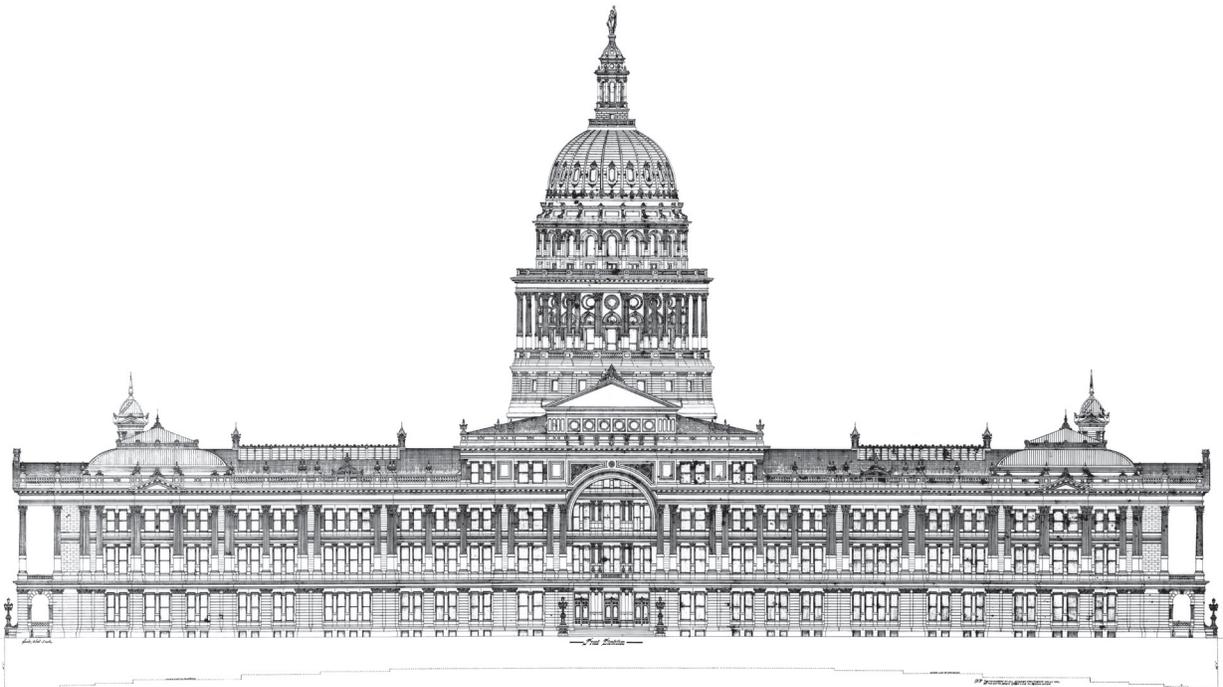




INTERIM REPORT

TO THE
82ND TEXAS LEGISLATURE

House Select Committee on
GENERAL INVESTIGATING AND ETHICS
December 2010



**HOUSE COMMITTEE ON GENERAL INVESTIGATING AND ETHICS
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2010**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
82ND TEXAS LEGISLATURE**

**CHUCK HOPSON
CHAIRMAN**

**COMMITTEE CLERK
PAUL HANNA**



Committee On
General Investigating and Ethics

November 12, 2010

Chuck Hopson
Chairman

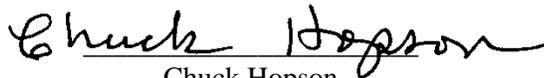
P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Joe Straus
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on General Investigating and Ethics of the Eighty-first Legislature hereby submits its interim report including recommendations for consideration by the Eighty-second Legislature.

Respectfully submitted,



Chuck Hopson



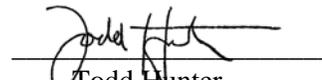
Larry Phillips



Brandon Creighton



Pete Gallego



Todd Hunter

Larry Phillips
Vice-Chairman

Members: Brandon Creighton, Pete Gallego, Todd Hunter

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INTRODUCTION

At the beginning of the 81st Legislature, the Honorable Joseph Straus, Speaker of the Texas House of Representatives, appointed five members to the House Committee on General Investigating and Ethics. The Committee membership included the following; Chuck Hopson, Chair; Larry Phillips, Vice-Chair; Pete Gallego; Todd Hunter; and Brandon Creighton.

The House Rules adopted by the 81st Legislature as House Resolution 2 on January 28, 2009, give the House Committee on General Investigating and Ethics its jurisdiction. Rule 3, Section 14 reads as followed:

General Investigating and Ethics —

- (a) The General Investigating and Ethics Committee shall have five members of the house appointed by the speaker. The speaker shall appoint the chair and the vice-chair of the committee.
- (b) The committee has all the powers and duties of a general investigating committee and shall operate as the general investigating committee of the house according to the procedures prescribed by Subchapter B, Chapter 301, Government Code, and the rules of the house, as applicable.
- (c) The committee has jurisdiction over all matters pertaining to the conduct of and ethical standards applicable to state and local government officers and employees.

During the interim, the Speaker assigned charges to the Committee. The House Committee on General Investigating and Ethics has completed its hearing and investigations, and has adopted the following report.

HOUSE COMMITTEE ON GENERAL INVESTIGATING AND ETHICS

INTERIM STUDY CHARGES

1. Review state law in light of the effects of Texas Ethics Commission Advisory Opinion No. 484 relating to acceptance of benefits provided to officeholders. Recommend any necessary legislative changes.
2. Review the definition of "political advertising" and determine whether the definition should be expanded to include content contained in blogs and other types of Internet communications.
3. Monitor the agencies and programs under the committee's jurisdiction.

