

Gifts, Benefits and Bribery

Presented by

Brad Young

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Bickerstaff, Heath, Pollan, & Caroom, LLP
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443

Phone: 512/472-8021

Fax: 512/320-5638

www.bickerstaff.com

BRADLEY B. YOUNG

Bickerstaff, Heath, Pollan & Caroom, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701

(512) 472-8021
(512) 320-5638 Facsimile

byoung@bickerstaff.com
www.bickerstaff.com

EDUCATION:

University of Texas School of Law, Juris Doctor (2000)
Lyon College, Bachelor of Arts (1997)

LICENSURE:

State Bar of Texas (2000)
United States District Court, Northern District of Texas (2003)
United States District Court, Western District of Texas (2003)

PROFESSIONAL EXPERIENCE:

Bickerstaff, Heath, Pollan & Caroom, L.L.P., Austin, Texas (Associate: 2000 – Current)

PROFESSIONAL ASSOCIATIONS:

Austin Bar Association - Labor and Employment Practice Section
Austin Young Lawyers' Association

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Gifts, Benefits and Bribery

or

How to Become and Remain an Ethical Texas Public Official

Presented by Brad Young

I. GIFTS TO PUBLIC SERVANTS: TEXAS PENAL CODE RESTRICTIONS AND EXEMPTIONS

Two sections of the Texas Penal Code impose restrictions on donors of gifts to public servants and on the acceptance of gifts by public servants, including state and local officials. This section of the paper describes those restrictions and the exemptions and exceptions to those restrictions that allow public officials to accept such gifts.

A. Restrictions on gifts to public servants

Section 36.08 of the Texas Penal Code contains restrictions on acceptance of gifts by public servants. Section 36.08(d) makes it a Class A misdemeanor offense for a public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government ... if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.

Section 36.08(e) likewise makes it a Class A misdemeanor for a public servant who has judicial or administrative authority, who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decision if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal. Additionally, Section 36.08(f) makes it a Class A misdemeanor for a member of the legislature, the governor, the lieutenant governor, or a person employed [by any of them] or an agency of the legislature [commits an offense if he] solicits, accepts, or agrees to accept any benefit from any person.

1. Exemptions from restrictions

There are several safe harbor provisions that exempt certain transactions from the strict prohibitions referenced above. Section 36.10 of the Texas Penal Code provides, in pertinent part, that the prohibitions of section 36.08 (receipt of gifts by public servants) and section 36.09 (offering gifts to public servants) do not apply to: gifts conferred on account of kinship or a personal, professional or business relationship independent of the official status of the recipient (section 36.10(a)(2)); a political contribution as defined by Title 15, Election Code (section 36.10(a)(4)); a gift, award, or memento to a member of the legislative or executive branch that is required to be reported under Chapter 305, Government Code (section 36.10(a)(5)); an item with a value of less than \$50, excluding cash or a negotiable instrument (section 36.10(a)(6)).

Further, section 36.10(b) exempts food, lodging, transportation, or entertainment accepted as a guest and, if the donee is required by law to report those items, reported by the donee in accordance with that law, and section 36.10(c) provides a similar exemption to donors for the same items accepted by the public servant as a guest if the donor reports the items in accordance with any law that requires reporting of such items.

In addition, the law provides that a public servant may dispose of an unsolicited gift that he is prohibited from accepting, and he can thus avoid criminal sanctions by donating the benefit to a governmental entity authorized to accept the gift or the official may donate it to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes. Section 36.08(i).

2. Definition of a Public Servant

A public servant includes employees as well as officials of county and local governments. A public servant is defined under the Penal Code to include any person elected, selected, appointed, employed, or otherwise designated as ... an officer, employee, or agent of the state or a county, municipality or political subdivision of the state or any branch or agency thereof. TEX. PENAL CODE ' 1.07(a)(24) and (41). Additionally, the prohibition in section 36.08(d) against gifts to a public servant who exercises discretion regarding pecuniary transactions of the government is not limited to the elected officials who are members of the governmental body that takes official action for the entity. Rather, the Ethics Commission has interpreted this section broadly to conclude that a public servant who advises or makes recommendations to the governmental body taking action exercises discretion for purposes of section 36.08(d) even though the public servant does not participate in the final decision-making. Op. Tex. Ethics Comm'n No. 396 (1998).

