



OKLAHOMA ETHICS COMMISSION

October 1, 2015

Proposed Draft Advisory Opinion 2015-01 (AOR-2015-03, Mr. Scott Fetgatter)

Attached is a proposed draft of Advisory Opinion 2015-01 (AOR-2015-03, Mr. Scott Fetgatter).

Members of the public may submit written comments on the draft advisory opinion. Written comments may be delivered via email to ethics@ethics.ok.gov or via hand delivery to the Commission's offices at the address on the bottom of this page. We are making this draft available for comment until 5:00 p.m. on October 8, 2015.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions. This meeting will occur at 10:00 a.m. on Friday, October 9, 2015, in Room 432A of the Oklahoma State Capitol, 2300 N. Lincoln Blvd, Oklahoma City, OK 73105.

For more information go to www.ethics.ok.gov or call (405) 521-3451.

1 Advisory Opinion Request 2015-03 (Draft 1)

2 Dear Mr. Fetgatter:

3 We are responding to your advisory opinion request concerning the application of the Oklahoma
4 Ethics Rules to your employment as a host on a radio show while you are a candidate for State
5 office. You ask, in effect, the following questions:

- 6 **1. May I continue my employment as a radio show host while I am a candidate for state**
7 **office?**
- 8 **2. If yes, may I discuss my candidacy on the radio show?**
- 9 **3. May I discuss my opinions on political topics during discussions on the show?**
- 10 **4. May I advertise on the radio station to promote my campaign? If so, under what**
11 **conditions?**
- 12 **5. May I accept campaign contributions from the station or owner or other station**
13 **employees?**
- 14 **6. If elected, can I discuss my opinions on political topics during discussions on the show?**

15

16 **Background**

17 You are a candidate for State House District 16 for the 2016 campaign cycle. You have an active
18 campaign committee registered with the Oklahoma Ethics Commission. You are currently
19 employed by a radio station as a host on a morning radio show. The radio station is 1240 AM
20 The Brew, which is based in Okmulgee. The radio station is organized as a corporation. The
21 station primarily covers Okmulgee County and surrounding areas.

1 The radio show airs from 7:00am to 9:00am, Monday through Friday. Your employment is part-
2 time, and you receive compensation for the hours you work. The show is primarily an
3 entertainment show, and at times the discussions on the show cover political topics. Typically
4 those political topics involve national issues, but state issues may be discussed as well. The show
5 occasionally accepts calls from listeners to join in the discussions.

6 **Discussion**

7 The Oklahoma Ethics Commission promulgates rules of ethical conduct for campaigns for
8 elective state office pursuant to the Oklahoma Constitution, Article XXIX, § 3. Rules relating to
9 campaign finance and ethical conduct for campaigns for elective state office are promulgated as
10 Rule 2 of the Oklahoma Ethics Rules (“the Rules”). These rules will govern our analysis of your
11 questions.

12 **I. May I continue my employment as a radio show host while I am a candidate for** 13 **state office?**

14 Yes, you may continue your employment as a radio show host while also campaigning for state
15 office. The Rules do not prohibit holding certain categories or industries of employment while
16 campaigning for state office; however, they do prohibit certain kinds of activities by candidates
17 and certain kinds of contributions to candidates for state office. Therefore, you may continue
18 your employment as a radio show host, but you are also required to simultaneously comply with
19 the Rules as they relate to your candidacy. The Rules, as they govern your actions as a candidate,
20 are more thoroughly discussed in the analysis of your other questions.

1 **II. May I discuss my candidacy on the show?**

2 The Ethics Commission recognizes what is commonly known as the “press exemption” for
3 contributions and expenditures. Generally, a contribution or expenditure does not include any
4 news story, commentary, or editorial distributed through the facilities of any broadcasting
5 station, newspaper, magazine, or other periodical publication, unless such facilities are owned or
6 controlled by any political party, political action committee, candidate, candidate committee or
7 ballot measure committee. This exemption acknowledges the Freedom of the Press encompassed
8 in the First Amendment to the United States Constitution to gather and report on news; however,
9 this exemption is not without narrow limitations. U.S.Const.am. 1; Okla.Const.art. 2, § 22.

10 The press exemption calls for a two-step process to determine its application. The first step is to
11 determine whether the press entity is owned or controlled by a political party, political action
12 committee, candidate, candidate committee or ballot measure committee. The second step is to
13 determine whether the press entity is acting as a press entity in making the broadcast or
14 distribution. *See Reader’s Digest Ass’n, Inc. v. F.E.C.*, 509 F.Supp. 1210, 1214 (S.D.N.Y. 1981).