CHARGE 1

Review state law in light of the effects of Texas Ethics Commission Advisory Opinion No. 484 relating to acceptance of benefits provided to officeholders. Recommend any necessary legislative changes.

On November 19, 2009, Texas House Speaker Joe Straus instructed the House Committee on General Investigating and Ethics to:

Review state law in light of the effects of Texas Ethics Commission Advisory Opinion No. 484 relating to acceptance of benefits provided to officeholders, and recommend any necessary legislative changes.

SCOPE OF CHARGE

This section of the Interim Report focuses on the testimony provided during a public hearing of the Committee, state laws referenced in Texas Ethics Commission Ethics Advisory Opinion No. 484, and the practical effects of the opinion on various parties.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on General Investigating and Ethics met in a scheduled public hearing on May 12, 2010, in Austin, Texas. Those invited to testify were:

David Riesman (Texas Ethics Commission)
Natalia Luna Ashley (Texas Ethics Commission)

The Committee also heard public testimony on Interim Charge #1 from the following:

Ed Shack (Attorney)
Jack Gullahorn (Professional Advocacy Association of Texas)
Jim Allison (County Judges and Commissioners Association of Texas)
Martha Dickie (Texas State Bar, Judicial Section)
Craig Enoch (Texas State Bar, Judicial Section)

Summary of Invited Testimony

David Riesman, Executive Director of Texas Ethics Commission
Natalia Luna Ashley, General Counsel to Texas Ethics Commission

Texas Ethics Commission Executive Director, David Riesman, provided the committee with a brief overview of Texas Ethics Commission Ethics Advisory Opinion No. 484. To reach its findings on whether an elected official can accept transportation, meals, or lodging from a corporation or labor union for performing a service that is more than perfunctory in connection with their office, the Commission found there are three relevant statutes which ought to be considered prior to accepting a benefit. Mr. Riesman stated, according to the Commission's findings, elected public officials should refer to the Penal Code, Lobby Law, and Title 15 of the Election Code. Restrictions on the acceptance of benefits and exceptions to those restrictions can be found in each.

After reviewing the applicability of restrictions and exceptions found in the Penal Code and

Lobby Law, Executive Director Riesman stressed the significance of officeholder contributions, as defined in Title 15 of the Elections Code, when making a determination about the legality of accepting a benefit.

Texas Ethics Commission General Counsel, Natalia Luna Ashley, responded to questions from committee members about the applicability of Ethics Advisory Opinion No. 484 to several hypothetical scenarios. Mrs. Ashley also spoke about legislative changes, such as the inclusion of de minimis standards in Title 15 of the Elections Code, which could be constructed if the legislature concludes that current law should be revised.

Summary of Public Testimony

Ed Shack, Attorney

Ed Shack spoke to the committee about the balance between the Penal Code, Lobby Law, and Campaign finance law prior to the release of Ethics Advisory Opinion No. 484. Mr. Shack also described how Ethics Advisory Opinion No. 484 conflicts with prior Ethics Advisory Opinions and creates considerable confusion among public officials attempting to comply with state law.

Mr. Shack warned that a legislative change to the statutes should not be the primary course of action because it could have unintended consequences and may create an imbalance between an otherwise well working and interconnected group of statutes. From Mr. Shack's standpoint, the statutes could maintain their harmony if the Texas Ethics Commission provided clarification on, or reconsideration of, Ethics Advisory Opinion No. 484. The catalyst for the clarification and/or reconsideration would be the submission of subsequent advisory requests.

Jack Gullahorn, President/Counsel of Professional Advocacy Association of Texas

Jack Gullahorn, President of the Professional Advocacy Association of Texas, spoke to the Committee about the ramifications of Ethics Advisory Opinion No. 484 as they relate to members of his trade association and local government officials seeking the association's guidance. Mr. Gullahorn placed an emphasis on the impact Ethics Advisory Opinion No. 484 has on locally elected public officials and lobbyists at the local level who do not qualify for exceptions found in the Lobby Law.

Mr. Gullahorn would like the Committee to send a strong message to the Commission stating that the Legislature did not intend for elected public officials' constituent communication opportunities to be considered as part of the election law prohibition on corporate contributions. Mr. Gullahorn believes the Commission could address the contentious points of the opinion through the rulemaking process. According to Mr. Gullahorn, rulemaking would better suit the needs of this matter than legislative changes or additional advisory opinions.

Jim Allison, General Counsel of the County Judges and Commissioners Association of Texas

Jim Allison addressed the committee on behalf of the County Judges and Commissioners Association of Texas. He views Ethics Advisory Opinion No. 484 as a reversal from previous opinions that disharmonizes the Penal Code and the Election Code. Mr. Allison suggested that

the opinion ignores the necessity to establish intent before criminal liability can be established, and he took issue with the Commission's presumption that all invitations to officeholders are in connection with an officeholder activity or duty. Mr. Allison would like to see the Commission withdraw or modify the Opinion. If they fail to take action, Mr. Allison asked the legislature to amend the Election Code to explicitly incorporate the Penal Code exception and fully define officeholder activities.

Martha Dickie, Texas State Bar, Judicial Section

Craig Enoch, Texas State Bar, Judicial Section

Martha Dickie represents judicial members of the Texas State Bar. Mrs. Dickie provided the Committee with examples of the negative impact Ethics Advisory Opinion No. 484 has had on Judges in the state of Texas seeking to fulfill their public and statutory obligation to participate in and provide continuing education opportunities.

