

If it is Open it Must be Ethical

Denise Davis, Partner
Davis Kaufman PLLC
508 West 14th Street
Austin, Texas 78701
512-428-4558
denise@daviskaufman.com

Tim Sorrells, Attorney and Counselor at Law
P.O. Box 302251
Austin, Texas 78703
512-484-2394
tim@timsorrells.com

Historical Context

Texas ethics laws are largely based on the notion that if it is “open” (reported) it is “ethical”

- **Sharpstown stock scandal** - 1971 – led to initial legislation in 1973 requiring reporting of contributions and expenditures and early open record laws, tougher lobby laws, as well as personal financial statement requirements
- **Brilab, Pilgrim, and Lewis** – 1980, 1989, 1990 – led to limits on cash contributions (but not checks, in-kind, or other forms), and, later may have been the impetus for creation of the Texas Ethics Commission in 1991 - more disclosure; more restrictions on lobbyists
- **1991 to present** – virtually every session has some ethics/open government reforms and this one is no different

Basis of Reform

Good government, or self serving politics?

- not surprisingly some “reform”
legislation is directed more at making life
easier for the reformers and their
supporters

-i.e. lobby gift reform from few sessions back

Local Government Interaction

What is lobbying?

May local officials lobby?

Do they have to register?

What is Lobbying and Do I Have to Register?

Texas Lobby Law – Chapter 305, Government Code

- Doesn't use the word lobby - “communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action”

In person, telephone, telegraph, letter, facsimile, electronic communications including email, texts, and tweets

“goodwill” communications count

- "Member of the legislative branch" means a member, member-elect, candidate for, or officer of the legislature or of a legislative committee, or an employee of the legislature.
- "Member of the executive branch" means an officer, officer-elect, candidate for, or employee of any state agency, department, or office in the executive branch of state government.

What is Lobbying and Do I Have to Register (cont'd)

- Legislation – a matter that is or may be the subject of action by either house of the legislature or by a legislative committee
- Administrative action – rulemaking, licensing, or any other matter that may be the subject of action by a state agency or executive branch office, including a matter related to the purchase of products or services by the agency or office. The term includes proposal, consideration, or approval of the matter or negotiations concerning the matter.

What is Lobbying and Do I Have to Register (cont'd)

Thresholds

- Compensation – you are compensated or reimbursed over \$1,000 in a calendar quarter to communicate directly to influence legislation or administrative action
 - Includes compensation you receive for preparation time
 - 5% Rule {basically, an affirmative defense}

OR

- Expenditures - you make over \$500 in expenditures in a calendar quarter in order to communicate directly to influence legislation or administrative action
 - Statutorily defined expenses – food, lodging, entertainment, gifts, etc.
Your own travel expenses, food, lodging, don't count
- Once you hit one of the thresholds, you must register within 5 days of making a covered communication
- Applies to entities as well, but an individual may register on behalf of an entity

A few of the exceptions:

- A person whose only direct communication with a member of the legislative or executive branch to influence legislation or administrative action is an appearance before or testimony to one or more members of the legislative or executive branch in a hearing conducted by or on behalf of either the legislative or the executive branch and who does not receive special or extra compensation for the appearance other than actual expenses incurred in attending the hearing.
- A person whose only activity is to encourage or solicit members, employees, or stockholders of an entity by whom the person is reimbursed, employed, or retained to communicate directly with members of the legislative or executive branch to influence legislation or administrative action.
- a person whose only activity to influence legislation or administrative action is attendance at a meeting or entertainment event attended by a member of the legislative or executive branch if the total cost of the meeting or entertainment event is paid by a business entity, union, or association. (entity may have to register)

Does Everyone
Who
Communicates
Have to Register?

Public Officials?

Regular compensation paid to a member of the judicial, legislative, or executive branch of state government or an officer or employee of a political subdivision of the state to register does not trigger registration by that official.

Keep in mind the expenditure threshold – if the official makes lobby expenditures that exceed the threshold, registration is triggered.

§ 34.41. Expenditure Threshold

(c) An expenditure made in connection with an event to promote the interests of a designated geographic area or political subdivision is not included for purposes of determining whether a person has crossed the registration threshold in Government Code, § 305.003(a)(1), if the expenditure is made by a group that exists for the limited purpose of sponsoring the event or by a person acting on behalf of such a group.

- What about advertisements opposing or supporting legislation?
 - Such communications by themselves would not trigger registration, but would constitute “Legislative Advertising” and would generally require the disclosure statement described in section 305.027 of the Government Code
- Grass roots doesn’t trigger
- Often it is best to assume that a communication is covered and then look to see if there is an exception

Other Communications/ Grass Roots

May government funds be used to hire a lobbyist?

