

GOVERNOR-ELECT TRANSITION DOCUMENT

OHIO ELECTIONS COMMISSION

The Ohio Elections Commission is a seven-member appointed body that receives, reviews, and adjudicates election-related complaints. The Commission’s jurisdiction is limited, and the complaints it considers primarily involve campaign finance violations and false statement claims. It does not consider voting or ballot related issues. According to media reports, the Commission handles approximately 800 to 1,000 claims per year, most relating to late campaign finance filings. The Commission handled 65 false statement claims in 2006. The Commission has an Executive Director/Staff Attorney and two other employees to assist the Commission in carrying out its duties.

MAJOR ISSUES

Issue #1: The Ohio Elections Commission, whose seven members are not required to be trained in constitutional law, determines the lawfulness of constitutionally protected political speech.

One of the most important functions of the OEC is to respond to charges that political advertisements contain false statements. To make this determination, the OEC must apply highly complex constitutional standards when deciding whether to sanction statements contained in political advertisements. During the course of this determination, the person making the accusation may use the filing of the complaint and subsequent actions as a political tool, while the person charged may have his or her constitutionally protected speech chilled.

Commission members are not required to be trained in applying constitutional law, and while the attorney for the Commission provides guidance to the members, stakeholders expressed concern about placing non-attorneys in such a critical constitutional role. In fact, only seventeen states statutorily regulate false statements regarding political candidates, while most states prefer to leave such determinations to the courts.

As currently configured, the OEC may be used as a political tool rather than as a truth-seeking agency. First at the filing stage, and then if a panel finds probable cause to hold a hearing with the full Commission, candidates issue press releases. The probable cause panels, as well as the full Commission, may unevenly apply the “clear and convincing” and “actual malice” standards required by the courts, and sometimes appear to be acting based on political allegiance instead. Thus, rather than providing voters with an assessment of the truth of political advertisements, the Commission may be functioning as another weapon in the political arsenal.

Stakeholder Suggestions:

--Change the Commission from an adjudicatory role to a truth-declaring role. The Commission would take evidence, hold hearings, and issue findings of fact regarding the truth of statements. The Commission would function more as a congressional investigative body, rather than a quasi-judicial body.

--Provide an "in camera" option so that some evidence can be taken without becoming a public record and thus available for use in political advertisements. The current interpretation is that all documents held by the Commission are public records

--Add two more Independents to the Commission so that all panels are one Republican, one Democrat, and one Independent, allowing for less politicization of the panels.

--Make investigations and adjudications confidential until the issues are decided, similar to how actions before Ohio Ethics Commission and Federal Elections Commission are conducted.

Issue #2: Prior decisions of the Commission are difficult to access and to use to predict the outcome for any particular fact situation.

In order to advise candidates about current and future behavior regarding campaign ads and campaign finance statement filings, stakeholders would like to rely on the Commission's past decisions. However, because the Commission issues no findings of fact or conclusions of law, instead using one or two sentence decisions, precedent is difficult to determine. Additionally, as each probable cause panel may be applying different understandings of legal standards, even similar fact patterns may be treated disparately.

Because the written decisions provide such limited information, stakeholders instead rely on several methods for gathering information to use in advising their clients. These methods including asking for informal opinions from the staff attorney, getting copies of the full transcripts of prior hearings, asking for formal advisory opinions, or searching through prior advisory opinions. Informal opinions may be helpful for that particular circumstance, but provide no immunity and do not help others similarly situated. Transcripts entail costs in both time and money. Stakeholders complain that formal advisory opinions are not always timely, and for some are difficult to understand and apply.

Most of these methods are inadequate for notifying the public of what has transpired at the Commission and what they might expect from the Commission regarding future scenarios.

Stakeholder Suggestions

--Post all decisions and advisory opinions on the web site immediately and make them searchable by topic.

--Make more frequent use of the rule-making process instead of relying on written decisions that respond only to individual situations. The Commission could examine how

it rules on repeated issues (e.g. disclaimers), and then promulgate rules that codify Commission practice. Rules provide more transparency.

