to use, the material unless it is fixed
- ◎ Road signs:
 - Must make good faith attempt to remove or correct
 - Can use sticker or even handwrite it on the signs or materials

Highway Right-of-Way Notice

- ⦿ Required for all “political advertising signs” that can be seen from a road, including:
 - Billboards
 - Yard signs
- ⦿ Does not apply to bumper stickers, but they must still contain the disclosure statement
- ⦿ Can go on the front or the back of the sign

Tex. Elec. Code §§ 251.001(16) and 259.001

Highway Right-of-Way Notice

NOTICE: IT IS A VIOLATION OF STATE LAW (CHAPTERS 392 AND 393, TRANSPORTATION CODE) TO PLACE THIS SIGN IN THE RIGHT-OF-WAY OF A HIGHWAY.

Tex. Elec. Code § 259.001

Highway Right-of-Way Notice

Person may not:

- ⦿ Knowingly enter into contract or agreement to print or make a political advertising sign without this notice; or
- ⦿ Instruct another to place political advertising sign without this notice

Tex. Elec. Code § 259.001(b)

Timing and Placement of Signs

- ⦿ Not set at the state level, except for rural roads
- ⦿ Set at the local level, i.e., city, county, ISD
- ⦿ If not set at the local level, there are no rules

Misrepresentation of Office

- ⦿ Political advertising and campaign communications may not represent that a candidate holds a public office they do not hold
- ⦿ Examples:
 - Using title “Judge” when not a current judge
 - Using “Re-elect” when not a current officeholder

Tex. Elec. Code § 255.006

Misrepresentation of Office

If you are a non-incumbent (new) candidate and you include the office sought in your political advertising or campaign communication:

- ⦿ Must include “for” to clarify candidate does not hold office
- ⦿ “For” must be at least ½ type size of office sought

~~Elect
John Doe
City Council, Place 1~~

Elect
John Doe
For
City Council, Place 1

Tex. Elec. Code § 255.006(c)

Misrepresentation of Office

Only an officeholder can use a representation of the state seal in political advertising



Tex. Elec. Code § 255.006(d)

Misrepresentation of Office

- **Officeholders:** may not use government resources, such as the officer's office in a government building, to create a photograph, video, or other communication for political advertising because the officer has custody or possession of the government resources by virtue of holding the public office

- **Judicial officeholders:**
 - May wear robes in political advertising so long as they own the robe
 - 255.003 does not apply to district judges because they are not officers or employees of a political subdivision
 - May not use their courtrooms to create political advertisements
 - May repurpose material that is created lawfully

Tex. Elec. Code §§ 255.003, 255.006; Tex. Penal Code § 39.02; Tex. Ethics Comm'n Op. Nos. 548 (2018), 550 (2019), and 561 (2021)

Misrepresentation of Source

- ⦿ A person may not misrepresent the true source of political advertising or campaign communication with intent to injure candidate or influence result of election
- ⦿ Political Advertising applies to entering contract or agreement to print, publish, broadcast
- ⦿ Campaign Communication: Can be broader than political advertising
- ⦿ Deep Fake videos created and published or distributed within 30 days of an election are also prohibited

Tex. Elec. Code § 255.004

Misrepresentation of Identity

A person may not misrepresent their identity (or the identity of their principal) in political advertising or campaign communication with intent to injure candidate or influence result of election.

Tex. Elec. Code § 255.005

Final Points

- ◎ Many political advertising violations are also misdemeanor criminal offenses
- ◎ TEC may assess a civil penalty for political advertising violations through their sworn complaint process
- ◎ Verify any local regulations w/local authorities
- ◎ Other than what we've covered in this presentation, the Ethics Commission does not regulate other parts of political advertising

Helpful Information on website

www.ethics.state.tx.us → Resources → Advertising:

- ⦿ Political Advertising: What You Need to Know brochure
- ⦿ Political Advertising FAQs
- ⦿ Additional resources: Tex. Elec Code Chapter 255; 1 Tex. Admin. Code § 26.1

Thanks for watching!

QUESTIONS?



Call 512-463-5800 or send an email to
reception@ethics.state.tx.us