As noted above, section 36.10(c) of the Penal Code provides a guest exemption to the donor of certain gifts to public servants. Section 36.10(c) exempts gifts of food, lodging, transportation, or entertainment accepted as a guest provided that, if the donor is required by law to report those items, the donor reports them in accordance with the applicable law. In the corporate context, the Ethics Commission has concluded that the guest exemption requires that a person must be present whose position, authority or conduct could create corporate liability for exemplary damages. Op. Tex. Ethics Comm'n No. 90 (1992).

Opinion No. 90 cited *Corporate Wings, Inc. v. King*, 767 S.W.2d 485 (Tex. App.-Dallas 1989, no writ) as authority for this proposition. Under *Corporate Wings*, persons who fall under the category of agents whose acts are regarded as acts of the corporation itself include: (a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom a corporation has confided the management of the whole or a department or division of its business. *Corporate Wings*, 767 S.W.2d at 488. In another opinion involving a computer equipment company, however, the Commission merely stated that the guest exemption requires that a representative of the company must be present. Op. Tex. Ethics Comm'n No. 261 (1995). On the other hand, in the case of a university or a city, the

Commission has concluded that the presence of an officer or employee met the host status requirement. See Op. Tex. Ethics Comm'n No. 69 (1992) (university); No. 75 (1992) (city).

In addition, the Ethics Commission has construed the guest exemption to require direct contact with and proximity to the guest during the event. The person hosting a public servant guest need not sit beside the public servant at the entertainment event but the host must be present at the event and be readily accessible to the guest. In the context of a university athletic event at a stadium, the Ethics Commission has stated that it is not necessary for the individual host to sit next to the guest, but that the individual host must have some direct contact with the guest, and the guest and host must be in reasonable physical proximity and have easy access to each other during the game. Op. Tex. Ethics Comm'n No. 69 (1992).

B. Acceptance of an Honorarium [Texas Penal Code § 36.07].

A public servant commits an offense if he/she solicits, accepts, or agrees to accept an *honorarium* in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties.¹ Violation of this statute is a Class A misdemeanor.² Section 36.07 of the Penal Code does NOT, however, prohibit a public servant from accepting transportation and lodging expenses in connection with a conference or similar event in which the public servant renders services, such as addressing an audience or engaging in a seminar, to the extent these services are more than merely perfunctory, or from accepting meals in connection with an event.³

C. Gifts of Transportation and Lodging

The Ethics Commission has concluded that transportation and lodging provided to a public servant as part of an event at which the donor is present qualifies for the guest exemption even if the donor is not present at the lodging accommodations where the public servants stay nor during the transportation to and from the event. Op. Tex. Ethics Comm'n No. 261 (1995). The Ethics Commission noted in Opinion 261 that although the presence requirement is generally applicable to transportation and lodging, the donor's presence is not necessary when transportation and lodging are provided in the context of a larger event at which the donor is present. See also, Op. Tex. Ethics Comm'n No. 287 (1995). Note, however, that in at least one case the State has argued that the exceptions for food, lodging, transportation or entertainment accepted as a guest do not apply when the public servant actively solicited those benefits.⁴

D. Reporting Requirements Applicable to County Public Servants (Donees)

As noted above, section 36.10(b) of the Texas Penal Code exempts food, lodging, transportation, and entertainment accepted as a guest, as long as the donee reports those items in

1 TEX. PENAL CODE § 36.07(a).

2 *Id.* at § 36.07(c).

3 *Id.* at § 36.07(b).