Craig Enoch, a former judge and representative of judicial members of the Texas State Bar, argued that, despite the findings in Ethics Advisory Opinion No. 484, a campaign contribution is not a reimbursement for expenses incurred while informing the public. To reach this finding, the Commission erred on the side of caution and approved an opinion with broad public policy implications based on a narrow reading of the statutes. The Opinion ignores public policy implications and the intent of the legislature to encourage communication with the public. Assuming the Legislature will take action, Mr. Enoch proposed that the Legislature create an exception for the Texas Center for the Judiciary, a 501(c)3 nonprofit corporation, to reimburse judges for education expenses. Mr. Enoch also elaborated on the limited window for judges to accept campaign contributions.

BACKGROUND

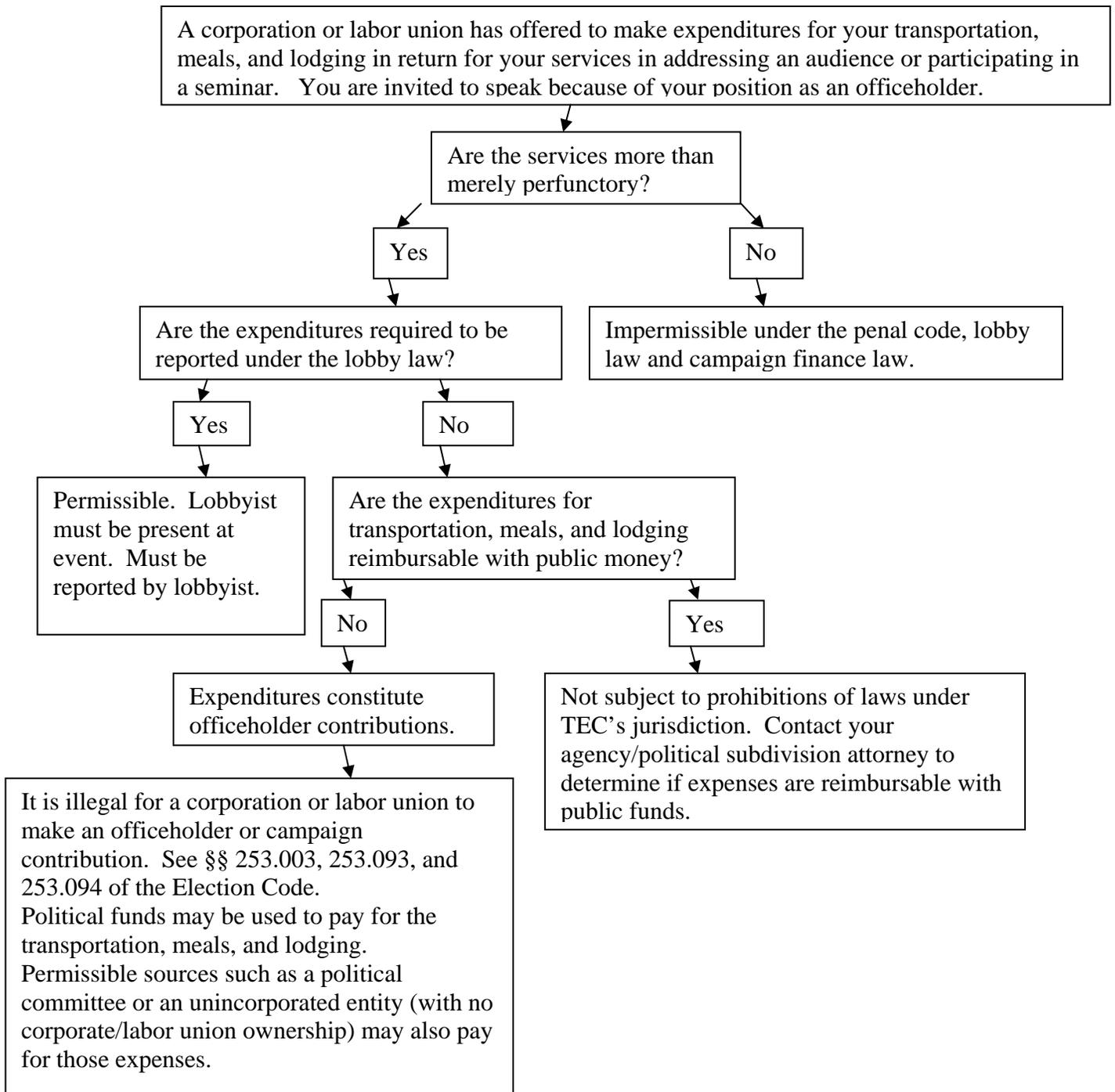
The Texas Ethics Commission has the authority to issue advisory opinions on the application of state laws under its jurisdiction, Sec. 571.091 of Govt. Code. Opinions issued by the commission may be used as a defense from prosecution, Sec. 571.097, and as a result, opinions issued by the Commission are often referenced to determine what is permissible prior to taking action.

On August 6th, 2009 the Commission released Ethics Advisory Opinion No. 484. In the Opinion, the Commission addresses whether an elected officeholder may accept transportation, meals, or lodging from a corporation or labor organization in return for addressing an audience or participating in a seminar when the reason they are asked to participate is their public position or duties and the service is more than perfunctory.¹

Based on its interpretation of the Penal Code, Lobby law, and Title 15 of the Election code, the Commission determined that an elected officeholder may not accept transportation, meals, or lodging from a corporation or labor organization in return for addressing an audience or participating in a seminar if the officeholder's services are in connection with his or her duties or activities as an officeholder, unless the transportation, meals, or lodging are reportable under the lobby law or are reimbursable with public money.²

Chart 1. was created by Commission staff to provide a roadmap for understanding Ethics Advisory Opinion No. 484.