- A local political subdivision may not use state funds it may receive for lobby purposes
- *See, Sec. 556.0055, Gov't Code . RESTRICTIONS ON LOBBYING EXPENDITURES.*

What about local funds?

- Although the law states a prohibition (*See, § 305.026, Gov't Code Prohibition on Use of Certain Public Funds*) , the exceptions basically swallow the prohibition
- As long as it is reported as required by statute

What Sort of Activities Are Allowed/Restricted?

Start with the Penal Code

- Non-Registrants:
 - Section 36.02 – Bribery – certain exceptions for those who are registered to lobby and for certain political contributions; not for non-registrants
 - Section 36.07 – Honorarium – cannot give an honorarium to a public servant, although there is an exception that allows for the provision of transportation, meals, and lodging expenses in connection with a conference or similar event at which the public servant provides services that are more than merely perfunctory
 - Section 36.08 – Gift to a Public Servant –prohibits gifts to a member of the legislature, the governor, the lieutenant governor, or a person employed by a member of the legislature, the governor, the lieutenant governor, or an agency of the legislature. Also prohibits gifts to those in the executive branch if the person wishing to provide the gift is subject o regulation, inspection, or investigation by the state officer's or employee's agency.

What Sort of Activities are Restricted (cont'd)

Section 36.10 – Penal Code –Exceptions

- Items worth less than \$50, but no cash or negotiable instrument
- Independent relationship /fees for services
- Political contributions
- Food , entertainment, transportation, and lodging accepted as a guest

Registrants

- Allowable gifts/benefits made and reported under the lobby law
 - Gifts up to \$500 in a calendar year, but no cash, loans, or negotiable instruments
 - Food and beverages if the lobbyist is present
 - Entertainment up to \$500 in a calendar year if the lobbyist is present
 - Awards and mementos worth not more than \$500 (not a yearly limit)
 - Travel and lodging in connection with certain fact-finding trips or to a seminar or conference at which the public servant is providing services that are more than merely perfunctory and where lobbyist is present.

Underlying theme:

If it is “open” it is “ethical

84th Session

Approximately 100 open government/ethics bills filed – narrow focus to broad sweep

Range from local government conflict and restrictions on local public funds for lobbying to abolishing the Public Integrity Unit

SB 343 – Huffines – Amends Local Government Code section 106.006.

Would prohibit local governments from making laws in conflict or more stringent than state law.

May well affect local campaign finance, lobby, and other open government ordinances.

-referred to State Affairs

SB 711 & 1862 – Burton – transfers and redesignates section 89.002 of the Local Gov't Code as section 556.006 of the Gov't Code

The bill would prohibit local public funds from being used to directly or indirectly influence the outcome of pending legislation, including compensating a person required to register as a lobbyist under chapter 305, Gov't Code, or to pay dues to an association that directly or indirectly influences pending legislation or that employs a lobbyist

Would have a real affect on local governments and associations.

Local officials would still generally be able to attempt to influence legislation in their role as a public servant

SB 1862 provides that a private citizen may bring suit for mandamus or injunction and allows a private citizen to be awarded a percentage of any proceeds of the action

- Both referred to State Affairs

-HB 3219 – Shaheen –similar but applies to school districts – referred to GIE

Lobby Bills

Former members and officeholders

HB 213/HB 314 – Button/Harless/Fallon – makes it a criminal offense for former legislators to lobby within two sessions of leaving
-referred to GIE

HB 487 – Howard/Israel/Schofield/Fallon – makes it a criminal offense for a former officeholder to use political contributions to make political contributions, political expenditures, and lobby expenditures within two years of the date the person ceases to hold office – exceptions for those who are not compensated and represent non-profits, certain low income, and those with disabilities.
-left pending in Elections

SB 1683 – Huffines – former candidate officeholder may not retain political contributions for more than 30 days after filing a lobby registration; expanded PFS reporting requirements
- referred to State Affairs

Lobby Bills (cont'd)

Thresholds -currently, the threshold is 60% of the legislative per diem rate, or \$114 per day

HB 972 - Geren/Harless/Sheffield/Metcalf/Villalba

SB585 - Watson/Burton

- sets the detailed reporting threshold at over \$50 a day for transportation and lodging/food and beverages/entertainment
- extends to family members
 - House and Senate State Affairs

SB586/587 – Watson/Burton

- also requires each registrant who pays part of an expenditure that exceeds \$50 to disclose the full amount, and for
- TEC must notify member and registrant when the threshold is equaled or exceeded
- requires posting of lobby reports on web
 - referred to Sate Affairs