4 *Smith v. State*, 959 S.W.2d 1, 22-23 (Tex. App. – Waco 1997, pet. ref'd). Because the court of appeals found that the defendant's evidence was insufficient to support his 36.10 defenses, the court did not reach the State's argument. Therefore, it remains an open question whether the State's contention is correct that the exception for food, lodging, transportation or entertainment accepted as a guest does not apply when the public official solicits those benefits.

accordance with any applicable law. Thus, even though a donor may qualify for the guest exemption and not have to report the donation because no reporting obligations are imposed by law, a public servant as donee may nonetheless have his own reporting requirements with which to comply.

In this respect, Texas Government Code Chapter 572 provides a comprehensive disclosure scheme that generally applies to legislative and executive branch public servants and lobbyists, but also has limited application to counties. Specifically, it has been applied to counties subject to Chapter 159 of the Texas Local Government Code, which is applicable only to counties with populations in excess of 100,000.⁵

In 1992, the Texas Ethics Commission issued Opinion No. 106, in which it ruled that county officials in certain counties may be subject to the disclosure requirements of Texas Local Government Code Chapter 159 (applicable to counties with populations in excess of 500,000, at the time) could accept such benefits as guests. This was based on the safe harbor provision in section 36.10(b), which provides:

(b) Section 36.08 (Gift to Public Servant) does not apply to food, lodging, transportation, or entertainment accepted as a guest ***and, if the donee is required by law to report those items, reported by the donee in accordance with that law.***

TEX. PENAL CODE ' 36.10(b)(Emphasis added).

Subsequently, in its opinion number 261, the Texas Ethics Commission determined that county officials may accept such benefits in connection with a demonstration of computer equipment to the county officials by a computer equipment vendor without running afoul of the general prohibitions on acceptance of gifts. Again, in this opinion, the Texas Ethics Commission made reference to the safe harbor provision in section 36.10(b). (Op. Tex. Ethics Comm'n No. 261 (1995)).

If a county public servant receives a benefit as a guest, then the question is whether the benefit must be reported. Our firm has talked informally with a representative of the Texas Ethics Commission who has advised us that the staff of the Ethics Commission interprets section 36.10(b) as providing a safe harbor if the county official is either (1) not required to report the benefit because he or she is from a county with a population of less than 100,000 and not subject to Chapter 159 of the Texas Local Government Code or (2) from a county subject to Chapter 159 who does report the benefit as required.⁶

⁵ Note that Chapter 305 of the Texas Government Code, which contains disclosure requirements for lobby expenditures related to communications with members of the legislative or executive branch, does not apply to gifts to county and local officials.

⁶ The Ethics Commission would also view a county imposed reporting requirement in a county not subject to Chapter 159, Texas Local Government Code, to require that a report be filed in order to come within the safe harbor of section 36.10(b) of the Texas Penal Code.

Under the rationale expressed by the representative of the Ethics Commission, a county official in a county with a population of fewer than 100,000 that would not come within the ambit of Chapter 159, Texas Local Government Code, would be able to rely on the safe harbor provision of section 36.10(b) in accepting the benefit.

II. STATE LAW RESTRICTIONS ON AIN-KIND® POLITICAL CONTRIBUTIONS [TO STATE OR LOCAL OFFICIALS]

Campaign expenditures on behalf of candidates for public office in Texas are governed by Title 15 of the Texas Election Code and are under the direct regulatory oversight of the Texas Ethics Commission. Generally speaking, any expenditure of funds by a donor on behalf of a candidate constitutes a political contribution to the candidate which requires disclosure by the candidate and which may be otherwise limited or prohibited in certain circumstances. Thus, such an expenditure cannot be made by the donor *without the prior consent or approval* of the candidate on whose behalf the expenditure is being made.

The Texas Election Code generally prohibits direct campaign expenditures on behalf of a candidate without the candidate's prior consent or approval except in very limited situations. For example, the Texas Election Code authorizes *an individual not acting in concert with another person* to make such direct campaign expenditures and exempts the individual from reporting direct campaign expenditures of \$100 or less for any one or more candidate(s) in an election. Direct campaign expenditures in excess of \$100 by the individual must be reported.