CHART 1: Ethics Advisory Opinion No. 484 Flow Chart



FINDINGS

The Texas Ethics Commission's interpretation of state law in Ethics Advisory Opinion No. 484 has been viewed as problematic by elected officials, ethics advisors, and associations seeking to maintain compliance with state law and conform their actions to the Commission's interpretation of the relevant statutes. Ethics Advisory Opinion No. 484 ignores legislative intent, and it discourages elected officials from participating in opportunities to interact with their constituents and judges from participating in education opportunities. If the Commission fails to withdraw or modify the opinion, corrective action could be taken by the Legislature to clarify that its intent conflicts with the interpretation of law found in Ethics Advisory Opinion No. 484, but taking legislative action is viewed favorably by stakeholders only when it is considered as a last resort.

Among the issues that are viewed as problematic and confusing in Ethics Opinion No. 484 is the definition of "reimbursable." Making a determination about the suitability of accepting transportation, meals, or lodging relies heavily on the meaning of the term. If any of the expenses at issue are not reimbursable with public money, then defraying the expenses would constitute an officeholder contribution. As such, a corporation or labor organization may not provide transportation, meals, or lodging to the officeholders in these circumstances.³ However if expenses are reimbursable with public money, it allows those seeking to accept transportation, meals, or lodging to overcome one of the crucial thresholds found in the opinion. (*see Chart 1.*)

Making the determination of whether or not an expense is reimbursable provokes several subsequent questions; who is the appropriate authority within a jurisdiction to make the determination if an expense is reimbursable with public money; what standards or rules do they use to make the determination that an expense is reimbursable with public money; are the standards or rules used to make the determination that an expense is reimbursable with public money uniform between like jurisdictions; and most importantly, must a jurisdiction have sufficient funds on hand to cover an expense at the point when an expense is deemed reimbursable.

Since the release of Ethics Advisory Opinion No. 484, a request for clarification of the term "reimbursable" has been submitted to the Commission, and the Commission has appointed a subcommittee to explore the issue.

Another point of contention and confusion created by the release of Ethics Advisory Opinion No. 484 is the application of prohibitions found in Title 15 of the Election Code. Stakeholders argued that discouraging public communication between constituents and elected officials, regardless of corporate affiliation, was not the intent of the Legislature when crafting Title 15 of the Election code. They support their argument by citing the Penal Code exception for elected officials to accept honoraria and the existence of a system for disclosing the acceptance of honoraria as evidence of the Legislature's intent to render the sort of activities in question permissible.

Elected officials from the Texas judiciary rely on nonprofit 501(c)3 corporations to pay for the transportation, meals, or lodging expenses associated with their participation in continuing education opportunities. Several nonprofit corporations, such as the Texas Center for the

Judiciary, are allocated state funds for the purpose of coordinating those education opportunities and reimbursing judges for their expenses.

As a result of Ethics Advisory Opinion No. 484, some members of the judiciary have been hesitant to participate in continuing education opportunities. In some cases, associations which facilitate education opportunities have informed judges that they may no longer pay for transportation, meals, or lodging associated with participation in their events.

The Legislature's appropriation of funds to nonprofit corporations for reimbursement of judges transportation, meals, or lodging expenses associated with continuing education implies that Title 15 of the Elections Code was not intended to restrict the afore mentioned activity. However, the Commission failed to address this contradiction to their findings in the Opinion.

RECOMMENDATIONS

1. The Texas Ethics Commission should reconsider Ethics Advisory Opinion No. 484 during an open meeting and provide the public another opportunity to comment on the issue.
2. The Texas Ethics Commission should consider exercising their rulemaking authority, after Ethics Advisory Opinion No. 484 is reconsidered during an open meeting, to clarify the manner in which an elected official can determine compliance with state law.

CHARGE 2

Review the definition of "political advertising" and determine whether the definition should be expanded to include content contained in blogs and other types of Internet communications.

On November 19, 2009, Texas House Speaker Joe Straus instructed the House Committee on General Investigating and Ethics to:

Review the definition of "political advertising" and determine whether the definition should be expanded to include content contained in blogs and other types of Internet communications.

SCOPE OF CHARGE

This section of the Interim Report focuses on regulation of Internet communications at the federal and state levels. Research was conducted in coordination with the Texas Legislative Council, Texas Reference Library, and Texas Ethics Commission.

BACKGROUND

In its recommendations for statutory changes to the 81st Legislature, the Texas Ethics Commission reported the need to clarify Section 251.001(16) of the Election Code, which defines "political advertising" in pertinent part as a communication supporting or opposing a candidate for nomination or election to a public office, that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication or on an Internet website.

Under the Election Code, certain types of political advertising are required to include a disclosure statement while other types of political advertising are excluded from that requirement.

The Commission, in July 2006, adopted a rule stating that the definition of political advertising does not include communications made by e-mail and consequently those communications are not required to include a disclosure statement. The Legislature has not acted to change the Commission's rule.

With the advent of new electronic messages and tools, an issue that is arising more frequently is whether blogs constitute political advertising and if so, whether they are required to include a disclosure statement.

In its December 2008 report, the Commission included two possible options to address this issue:

1. Amend the definition of political advertising to expressly include blogs, or
2. Amend the definition of political advertising to expressly state that the definition of political advertising does not include blogs.

The recommendation noted that if the Legislature wants to include blogs in the definition of political advertising, the legislature may want to consider the Federal Election Commission (FEC) rules for addressing the issue. Under the FEC standard, most blogs are not regulated. Generally, the types of blogs that are not regulated under the FEC rules are those from: (1) uncompensated individual Internet activities, (2) entities covered by the press exemption, including qualified online publications, and (3) certain corporate and labor organizations.