Elections and Campaign Finance

Third Party/"Dark Money" Legislation

HB 37 - Cook/Geren/Harless – sets forth reporting requirements for a person or group that is not a political committee but that makes political expenditures exceeding \$25,000 in a calendar year

- Must disclose the names of donors who know or have reason to know that their donations will be used to make political contributions;
- A donor may designate that a payment not used to make a political contribution or expenditure; such donor would not be disclosed.
 - left pending in State Affairs

Third Party/"Dark Money" Legislation (cont'd)

HB 38 - Cook/Geren/Harless - prohibits certain corporations from using funds of donors who "opt out," to make political contributions or expenditures using those funds. Corporations that are required to file reports under Title 15 must provide the option to opt out in solicitation materials..

-left pending in State Affairs

HB 1671 - Cook – defines "principal purpose" and "acting in concert;" essentially codifies existing TEC Rules; § § 20.1(20) & 22.6(b)

-referred to state affairs

HB 3773 - Cook – restrictions on use of funds by corporation

- another "opt out" this one in Bus. Org. Code- referred to State Affairs

HB 4075 – Cook – related to reporting contributions used to make direct campaign expenditures – referred to State Affairs

HB 4078 – Cook – may not disclose a donor who specifically asked that a contribution made by the donor not be used to make a political contribution or political expenditure, unless the donation constitutes a political contribution - Referred to State Affairs

General

SCR 2/ HCR 49 – Ellis/Thompson – urges Congress to propose and submit to the states an amendment that would effectively overturn the holding in Citizens United – SCR 2 – referred to State Affairs; HCR 49 hearing today in Select Committee on State and Federal Power and Responsibility

HB 24 – Davis – raises GPAC and SPAC thresholds before filing a campaign treasurer appointment to \$5,000 and \$1,000, respectively?

- effect on COA 2-2-23?

- referred to State Affairs

HB 1533/SB 1992 – Geren/Taylor – during the last 30 days before an election, prohibits a candidate, or committee involved in the election, from using political contributions from a single source that in the aggregate exceed \$5,000 unless first reported, and if a TEC filer, posted by TEC.

- left pending in State Affairs

HB 1787 – C. Turner – requires quarterly reporting at all levels; defines “in-kind” contribution

- left pending in State Affairs

General (cont'd)

SB 63 – Huffines – term limits all elective offices in state to 8 years (multiple office count toward limit); also term limits on speaker and certain legislative committees

- referred to State Affairs

HB 3490 – Meyer – creates a very detailed investigative process/requirement if someone subject to Title 15 is alleged to have made a “materially false statement” in political advertising or a campaign communication with “reckless disregard” of whether it was false or not.

- referred to GIE

HB 3684 – Geren – updates and expands section 255.001, Political Advertising Disclosure, to provide more detailed requirements for political advertising appearing on radio, television, internet, and social media;

- referred to elections

General (cont'd)

SB 1437 – specifically allows local entities to file campaign finance reports and personal financial statements using TEC developed software.

- referred to State Affairs

HB 220 – Stephenson – requires the permission of a political party before a GPAC may include the party name in the name of the GPAC; TEC must notify committee and CT becomes invalid if name not changed within 14 days

-left pending in Elections

Personal Financial Statements

HB 485 - Leach – requires posting PFS of legislative/executive branch and State Board of Education on Internet within 10 business days – referred to Elections

HB 1059 – C. Turner – tightens up and expands reporting categories for PFS – requires posting of all PFSs within 15 days. – CS reported favorably from GIE

HB 1085 – Marquez- extends PFS filing requirement to school boards; file with board and commissioners court; late reporting enforced by commissioners court – CS reported favorably from GIE

HB 1354 – Howard – creates a select interim committee to study PFS and recommend changes - referred favorably from GIE

SB 431 – Seliger – extends PFS filing deadline by 20 days – passed in Senate

SB 736 – Taylor – adds additional reporting requirements with respect to certain contracts governmental entities – referred to State Affairs

HB 3683/3789 – Geren – electronic filing of PFS – hearing today in GIE; disclosure of contracts with governmental entities – referred to GIE

Public Integrity Unit Bills

HB 1690 – King – creates a special prosecutor who will be appointed by the chief justice of the supreme court to serve a two years term

- Authority to prosecute certain offenses (title 8 Penal Code, Ch 305 Gov't, et al) – Committee Substitute reported favorably from GIE

HB 2222 – Murr – creates new public integrity unit/committee – committee substitute considered and left pending in GIE

SB 10 – Huffman – creates separate PIU; venue in county of residence of accused for certain offenses; Committee substitute voted from committee; placed on intent calendar