Below this paper discusses in more detail the Texas Election Code provisions and the Texas Ethics Commission Regulations applicable to the specific circumstances limiting contributions or triggering disclosure requirements. To put this information in context, the paper prefaces these more detailed discussions with a brief overview of the coverage of Title 15.

A. Overview of Title 15 Texas Election Code

Title 15 of the Texas Election Code regulates the making of political contributions and expenditures and provides various disclosure requirements for such transactions for persons seeking nomination or election to public office. For purposes of Title 15, candidacy and office-holding relate to state or local offices of political subdivisions filled by election. This title does not apply to candidates for an office of the federal government,⁷ or to an office of a political party.⁸

Generally, the disclosure requirements of Title 15 are directed at the candidates themselves or at committees established to advocate for or against such candidates. Such responsibilities are triggered by:

⁷ In TEX. ELEC. CODE section 251.006(b), however, the Texas Ethics Commission requires such candidates to file copies of their federal filings with the Ethics Commission.

⁸ *Martinez v. Democratic Committee for Responsible Government*, 521 S.W.2d 284 (Tex. Civ. App - Eastland 1975, writ ref'd n.r.e.).

- ! appointment of a campaign treasurer
- ! filing for a place on a ballot
- ! filing for nomination by convention
- ! filing a declaration of intent to become an independent candidate or a write-in candidate
- ! making a public announcement of intent to run for office
- ! soliciting campaign contributions, and
- ! making campaign expenditures.

TEX. ELEC. CODE ' 251.001(1)(A)-(H).

The disclosure requirements of Title 15 are imposed upon a candidate for the entire time that the person maintains funds of this type and until he takes affirmative steps to terminate his status as a candidate and dispose of any remaining campaign funds. If a candidate is elected to office, the campaign account and treasurer designation are converted to an office-holder account with continuing reporting requirements.

Title 15 of the Texas Election Code does much more than impose disclosure and reporting requirements on candidates and officeholders. An important aspect of Title 15 is the limitation on the types and sources of contributions that a candidate may accept. For example, corporations and labor unions are strictly limited in the types of contributions they can make. Similarly, law firms and lobbyists are limited in certain types of contributions they can make to certain candidates and how these are reported.

B. Use of Unexpended Campaign Contributions

1. Personal Use Prohibited

A person who accepts a political contribution as a candidate or officeholder may not convert such monies to *personal use*.⁹ The statute defines “personal use” as a use that primarily furthers individual or family purposes and is not connected with the performance of duties or activities as a candidate for or holder of public office.¹⁰ “Personal use” does not, however, include use of political contributions for defending a criminal action or prosecuting or defending a civil action brought by or against the person in his status as a candidate or officeholder or participation in an election contest.¹¹

2. Disposition of Unexpended Contributions

Section 254.204 of the Election Code provides that a person may not retain political contributions, assets purchased with the contributions, or interest and other income earned on the contributions for more than six years after the date the person either ceases to be an officeholder or candidate or files a final report under Chapter 254 of the Election Code, whichever is later. If the person becomes an officeholder or candidate within the six-year period, however, this

⁹ TEX. ELEC. CODE §253.035(a)

¹⁰ *Id.* at § 253.035(d).

¹¹ *Id.* at § 253.035(i).

prohibition does not apply until the person again ceases to be an officeholder or candidate.¹² Failure to dispose of such unexpended contributions is a Class A misdemeanor.¹³

After end of the six-year period, the former officeholder may remit unused contributions to one or more of the following:¹⁴

- (1) The former candidate's political party (last time the candidate's name was on the ballot);
- (2) A candidate or political committee;
- (3) The state comptroller;
- (4) Under certain conditions,¹⁵ one or more persons from whom political contributions were received;
- (5) Charity; or
- (6) A public or private institute of higher education.