Generally, the types of blogs that are regulated under the FEC rules are those: (1) from political committees, (2) that are placed on another person's website for a fee, and (3) from certain corporations.

Across the country, other states are also considering guidelines for this issue. A recent Associated Press article reported on a pending matter before the Florida Elections Commission in which a candidate for office is fighting a complaint that the candidate's "pop up" advertisement did not have a "paid for" disclaimer. The candidate purchased an ad that popped up online when anyone entered a Google search for the candidate's opponents' names. The Florida Commission ordered the candidate to remove the ad and pay a \$250 fine.

The article also reported that Wisconsin's Government Accountability Board, citing the Florida case, ordered staff to draft guidelines outlining the circumstances under which the public needs to know who is paying for an online ad or Website. The article also reports that the California Fair Political Practices Commission has formed a task force to study the issue and make recommendations.

The following is a review of state and federal laws relating to the regulation of Internet communications and recommendations to the 82nd Legislature.

FEDERAL LAW AND REGULATIONS

The Bipartisan Campaign Reform Act of 2002 defines the term "public communication" as all communications by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.⁴ The BCRA definition of "public communication" did not expressly indicate that Internet communications fit within the definition of "public communication," and the FEC chose not to include Internet communications when drafting their original rules.

As a result, at the federal level, most Internet communications were not subject to the "public communication" disclaimer requirements found in Title 11 of the Code of Federal Regulations, Sec 110.11.

In 2004, suit was filed against the FEC for creating rules that excluded Internet communications from the definition of "public communication." The plaintiffs argued that the FEC's exclusion of Internet communications contradicted congressional intent because some Internet communications ought to fall within the open ended definition of "public communication." In the findings of *Shay v. Federal Election Commission*, the Court sided with the plaintiffs and ruled that the exclusion of all Internet communications was impermissible.

In response to the ruling, the FEC amended Title 11 of the Code of Federal Regulations, Sec. 100.26, to read as follows:

Public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.

The FEC also made changes to the disclaimer requirements found in Sec. 110.11. According to the new definition of "public communication" and the expanded disclaimer requirements, paid advertisements placed on another person's Internet website, websites maintained by a political committee, and electronic mail of more than 500 substantially similar communications sent out by a political committee must include a disclaimer.

Most Internet blog sites and blogger activities do not fall within the scope of the amended disclaimer requirements. Through the application of the media exemption, bloggers acting independently from a political committee are free to post campaign material on a blog, add hyperlinks, or editorialize about a campaign or candidates without the need to include a disclaimer or report action to the FEC. Individuals share the same protection to post content on blogs as well. However, when a political committee posts campaign material on a blog for a fee, it must include a disclaimer and some reporting requirements apply.

Public comments submitted to the FEC suggested that entries placed on a blog by a political committee for free ought to contain a disclaimer, but the FEC declined to modify its rules for this scenario.

Under the current rules, electronic mail created by a political committee does not require disclaimers unless the political committee sends out more than 500 substantially similar communications. Uncompensated individuals may redistribute campaign literature, hyperlinks by email without disclaimers or reporting even if their effort is coordinated with a political committee. 110.11

While the FEC has the authority to create more stringent rules, based on the unique characteristics of the Internet and the need to safeguard constitutionally protected political speech, they have abstained.⁵

By eliminating the traditional barriers which prevent most individuals from communicating through mass media outlets, the Internet has become a medium for the free exchange of information on a large scale. Unlike other forms of mass media communication, Internet communication provides individuals with the opportunity to promote a message to large geographic areas without confining the communication to limitations posed by traditional mass media communications, such as excessive cost to deliver the message, time constraints presented by radio and television, and space limitations of print media.⁶

The FEC is cognizant of the fact that less barriers to entry results in the participation of individuals without the financial resources to obtain legal counsel and monitor Commission regulations.⁷ As a result, the FEC cautiously crafted rules that pinpoint political committee activities and exclude the Internet communication activities of individuals.

For additional information and guidance on FEC rules relating to Internet communications visit <http://www.fec.gov/pdf/record/2006/may06.pdf>.

STATE LAW AND REGULATION

Thirty eight states do not regulate Internet communications by requiring disclosure statements. Of the Twenty-two states that do regulate Internet campaign communications by requiring disclosure statements, only sixteen explicitly mention the Internet or electronic communications in their definition of "political advertising." The six states which do not explicitly identify Internet communications in statute have broad definitions for political advertising or public communication which have been interpreted by the courts or state agencies as being applicable to Internet communications.

Table 1⁸ provides definitions of "political advertising" that include content contained in Internet communications or electronic mail. Only Alabama, Kansas, Nebraska, Ohio, and Vermont provide specific language on the use of emails, and no state statutes currently refer to blogs.

**Table 1. Definitions of "Political Advertising"⁹ That Include Content Contained in Internet Communications or Electronic Mail:
State Statutes**

State	Statute or Rule Citation and Text
Alabama	Sec. 17-5-12, Code of Alabama. Paid advertisements to be identified as such. Any paid political advertisement appearing in any print media or broadcast on <i>any electronic media</i> shall be clearly identified or marked as a paid political advertisement and provide the identification required by Section 17-5-2(a)(5) [definition of "identification"]. It shall be unlawful for any person, candidate, principal campaign committee, or political action committee to broadcast, publish, or circulate any campaign literature or political advertisement, without a notice appearing on the face or front page of any printed matter, or broadcast at the beginning or end of a radio or television spot, stating that the communication was a paid political advertisement and giving the identification of the person, principal campaign committee, or political action committee that paid for or otherwise authorized such communication.
Alaska	Alaska Statutes 15.13.400. Definitions. In this chapter [Chapter 13, State Election Campaigns], . . . (3) "communication" means an announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, <i>the Internet</i> , or through a mass mailing, excluding those placed by an individual or nongroup entity and costing \$500 or less and those that do not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c) [relating to contributions]. . . .

