# ARKANSAS ETHICS COMMISSION

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ADVISORY OPINION NO. 2008-EC-008
Issued August 15, 2008

The Arkansas Ethics Commission has received a written advisory opinion request from Michael Cook, Chief of Staff for Lieutenant Governor Bill Halter. In his opinion request, Mr. Cook asks what conditions or circumstances must be met in order for a public servant to trigger reporting under the Disclosure Act for Public Initiatives, Referenda, and Measures Referred to Voters (hereinafter, the "Disclosure Act".)

The Disclosure Act is codified at Ark. Code Ann. § 7-9-401 et seq. The statutory provision applicable to the instant question is Ark. Code Ann. § 7-9-406(c), which provides as follows:

> A public servant or governmental body expending public funds in excess of five hundred dollars ($500) for the purpose of expressly advocating the qualification, disqualification, passage, or defeat of a ballot question[1] or the passage or defeat of a legislative question[2] shall file with the commission financial reports as required by §§ 7-9-407- 7-9-409.

Based upon this provision, it is clear that Arkansas law allows a public servant or a governmental body to expend public funds to "expressly ... [advocate] the qualification, disqualification, passage, or defeat of a ballot question or the passage or defeat of a legislative question." However, the law does require the filing of periodic financial reports by the public servant or governmental body when more than five hundred dollars

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[1] The term "ballot question" is defined in Ark. Code Ann. § 7-9-402(1) to mean:

> a question in the form of a statewide, county, municipal, or school district initiative or referendum which is submitted or intended to be submitted to a popular vote at an election, whether or not it qualifies for the ballot.

[2] The term "legislative question" is defined in Ark. Code Ann. § 7-9-402(7) to mean:

> a question in the form of a measure referred by the General Assembly, a quorum court, a municipality, or a school district to a popular vote at an election.

($500) of public funds is expended to engage in such activity. Accordingly, a public servant meets the threshold or "trigger" for reporting under the Disclosure Act when he or she has expended public funds in excess of $500 for the purpose of "expressly advocating the qualification, disqualification, passage, or defeat of a ballot question or the passage or defeat of a legislative question."

In Advisory Opinion 2006-EC-004, the Commission specifically addressed the meaning of the phrase "expressly advocates" as used in the definition of an "independent expenditure." That opinion contained a lengthy discussion of case precedent, including the landmark case of *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612 (1976)("Buckley I"). Although the opinion addressed express advocacy in the context of *candidate* support or opposition, the rationale set forth therein provides guidance regarding the question at hand. Moreover, the Supreme Court has made it clear that the principles enunciated in Buckley I extend equally to issue-based elections. See *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 115 S.Ct. 1511 (1995).

As this Commission has previously opined, express advocacy which is subject to Arkansas' campaign finance laws requires explicit words urging action (i.e., "vote for" "vote against") in order to be constitutionally regulated by the State. Accordingly, when a public servant or a governmental body expends more than five hundred dollars ($500) of public funds urging action in support or opposition of a ballot measure, that public servant or governmental body is required to file financial reports pursuant to Ark. Code Ann. §§ 7-9-407-7-9-409. Communication which falls short of urging action is unregulated political speech and not subject to the Disclosure Act.

It is noted that the Disclosure Act does not specify which types of expenditures count towards the $500 threshold set forth in Ark. Code Ann. § 7-9-406(c). However, some light is shed on the subject by Ark. Code Ann. § 7-9-412 and 7-9-413.

The first of these statutes, Ark. Code Ann. § 7-9-412, places certain reporting requirements on state agencies, boards, or commissions spending appropriated funds for the purpose of opposing or supporting a measure which is submitted or intended to be submitted to a popular vote at an election.[3] The second such statute, Ark. Code Ann. § 7-9-413, goes on to provide that the "use of state funds" under § 7-9-412 includes:

(1) Newspaper, television, radio, and other forms of communication;
(2) Publication materials;
(3) Travel expenses relative to reimbursement;
(4) Surveys;
(5) Private contracts; and

[3] Ark. Code Ann. § 7-9-412 provides as follows:

> Any funds appropriated to any state agency, board, or commission that are expended, as prescribed in § 7-9-413, for the purpose of opposing or supporting any initiative, referendum, proposed constitutional amendment, or other measure which is submitted or intended to be submitted to a popular vote at an election, whether or not it qualifies for the ballot, shall be reported to the Legislative Council if the amount exceeds one hundred dollars ($100).

(6) Postage.

Although not controlling on the question of which types of expenditures count toward the $500 threshold of Ark. Code Ann. § 7-9-406(c), the Commission finds that the list set forth in § 7-9-413 is instructive. A review of the list reflects that it contains expenditures which are above and beyond general overhead of a governmental office. Accordingly, it is the Commission's opinion that additional or increased costs which result from engaging in express advocacy with respect to a ballot measure count towards the $500 reporting threshold but that general overhead expenses do not count towards the threshold.

This advisory opinion is issued by the Commission pursuant to Ark. Code Ann. § 7-6-217(g)(2).

**ARKANSAS ETHICS COMMISSION**

**By:** 

Rita S. Looney, Chief Counsel