

**INFORMAL OPINION IO-2006-002
ISSUED OCTOBER 9, 2006**

Because your questions are reasonably susceptible to a single analysis by the clear language of the of the Constitutional Ethics Rules [“the Rules”], Section 257:1-1-1 et seq. of the Rules of the Ethics Commission, 74 O.S. Supp. 2006, Ch. 62, App.,¹ we have responded by informal opinion. You have asked:

Do telephone calls made within 60 days of a general election qualify as electioneering communications under the Rules? Also, are electioneering communications of three different types [e.g. a voter guide, a new sletter and a position paper] issued by a single entity considered one electioneering communication or three separate electioneering communications for purposes of triggering the \$5,000 threshold set for in Rules’ Section 257:10-1-16(b)?

FACTS

You have advised that an entity you represent might wish to make phone calls mentioning candidate names to an electorate within 60 days of the general election. You also indicated you may wish to mail three separate items – for example, a voter guide, a new sletter and a position paper – to a 5,000 targeted electorate within that time frame. You ask whether Rules’ Section 257:10-1-16(b), as presently written, is triggered by each communication separately, or whether the three must be lumped together when calculating the \$5,000 threshold amount.

ANALYSIS

Before proceeding, you have asked that this opinion **not** address the question of whether the 501(c)(4) entity you represent qualifies as an ideological corporation, whether its treasury is funded 10% or more from for-profit corporate funds or whether its structure is such that would require conducting the instant activity through a political action committee. Staff has advised those are issues that have potential bearing on the outcome. However, you have asked that we confine this opinion to the limited questions set forth above.

Your questions pertain to the recent electioneering communications provision which became effective July 1, 2005. The term is defined as:

¹Rules Section 257:1-1-6(h) provides:

...The executive director or the general counsel may issue informal written opinions, as time permits and with the prior approval of the chair or vice chair, pertaining to the provisions of this title on questions that are susceptible to a single analysis by the clear language of the rule and are not the subject of litigation, investigation or legislation.

Definitions

* * *

“Electioneering communication”

(1) means any communication that is sent by handbill or direct mail; broadcast by radio, television, cable or satellite; or appears in a newspaper, magazine or on a billboard which –

(A) refers to one or more clearly identified candidates for state office or one or more ballot measures;

(B) is made within –

(i) 60 days before a general or special election for the office sought by the candidate or candidates or the ballot measure or ballot measures; or

(ii) 30 days before a primary or runoff primary election for the office sought by the candidate or candidates; and

(C) is targeted to the relevant electorate;

(2) does not mean –

(A) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political action committee, candidate, candidate committee or ballot measure committee;

(B) a communication which constitutes an expenditure or an independent expenditure under this chapter; or

(C) a communication which constitutes a candidate debate or forum or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(3) For purposes of this definition, a communication which refers to one or more clearly identified candidates for state office or one or more ballot measures is ‘targeted to the relevant electorate’ if the communication has been or can be received by –

(A) 2,500 or more persons in the district the candidate seeks to represent in the case of a candidate for the Oklahoma State House of Representatives;

(B) 5,000 or more in the district the candidate seeks to represent in the case of a candidate for district attorney, district judge, associate district judge, or the Oklahoma State Senate; or

(C) 25,000 or more persons in the State of Oklahoma in the case of a candidate for a statewide elective office or ballot measure.

* * *

Section 257:1-1-2

The Rules specify that electioneering communications may not be made in the name of another.

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(c) **Independent expenditures and electioneering communications in the name of another prohibited.** No person shall make an independent expenditure or disbursement for an electioneering communication in the name of another person or knowingly permit his, her or its name to be used to effect such an independent expenditure or electioneering communication, and no person shall knowingly accept a payment or promise of a payment for an independent expenditure or electioneering communication from one person in the name of another person.

Section 257:10-1-7

Under Rules's Section 257:10-1-16(b), electioneering communications carry a disclosure requirement. It provides:

Report of last minute independent expenditures and electioneering communications

* * *

(b) **Electioneering communications.**

(1) Any person who makes a payment or promise of payment totaling five thousand dollars (\$5,000) or more for an electioneering communication shall file a statement with the Commission disclosing the name of such person and street address, city, state and zip code, occupation and employer, along with the recipient's name, street address, city, state and zip code, description of the payment, the amount, the name of one or more candidates mentioned, the purpose of the communication, whether support or opposition, and how much

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257:10-1-16

Applying these provisions to your facts, staff notes that telephone calls are not listed among the items regulated as electioneering communications. They therefore fall outside the Rules. Phone calls may thus be made without triggering the electioneering communication definition or any of the corresponding sections.

With regard to your second question, staff notes that Rules' Section 10-1-16(b) controls. In pertinent part, it reads:

Any person who makes a payment or promise of payment totaling five thousand dollars (\$5,000) or more for *an electioneering communication* shall file a statement with the Commission disclosing . . .

Section 257:10-1-16(b)(1)

[emphasis added]

The wording is in the singular, referring to “an electioneering communication.” As presently written, the \$5,000 reporting threshold is triggered by a single communication – rather than multiple communications lumped together. It is therefore the informal opinion of the Ethics Commission staff that each of the three types of communications you envision – for instance, a voter guide, a newsletter and a position paper – must individually total \$5,000 before the reporting requirement has been triggered.

As discussed, the Commission is considering revisions to the current electioneering communication provisions. If promulgated and allowed to take effect, those amendments would become law July 1, 2007. These questions may need to be revisited at that time.

CONCLUSION

It is therefore the informal opinion of the Ethics Commission staff that the definition of “electioneering communication” as set forth in Rules’ Section 257:1-1-2, does not include telephone calls. For that reason, they are not regulated as electioneering communications.

It is further staff’s informal opinion that Rules’ Section 257:10-1-16(b)(1), as presently written, is based upon a \$5,000 threshold, which is triggered by a single communication — as opposed to a series of communications. It is therefore staff’s opinion that each of the three types of communications you envision — for instance, a voter guide, a newsletter and a position paper — must individually total \$5,000 in order to trigger the reporting requirement.

Like ethics interpretations, informal staff opinions are fact specific. They answer only the question or questions put forth in the underlying request according to information described in the “Facts” section [supra]. While they may shed light on other situations, this opinion does not necessarily control them.

The Rules permit the Commission staff to issue informal opinions, upon the approval of the Chair or Vice Chair, provided the matter is reasonably susceptible to a single analysis and is not the subject of litigation, investigation or legislation. We hope these informal letters shed light on the issues and provide guidance. They are not, however, official pronouncements.

This opinion letter has been approved by the Commission Chairman. According to policy, this opinion will be submitted to the members, any of whom can request that the matter be converted to an ethics interpretation and considered by the full Commission.

Informal opinions are published with sufficient deletions to prevent identification of the person or persons involved in the situations herein described. The name of the requestor is considered confidential.