**Table 1. Definitions of "Political Advertising"⁹ That Include Content Contained in Internet Communications or Electronic Mail:
State Statutes**

State	Statute or Rule Citation and Text
Connecticut	<p>Sec. 9-601, Connecticut General Statutes. General definitions. As used in this chapter [Chapter 155, Elections: Campaign Financing], . . . (25) "Organization expenditure" means an expenditure by a party committee, legislative caucus committee or legislative leadership committee for the benefit of a candidate or candidate committee for: (A) The preparation, display or mailing or other distribution of a party candidate listing. As used in this subparagraph, "party candidate listing" means any communication that meets the following criteria: . . . (ii) the communication is distributed through public advertising such as broadcast stations, cable television, newspapers or similar media, or through direct mail, telephone, <i>electronic mail, publicly accessible sites on the Internet</i> or personal delivery</p>
Florida	<p>Sec. 106.011, Florida Statutes. Definitions. As used in this chapter [Chapter 106, Campaign Financing], . . . (13) "Communications media" means broadcasting stations, newspapers, magazines, outdoor advertising facilities, printers, direct mail, advertising agencies, <i>the Internet</i>, and telephone companies; but with respect to telephones, an expenditure shall be deemed to be an expenditure for the use of communications media only if made for the costs of telephones, paid telephonists, or automatic telephone equipment to be used by a candidate or a political committee to communicate with potential voters but excluding any costs of telephones incurred by a volunteer for use of telephones by such volunteer; however, <i>with respect to the Internet, an expenditure shall be deemed an expenditure for use of communications media only if made for the cost of creating or disseminating a message on a computer information system accessible by more than one person but excluding internal communications of a campaign or of any group.</i></p>
Illinois	<p>10 Illinois Compiled Statutes 5/9-9.5. Disclosure in political communications. (a) Any political committee, organized under the Election Code, that makes an expenditure for a pamphlet, circular, handbill, <i>Internet</i> or telephone <i>communication</i>, radio, television, or print advertisement, or other communication directed at voters and mentioning the name of a candidate in the next upcoming election shall ensure that the name of the political committee paying for any part of the communication, including, but not limited to, its preparation and distribution, is identified clearly within the communication as the payor. . . .</p>
Iowa	<p>Iowa Code Sec. 68A.405. Attribution statement on published material. 1. <i>a.</i> For purposes of this subsection: . . . (3) "<i>Published material</i>" means any newspaper, magazine, shopper, outdoor advertising facility, poster, direct mailing, brochure, <i>Internet website</i>, campaign sign, or any other form of printed general public political advertising. . . .</p>
Kansas ¹⁰	<p>Kansas Statutes 25-4156. Charges for space in newspapers and other periodicals; excess charges; corrupt political advertising; misdemeanor. . . . (b)(1) Corrupt political advertising of a state or local office is: . . . (C) telephoning or causing to be contacted by any telephonic means including, but not limited to, <i>any device using a voice over Internet protocol</i> or wireless telephone, any paid matter which expressly advocates</p>

**Table 1. Definitions of "Political Advertising"⁹ That Include Content Contained in Internet Communications or Electronic Mail:
State Statutes**

State	Statute or Rule Citation and Text
	<p>the nomination, election or defeat of a clearly identified candidate for a state or local office, unless such matter is preceded by a statement which states: "Paid for" or "Sponsored by" followed by the name of the sponsoring organization and the name of the chairperson or treasurer of the political or other organization sponsoring the same or the name of the individual who is responsible therefor;</p> <p>(D) publishing or causing to be published <i>any brochure, flier or other political fact sheet</i> [see Rule 19-20-4, Kansas Administrative Regulations, below] which expressly advocates the nomination, election or defeat of a clearly identified candidate for a state or local office, unless such matter is followed by a statement which states: "Paid for" or "Sponsored by" followed by the name of the chairperson or treasurer of the political or other organization sponsoring the same or the name of the individual who is responsible therefor. The provisions of this subparagraph (D) requiring the disclosure of the name of an individual shall not apply to individuals making expenditures in an aggregate amount of less than \$2,500 within a calendar year; or</p> <p>(E) making or causing to be made <i>any website, e-mail or other type of Internet communication</i> which expressly advocates the nomination, election or defeat of a clearly identified candidate for a state or local office, unless such matter is followed by a statement which states: "Paid for" or "Sponsored by" followed by the name of the chairperson or treasurer of the political or other organization sponsoring the same or the name of the individual who is responsible therefor. <i>The provisions of this subparagraph (E) requiring the disclosure of the name of an individual shall apply only to any website, e-mail or other type of Internet communication which is made by the candidate, the candidate's candidate committee, a political committee or a party committee and such website, e-mail or other Internet communication viewed by or disseminated to at least 25 individuals.</i> For the purposes of this subparagraph, the terms "candidate," "candidate committee," "party committee" and "political committee" shall have the meanings ascribed to them in K.S.A. 25-4143 [Campaign finance; definitions], and amendments thereto. . . .</p> <p>Rule 19-20-4, Kansas Administrative Regulations. (See pages 1020 and 1021 of .pdf document) Disclosures required on political advertising. . . . (b) The phrase "brochure, flier or other political fact sheet," as used in K.S.A. 25-4156 [see above] and amendments thereto, shall include the following if the items "expressly advocate the nomination, election or defeat of a clearly identified candidate," as defined by K.S.A. 25-4143 [Campaign finance; definitions] and amendments thereto: (1) Business cards; (2) door hangers; (3) windshield fliers; (4) postcards; (5) fund-raiser invitations; (6) traditional brochures, fliers, or mailers; and (7) <i>web sites, e-mails, or other types of Internet communications.</i> . . .</p> <p>(d) A postal or <i>Internet address</i> that contains words that expressly advocate the nomination, election or defeat of a clearly identified candidate shall be considered political advertising if that address is published. Published matter containing an address</p>