Issue #3: The current staff of three is insufficient for the level of work required.

Stakeholders uniformly praised the current staff for being responsive and competent, but also emphasized that the staff is underfunded and overworked. Insufficient staffing is most apparent and most critical precisely at the time when the staff is most needed-- during the several months preceding an election when assessing false statement claims. This insufficiency affects both the adjudicative and opinion-generating function of the Commission.

As currently configured, the statutorily-mandated full time attorney for the Commission is also the Executive Director, thus he performs both an administrative and advisory role. The Executive Director provides the Commission with recommendations, which the Commission considers, but there is less time for formal briefings during the critical time immediately preceding an election. Additionally, because the Director makes recommendations, the role is pivotal and must be held by a person known for objectivity and who is completely above charges of partisanship, which is one of the reasons the Commission was removed from the Secretary of State's office. Separating the administrative role from the advisory role could increase the perception of objectivity.

Stakeholder Suggestions:

- Use the Ethics Commission as a model: director as gatekeeper, more staff, better public information, better public education
- Combine the Elections Commission with Ethics Commission. This combination would provide a cadre of lawyers who understand both ethics and elections law and who would be available for the entire campaign cycle, as well as provide additional staff.
- Routinize campaign finance cases, perhaps with a schedule of fines for late filings, so that some campaign finance cases can stay at the Secretary of State's office instead of requiring mandatory referral to the Commission. Appeals could be made to the Commission.
- Increase the use of electronic media, including permitting the electronic filing of complaints and providing notice using fax or email
- Provide for some kind of mediation or arbitration option, so that unintentional problems could be settled.

MAJOR BUDGET ISSUES

The FY06-07 budget request shifted the source of funding to be less reliant on the Elections Commission Fund, providing a greater percentage of the Commission's budget from the GRF. This shift responded to increased uncontrolled agency costs due to members representing greater geographical diversity, which increased both travel and lodging costs. Additionally, the Commission anticipated increased workload due to HB 1 of the 125th General Assembly Special Session.

The Commission should anticipate additional potential workload increases due to campaign finance changes in HB 694 of the 126th, the *Wisconsin Right to Life* decision that may open the door for some as-applied challenges to statutes regulating campaigns, and the increased use of issue advocacy groups, possibly requiring additional inquiry about false statements.

Some stakeholders indicated that the Commission rarely, if ever, charges attorney fees for frivolous claims as permitted in OAC 3517-1-13. In addition to generating income for the Commission, such fees might serve to discourage use of the Commission as a political tool, cutting down on some of the workload. Other possible sources of revenue are minimal filing fees for complaints or an increased fine structure for violators.

REGULATORY REVIEW

Five Most Used Regulations

- 3517-1-02: Initiation of proceedings, including request for advisory opinions
- 3517-1-03: Service of documents commencing proceedings
- 3517-1-10: Expedited hearings
- 3517-1-11: Preliminary review and hearing
- 3517-1-12: Open meetings

Five Most Controversial Regulations

- 3517-1-02: Initiation of proceedings (affidavit based on personal knowledge)
- 3517-1-05: Organization of commission panels and meetings
- 3517-1-13: Frivolous complaints and attorney fees (complaint is lack of application)
- 3517-1-14: Penalties
- 3517-1-16: Definitions, especially “standard of proof”

INTERAGENCY PROJECTS

Without speaking with the Commission staff, I was unable to determine if any interagency projects exist. Stakeholders did not mention any such projects.

IT PROJECTS

Project Name:

I am unaware of any specific projects. However, House Bill 3 (126th) includes the following new language: “3517.153(E) The commission shall establish a web site on which it shall post, at a minimum, all decisions and advisory opinions issued

by the commission and copies of each election law is it is amended by the general assembly. The commission shall update the web site regularly to reflect any changes to those decisions and advisory opinions and any new decisions and advisory opinions.”

