

**PRESENTED AT**

**39<sup>th</sup> Annual School Law Conference**

February 16, 2024

Austin, TX

## **Elections: Do's and Don'ts**

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## **I. Introduction**

Elections touch upon a wide range of topics. Some elections decide who will hold positions of power. Others determine whether governmental entities receive necessary funding for critical facility improvements or teacher pay raises. While each election is different, each is extremely important. These elections are particularly critical to school administrators, employees, and board members. They are public servants who are typically very passionate about public education and their students. They also tend to know exactly how important these elections are to the success of their respective districts. Thus, they typically have quite a bit to say about these elections. However, much of what they want to say is limited by various statutes and other considerations. School employees and board members should not feel as if they are muzzled by these restrictions, but they do need to understand that there are boundaries upon their election-related communications. Understanding these limitations is key not only to sticking within legal mandates but also to ensuring that their elections have the highest likelihood of success.

## **II. Section 255.003(a), Texas Election Code**

Both United States Congress and the governments of the various states are prohibited from abridging freedom of speech.<sup>1</sup> Freedom of speech, however, is not unlimited. With respect to elections concerning Texas school districts and other political subdivisions, perhaps the most important limitation on speech is found in Section 255.003(a), Texas Election Code. Such statute provides that “[a]n officer or employee of a

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<sup>1</sup> U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652 (1925).

political subdivision may not knowingly spend or authorize the spending of public funds for political advertising.”<sup>2</sup>

Violation of this provision is a criminal offense.<sup>3</sup> As a Class A misdemeanor, a violation of this statute is punishable by a fine of as much as \$4,000, confinement in jail for up to one year, or both.<sup>4</sup> Violating this statute has implications not only for the district but for individual school board members and employees.

The key to interpreting this statute primarily lies in understanding the terms “political advertising” and “public funds.” These terms will be discussed in turn.

### **A. Political Advertising**

To be considered political advertising, a communication must contain specified content and must also appear in a specified format. As to content, political advertising is a communication that supports or opposes a “candidate”<sup>5</sup> or an election “measure.”<sup>6</sup> Many refer to this as election advocacy.<sup>7</sup>

There are plenty of gray areas in determining whether particular communications contain election advocacy. However, there are at least three types of statements that should immediately register as election advocacy:<sup>8</sup>

- Express advocacy, such as:

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<sup>2</sup> Tex. Elec. Code § 255.003(a). This statute applies to school board members and employees. *See Mitchell v. State*, 692 S.W.2d 909, 912 (Tex. App.—Beaumont 1985, pet. ref’d) (noting that a school district is a political subdivision of the state); *see also* Tex. Att’y Gen. Op. No. KP-0114 (2016) (noting that a school trustee holds public office).

<sup>3</sup> Tex. Elec. Code § 255.003(c).

<sup>4</sup> Tex. Elec. Code § 255.003(c); Tex. Pen. Code § 12.21.

<sup>5</sup> *See* Tex. Elec. Code § 251.001(1), which is discussed in more detail below.

<sup>6</sup> *See* Tex. Elec. Code § 251.001(19), which is discussed in more detail below.

<sup>7</sup> Some might use “advocacy” and “political advertising” interchangeably. However, as discussed, this is not actually correct. Political advertising must contain both election advocacy content and appear in one of the enumerated formats.

<sup>8</sup> *See* Texas Ethics Commission, *A Short Guide to the Prohibition Against Using Political Subdivision Resources For Political Advertising in Connection with an Election*, Jan. 11, 2024, [https://www.ethics.state.tx.us/resources/advertising/Bsub\\_adv.php](https://www.ethics.state.tx.us/resources/advertising/Bsub_adv.php).

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First appeared as part of the conference materials for the  
39<sup>th</sup> Annual School Law Conference session

"Elections: Do's and Don'ts"