**Table 1. Definitions of "Political Advertising"⁹ That Include Content Contained in Internet Communications or Electronic Mail:
State Statutes**

State	Statute or Rule Citation and Text
	that constitutes political advertising shall require a disclosure pursuant to K.S.A. 25-4156 and amendments thereto.
Maine	<p>Maine Revised Statutes, Title 21-A, Sec. 1014. Publication or distribution of political communications.</p> <p>1. Authorized by candidate. Whenever a person makes an expenditure to finance a communication expressly advocating the election or defeat of a clearly identified candidate through broadcasting stations, newspapers, magazines, campaign signs or other outdoor advertising facilities, <i>publicly accessible sites on the Internet</i>, direct mails or other similar types of general public political advertising or through flyers, handbills, bumper stickers and other nonperiodical publications, the communication, if authorized by a candidate, a candidate's authorized political committee or their agents, must clearly and conspicuously state that the communication has been so authorized and must clearly state the name and address of the person who made or financed the expenditure for the communication. . . .</p> <p>2. Not authorized by candidate. If <i>the communication described in subsection 1</i> is not authorized by a candidate, a candidate's authorized political committee or their agents, the communication must clearly and conspicuously state that the communication is not authorized by any candidate and state the name and address of the person who made or financed the expenditure for the communication. If the communication is in written form, the communication must contain at the bottom of the communication in print that is no smaller in size than 10-point bold print, Times New Roman font, the words "NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE."</p> <p>2-A. Other communications. Whenever a person makes an expenditure to finance a communication that names or depicts a clearly identified candidate and that is disseminated during the 21 days before a primary election or 35 days before a general election through <i>the media described in subsection 1</i>, the communication must state the name and address of the person who made or financed the communication and a statement that the communication was or was not authorized by the candidate. The disclosure is not required if the communication was not made for the purpose of influencing the candidate's nomination for election or election. . . .</p>
Maryland	<p>Sec. 1-101, Maryland Election Law. (no title) . . . (K)(1) "Campaign material" means any material that: (i) contains text, graphics, or other images; (ii) relates to a candidate, a prospective candidate, or the approval or rejection of a question; and (iii) is published or distributed.</p> <p>(2) "Campaign material" includes: (i) <i>material transmitted by or appearing on the Internet or other electronic medium</i>; and (ii) an oral commercial campaign advertisement. . . .</p>
Montana	<p>Sec. 13-35-225, Montana Code. Election materials not to be anonymous--statement of accuracy. (1) All communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, <i>Internet</i></p>

**Table 1. Definitions of "Political Advertising"⁹ That Include Content Contained in Internet Communications or Electronic Mail:
State Statutes**

State	Statute or Rule Citation and Text
	<p><i>website</i>, or other form of general political advertising must clearly and conspicuously include the attribution "paid for by" followed by the name and address of the person who made or financed the expenditure for the communication. When a candidate or a candidate's campaign finances the expenditure, the attribution must be the name and the address of the candidate or the candidate's campaign. In the case of a political committee, the attribution must be the name of the committee, the name of the committee treasurer, and the address of the committee or the committee treasurer. . . .</p>
Nebraska	<p>Sec. 49-1474.02, Nebraska Revised Statutes. Dissemination of message by telecommunication or electronic means; requirements. . . . (3) Any person who makes an expenditure reportable under the act to disseminate by <i>any electronic means, including the Internet or email</i>, a message relating to a candidate or ballot question shall include in the message the name of the person making the expenditure.</p>
New Hampshire	<p>New Hampshire Revised Statutes 664:2. Definitions. As used in this chapter [Chapter 664. Political Expenditures and Contributions]: . . .</p> <p>VI. "Political advertising" means <i>any communication</i>, including buttons or printed material attached to motor vehicles, which expressly or implicitly advocates the success or defeat of any party, measure or person at any election.</p> <p>VII. "Communication" shall include, but not be limited to, publication in any newspaper or other periodical or <i>on any Internet site</i>, broadcasting on radio, television, or over any public address system, transmission by telephone or facsimile, placement on any billboards, outdoor facilities, window displays, posters, cards, pamphlets, leaflets, flyers, or other circulars, or in any direct mailing. . . .</p>
New Mexico	<p>Sec. 1-19-26, New Mexico Statutes. Definitions. As used in the Campaign Reporting Act [Secs. 1-19-25 to 1-19-36, New Mexico Statutes]: A. "advertising campaign" means an advertisement or series of advertisements used for a political purpose and disseminated to the public either in print, by radio or television broadcast or <i>by any other electronic means</i>, including telephonic communications, and may include direct or bulk mailings of printed materials; . . .</p>
Ohio	<p>Sec. 3517.20, Ohio Revised Code. Political publications identification of source.</p> <p>(A)(1) As used in this section:</p> <p>(a) "Political publication for or against a candidate" means a notice, placard, advertisement, sample ballot, brochure, flyer, direct mailer, or other form of general publication that is designed to promote the nomination, election, or defeat of a candidate.</p> <p>(b) "Political publication for or against an issue" means a notice, placard, advertisement, sample ballot, brochure, flyer, direct mailer, or other form of general publication that is designed to promote the adoption or defeat of a ballot issue or question or to influence the voters in an election.</p> <p>(c) "Public political advertising" means newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or flyers, handbills, or other nonperiodical printed matter. . . .</p>