15 In this case, there is no evidence the radio station is owned or controlled by a political party,
16 political action committee, candidate, candidate committee or ballot measure committee. There
17 is, however, some concern whether a press entity is acting in its capacity as a press entity in
18 allowing an employee the free use of air time to discuss his or her candidacy for state office. If
19 the radio station is acting in the context of the distribution of a news story through its facilities,
20 then the press exemption is applicable. *See Id.* at 1215. If the radio station is acting in a manner
21 unrelated to its publishing and broadcasting function, then the press exemption may not be
22 applicable. *Id.*

1 The radio station you work for is organized as a corporation. Corporations are prohibited from
2 influencing elections by giving contributions of money or anything else of value to candidates.
3 Okla.Const.art. 9, § 40; 21 Okla.Stat.Supp.2015, § 187.2; Ethics Rule 2.23. “Contribution” is
4 defined as:

5 any gift, subscription, loan, guarantee or forgiveness of a loan,
6 conveyance, advance, payment, distribution or deposit of money
7 made to, or anything of value given to, or an expenditure other
8 than an independent expenditure made on behalf of, a political
9 party, political action committee or candidate committee, but shall
10 not include the value of services provided without compensation
11 by an individual who volunteers those services

12 Ethics Rule 2.2; 21 Okla.Stat.Supp.2015, § 187.

13 The definition of contribution includes “anything of value” given to a candidate committee,
14 which embraces both monetary contributions and in-kind contributions of goods or services. The
15 free use of radio air time to campaign and discuss your candidacy has value and is therefore an
16 in-kind contribution if the press exemption does not apply. Because the radio station is a
17 corporation it cannot give a contribution of free air time to a candidate or campaign committee.

18 Therefore, we conclude that if the discussion of your candidacy is in the context of the
19 distribution of a news story through the radio station’s facilities, then the press exemption applies
20 and it is not an in-kind contribution to your campaign. If the discussion of your candidacy is
21 unrelated to the radio station’s publishing and broadcasting function, then the press exemption is
22 not applicable and the station has made an unlawful contribution to your campaign. Whether any

1 particular discussion of your candidacy on the radio station is covered by the press exemption
2 depends on the specific facts and circumstances of that discussion, which cannot be answered at
3 this time.

4 In an effort to provide some additional guidance, the Commission concludes that the press
5 exemption would apply in circumstances where the major purpose of the activities in question
6 are not designed to influence the candidate's nomination or election. Evidence of this includes
7 (1) the absence of any communication expressly advocating the nomination or election of the
8 candidate, and (2) the avoidance of soliciting, making, or accepting campaign contributions for
9 the candidate in connection with the activities.

10 **III. May I discuss my opinions on political topics during discussions on the show?**

11 As discussed above, the press exemption applies when the press entity is acting as a press entity
12 in making the broadcast or distribution. You stated the radio show regularly covers federal and
13 state political topics. The discussion of political topics, including commentary and editorials, is
14 exempted under the press exemption. U.S.Const.am. 1; Okla.Const.art. 2, § 22. Therefore, we
15 conclude you may discuss your opinions and provide commentary on political topics on the show
16 when such broadcasts are part of the regular press functions of the radio station.

17 To provide additional guidance as to when the press entity is engaging in press functions, the
18 Commission reiterates that the press function exists where the major purpose of the activities in
19 question are not designed to influence the candidate's nomination or election. Evidence of this
20 includes (1) the absence of any communication expressly advocating the nomination or election
21 of the candidate, and (2) the avoidance of any solicitation, making, or acceptance of campaign
22 contributions for the candidate in connection with the activities.

1 **IV. May I advertise on the radio station to promote my campaign? If so, under what**
2 **conditions?**

3 Yes, you may advertise on the radio station to promote your campaign under the same conditions
4 as other advertisers. The radio station you work for is organized as a corporation. Corporations
5 are prohibited from influencing elections by giving contributions of money or anything else of
6 value to candidates. Okla.Const.art. 9, § 40; 21 Okla.Stat.Supp.2015, § 187.2; Ethics Rule 2.23.