The Commission’s current web site is too far out of date to be useful to the public and most stakeholders stated that they do not use the Commission’s web site. As of December 29, 2006, the most recently posted agenda was from December, 2005. No advisory opinions issued in 2006 were posted, although the Commission issued at least four advisory opinions this year. The posted statutes and regulations that govern the Commission’s activities are also out of date, and thus inaccurate and potentially misleading.

For infrequent users of the Commission and the public at large, the web site is unhelpful and misleading. The Ethics Commission web site and the Federal Election Commission web site were suggested as examples of sites that provide an informative and educational role for users, as well as containing searchable advisory opinions.

STAKEHOLDERS

KEY STAKEHOLDER GROUPS

Stakeholder Group 1:

Legal counsel for political candidates, caucuses, and issue campaigns

Stakeholder Group 2:

Candidates appearing on their own behalf

Stakeholder Group 3:

Advocacy/good government groups and citizens

Stakeholder Group 4:

Secretary of State's office

Stakeholder Group 5:

Legal counsel for the Commission

Stakeholder Group 6:

Courts

STAKEHOLDER RELATIONS

The Commission staff has a reputation for being helpful to all participants in the process, from persons appearing for the first time representing themselves against a complaint to those who regularly and frequently appear before the Commission. Stakeholders stated that persons appearing on their own behalf were giving assistance as needed, and that the Commission staff is responsive to requests for information, informal opinions, complaints and other documents. Timeliness was a concern for some stakeholders who reported that the Commission is slow to issue advisory opinions.

While the staff is forthcoming with documents when requested, such requests depend on the requestor's initiative. As noted above, the general public may have difficulty understanding how the Commission functions and how the Commission has ruled, due to the web site being woefully out of date. The existing structure does not allow the staff to provide the public guidance to assist with compliance, or easy-to-access practical advice on how to avoid violations. While the Secretary of State's Office does some of this type of outreach on campaign finance issues, the Commission could play a more useful supporting role in educating the public (including candidates and committees) not only on how the Commission operates, but how to comply with the law.

JOB-CREATION OPPORTUNITIES

The Ohio Revised Code allows for the Commission to contract with additional investigatory attorneys on an as-needed basis. (ORC 3517.152(H)) On-going relationships might present conflicts-of-interest challenges, thus the Elections Commission provides few opportunities for creating additional private sector jobs.

QUESTIONS TO CONSIDER

As the probable cause panels are of paramount importance, how is each panel chosen? Because OAC 3517-1-05 mandates that no more than one-half of the members of a panel may be from the same party, if the independent is unavailable, does the chair seat a panel of four or must the independent be on every panel? If the independent is unavailable to meet with a panel to which he or she has been appointed, does the whole process stop? What happens if a member recuses him or herself from either a panel or the full Commission? If sufficient members recuse themselves from a particular process, what recourse is available to the complainant or the respondent?

What regulatory models are used by the seventeen states that regulate false campaign speech? How are members appointed? What powers do they have if they find violations of their laws?

Why are commission members paid \$25,000 per year and expenses? SB 9 of the 121st General Assembly instituted this practice.

Are there any restrictions on what may be said and done by the complainant and the respondent while a matter is pending? If a respondent changes an ad in response to a complaint, will that change be used to prove a knowingly false statement?

Is the current expedited hearing process effective during the last several weeks prior to an election?

Is there a more efficient and responsive way to address discovery disputes, or otherwise limit frivolous discovery?

Should the Commission be able to initiate complaints on its own?

Notes:

Several people mentioned that Rep. DeWine is working on a bill to make changes to the Elections Commission.

Any changes to the Elections Commission must take into account the values of timeliness, expertise, cost, and consistency across the state.

Questions for Elections Commission

--How are members trained and updated on statutory and court-made changes in law?

--How far in advance is it possible to post agendas to the web—at what point are they firm?

--What is current procedure for notifying persons that a complaint has been filed against them, of probable cause hearing, of outcomes?

Stakeholders Interviewed for Ohio Elections Commission Agency Review

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