**Table 1. Definitions of "Political Advertising"⁹ That Include Content Contained in Internet Communications or Electronic Mail:
State Statutes**

State	Statute or Rule Citation and Text
	<p>Ohio Elections Commission, Advisory Opinion 96ELC-10. (issued 9/10/96) "[I]t is the opinion of the Ohio Elections Commission . . . that electronic messages posted <i>on a World Wide Web page of the Internet or sent via electronic mail</i> supporting or opposing a candidate or issue, which messages are posted or sent by a candidate, campaign committee, legislative campaign fund, political party, other entity, a political action committee described in such section, [i.e., Sec. 3517.20, Ohio Revised Code, above] a corporation, or a labor organization, are subject to the disclaimer requirement set forth in R.C. [Ohio Revised Code] §3517.20 [See Sec. 3517.20(A), Ohio Revised Code, above.] and that the language included in the disclaimer must be the same as that outlined in R.C. §3517.20(A)."</p>
Texas	<p>Sec. 251.001, Election Code. DEFINITIONS. In this title [Title 15. Regulating Political Funds and Campaigns.]: . . . (16) "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) <i>on an Internet website</i>. . . .</p>
Vermont	<p>17 Vermont Statutes Sec. 2891. Definitions. As used in this chapter [Chapter 59. Campaign Finance], "electioneering communication" means any communication, including communications published in any newspaper or periodical or broadcast on radio or television or over any public address system, placed on any billboards, outdoor facilities, buttons or printed material attached to motor vehicles, window displays, posters, cards, pamphlets, leaflets, flyers, or other circulars, or in any direct mailing, robotic phone calls, or <i>mass e-mails</i> that refers to a clearly identified candidate for office and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office, regardless of whether the communication expressly advocates a vote for or against a candidate.</p>

While no states currently refer to blogs in statutes relating to political advertising or public communication, several states have been turning their focus toward revising their definitions. The Maryland State Board of Elections (MSBE) gained national attention for being one of the first to draft disclosure rules that specifically apply to various types of Internet content created by a political committee.

Under the new MSBE rules, a distinction is made between "social media" and "micro-blog." "Social media" is defined as an electronic medium where users may create and view user generated content, such as uploaded or download videos or still photographs, blogs, video blogs, podcasts, instant messages, or email. "Micro-blog" is a web service that allows the user to post and send, either to a selected group of people, or so that they can be viewed by anyone, short user generated content which includes text messages, photos, or videos.

Both classes of Internet communication require authority lines in association with the content and retention of content maintained in print form for up to one year after each general election.

FINDINGS

The Internet has evolved into a useful communication medium for political committees, but regulators have not reached a consensus on which classifications of Internet communications ought to be regulated.

The federal government's regulation of communications placed on another person's website for a fee prudently distinguishes between Internet communications that necessitate an expenditure of funds and Internet activities that are free. Their limited approach to Internet communication regulation recognizes that all Internet communications are not analogous and some forms ought to be protected. Creating a more stringent regulation regime may unnecessarily restrict political dialogue that is protected by the Constitution and discourage participation in a medium of discourse which currently has few barriers from entry.

While the limited approach of the FEC applies a standard that is easy to comply with and contains significant protections for individuals, it also contains a loophole that necessitates revision prior to incorporation at the state level. Under the current FEC guidelines, individuals are permitted to expend funds on Internet communications in coordination with a political committee without the communication being classified as an in kind contribution.¹¹ This loophole could be remedied at the state level, but it may require a significant departure from the simple standard created at the federal level.

MSBE's approach to Internet communications is a distinct approach from the one maintained by FEC. The more stringent standards created by MSBE do not require an expenditure of funds prior to triggering "social media" and "micro-blog" disclosure requirements and suggests that participation in those types of Internet forums, without regard to a monetary transaction between a political committee and another party, is not parallel to casual speech protected by the Constitution.

As the Legislature further considers regulation of Internet communications, several questions may need to be addressed; what is the definition of a blog; does it include social media tools such as Facebook and Twitter; is the definition flexible enough to account for the evolving nature of Internet communications; and are some blog entries protected free speech analogous to voicing concerns from a soap box or casual discourse between citizens.

RECOMMENDATIONS

1. The Texas Legislature should consider regulating blogs from a political committee that are placed on another person's website for a fee.
2. The Texas Legislature should continue to monitor Internet communication regulations at the state level and the implementation of FEC and MSBE Internet communication regulations.

ENDNOTES

¹ Texas Ethics Commission, Ethics Advisory Opinion No. 484. Aug 6, 2009

² Ibid.

³ Ibid.

⁴ Federal Register. Vol. 71, No. 70. April 12, 2006. pg 18591

⁵ Ibid., pg 18590

⁶ Ibid.

⁷ Ibid., pg. 18591.

⁸ Table 1 was drafted by the Texas Legislative Council and included in a report transmitted to Committee staff on May 21, 2010.

⁹ Includes definitions of "political communication," "political publication," and other related terms and provisions. Also includes definitions that refer broadly to electronic media, which may apply to Internet communications and electronic mail.

¹⁰ Senate Bill 117, which is pending in the Kansas Legislature, would amend Kansas Statutes 25-4146 to include the language in Rule 19-20-4, Kansas Administrative Regulations, relating to websites, e-mails, and other types of Internet communications.

¹¹ Daniel W. Butrymoxicx. Loophole.com: How the FEC's failure to fully regulate the Internet undermines campaign finance law. Columbia Law Review. November, 2009.