7 “Contribution” is defined as:

8 any gift, subscription, loan, guarantee or forgiveness of a loan,
9 conveyance, advance, payment, distribution or deposit of money
10 made to, or anything of value given to, or an expenditure other
11 than an independent expenditure made on behalf of, a political
12 party, political action committee or candidate committee, but shall
13 not include the value of services provided without compensation
14 by an individual who volunteers those services

15 Ethics Rule 2.2; 21 Okla.Stat.Supp.2015, § 187.

16 The definition of contribution includes “anything of value” given to a candidate committee,
17 which includes both monetary contributions and in-kind contributions of goods or services. Free
18 or reduced rate advertising for your campaign is a thing of value and is a contribution. Such a
19 contribution from a corporation is prohibited. However, there are no Ethics Rules that prohibit
20 you from advertising to promote your campaign under the same conditions as other advertisers.

1 Therefore, we conclude you may advertise on the radio station to promote your campaign under
2 the same costs and conditions as other advertisers.

3 **V. May I accept campaign contributions from the station or owner or other station**
4 **employees?**

5 You may accept contributions individually from the station owner and other station employees.

6 You may not accept contributions from the radio station itself.

7 The radio station you work for is organized as a corporation. Corporations are prohibited from
8 influencing elections by giving contributions of money or anything else of value to candidates or
9 candidate committees. Okla.Const.art. 9, § 40; 21 Okla.Stat.Supp.2015, § 187.2; Ethics Rule
10 2.23. Therefore, you may not accept a contribution from the radio station itself. You may,
11 however, accept voluntary contributions from the station owner and other station employees as
12 individuals. Ethics Rule 2.17. Individuals may give contributions to a candidate committee in an
13 amount not to exceed the limitations set forth in Ethics Rule 2.37.

14 **VI. If elected, can I discuss my opinions on political topics during discussions on the**
15 **show?**

16 The Ethics Commission generally only provides advisory opinions on factual scenarios that exist
17 at the time the advisory opinion is issued. The Ethics Commission does not provide advisory
18 opinions on matters that are speculative, hypothetical, based on contingent or unknown facts, or
19 are only applicable to third parties. Okla.Const.art. 28, § 5; Ethics Rule 1.7. Therefore, if you are
20 elected, then you may renew this question with the Ethics Commission for additional advice. At

1 this time, however, the Ethics Commission will decline to answer to this question because it is
2 hypothetical and is based on contingent facts at this time.

3 **Conclusion**

4 You have asked a variety of questions relating to your job as a radio show host and how that
5 position overlaps with your candidacy for state office. In conclusion, we recognize the broad
6 freedoms granted to the press under the First Amendment of the U.S. Constitution and the
7 Oklahoma Constitution. U.S.Const.am. 1; Okla.Const.art. 2, § 22. We also recognize a “press
8 exemption” to the Ethics Rules relating to contributions and expenditures. To reiterate that
9 exemption, a contribution or expenditure does not include any news story, commentary, or
10 editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or
11 other periodical publication, unless such facilities are owned or controlled by any political party,
12 political action committee, candidate, candidate committee or ballot measure committee.

13 The press exemption calls for a two-step process to determine its application. *See Reader’s*
14 *Digest Ass’n, Inc.*, 509 F.Supp. at 1214. The first step is to determine whether the press entity is
15 owned or controlled by a political party, political action committee, candidate, candidate
16 committee or ballot measure committee. *Id.* The second step is to determine whether the press
17 entity is acting as a press entity in making the broadcast or distribution. *Id.*

18 The Ethics Commission does not express any opinion as to any federal communications laws or
19 Federal Communications Commission rulings that may be applicable to this set of facts,
20 including “equal opportunity” rules in Section 315 of the Federal Communications Act of 1934.

21

1 **Therefore, it is the official opinion of the Ethics Commission:**

- 2 **1. You may continue your employment as a radio show host while also campaigning**
3 **for state office.**
- 4 **2. Your candidacy may only be discussed on the radio show if the discussion of your**
5 **candidacy is in the context of the distribution of a news story through the radio**
6 **station's facilities. If the discussion of your candidacy is unrelated to the radio**
7 **station's publishing and broadcasting function, then the press exemption is not**
8 **applicable and the station has made an unlawful contribution to your campaign.**
- 9 **3. You may discuss your opinions and provide commentary on political topics on the**
10 **show when such broadcasts are part of the regular press functions of the radio**
11 **station.**
- 12 **4. You may advertise on the radio station to promote your campaign under the same**
13 **costs and conditions as other advertisers.**
- 14 **5. You may not accept a contribution from the radio station itself; however, you may**
15 **accept voluntary individual contributions from the station owner and other station**
16 **employees, subject to contribution limits in the Ethics Rules.**
- 17 **6. The Ethics Commission does not provide advisory opinions on matters that are**
18 **speculative, hypothetical, based on contingent or unknown facts, or are only**
19 **applicable to third parties.**