3. Specific Examples

a. State bar dues

A public servant may use campaign contributions to pay for state bar dues *if bar membership is a requirement of office*. The Texas Election Code provides that a person who accepts a political contribution as a candidate or officeholder may not convert the contribution to "personal use." TEX. ELEC. CODE § 253.035(a). "Personal use" means "a use that primarily furthers individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of a public office." *Id.* at 253.035(d). Therefore, a judge or judicial candidate may use political contributions to pay for his or her state bar dues because Texas law requires that judges be licensed to practice law in Texas, and attorneys licensed to practice law in Texas must be members of the state bar and must pay state bar membership dues. Op. Tex. Ethics Comm'n No. 245 (1995). A candidate or official in a non-judicial office, however, for which having a license to practice law in Texas is not a requirement, may not use political contributions to pay for his or her state bar dues.

b. Civil engineer's license fees

A public servant probably may not use campaign contributions to pay for civil engineer's license fees. The Texas Ethics Commission considered the question of whether the mayor of a city may use political contributions to pay the annual fee for his or her civil engineer's license. The Commission recognized that an engineering background might benefit the performance of the mayor's duties and activities of office. Since maintaining a civil engineering license was not a *requirement* for the office of mayor, however, the Commission determined that a mayor could

¹² *Id.* at § 254.203(b).

¹³ *Id.* at § 254.203(c).

¹⁴ *Id.* at § 254.204(a).

¹⁵ The amount of political contributions that may be remitted to one person from whom such contributions were received may not exceed the aggregate amount accepted from that person during the last two years that the candidate or officeholder accepted contributions under Title 15 of the Election Code. *Id.* at § 254.204(d).

not use political contributions to maintain his or her civil engineering license. Op. Tex. Ethics Comm'n No. 432 (2001).

c. Legal expenses related to defense of civil or criminal charges

Generally, a public servant may use campaign contributions to pay for legal expenses related to defense of civil or criminal charges. "Personal use" does not include the use of political contributions for "defending a criminal action or prosecuting or defending a civil action brought by or against the person in [his] status as a candidate or officeholder." TEX. ELEC. CODE § 253.035(i)(1). Thus, a legislator could use political contributions to pay legal expenses related to a lawsuit if the focus of the suit was on the legislator's conduct as a member of the legislature. A legislator may not, however, use political contributions to pay legal expenses if the focus of the suit is the legislator's conduct as a private professional. Op. Tex. Ethics Comm'n Nos. 363, 310. Similarly, a county court judge may raise funds to pay expenses incurred in connection to the judge's defense against charges brought by the Texas State Commission on Judicial Conduct. Op. Tex. Ethics Comm'n No. 433.

d. To fund the campaign of another candidate

A public servant may use campaign contributions to fund the campaign of another candidate. Section 254.204 of the Election Code allows for the disposition, after six years, of unexpended political contributions to a "candidate or political committee," among other entities. TEX. ELEC. CODE § 254.204(a)(2). However, the Code requires that the donor must report each contribution "as if the person were a campaign treasurer of a specific-purpose committee." *Id.* at § 254.204(b).

III. BRIBERY AND CORRUPT INFLUENCE

Public servants are prohibited from either gaining or bestowing benefits derived from their public position. TEX. PENAL CODE ' 36.01 *et seq.* Prohibited are benefits as consideration for the recipient's decision, opinion, recommendation, vote, or violation of a duty imposed by law. It is no defense that the public servant was not yet in office, has left office, or that the decision, opinion, recommendation, vote, or other exercise of discretion has already occurred. A benefit does not constitute a bribe if it is not offered or accepted as consideration for some official act. Op. Tex. Ethics Comm'n No. 60 (1992).

The term "law" under the statute may include any rule or regulation adopted by a municipality. In *Tweedy v. State*, 722 S.W.2d 30 (Tex. App. – Dallas 1986, pet. ref'd), for example, a defendant received a sentence of five years' confinement and a one thousand dollar fine for offering two hundred dollars to a city construction inspector if the inspector would allow defendant and defendant's crew to dig trenches, lay pipe, and backfill the trenches without the inspector examining the work. The city's work specifications required that none of the work mentioned above could commence until the city inspector had given his prior approval. Defendant argued that because the city had adopted its work specifications by resolution rather

than by ordinance, defendant had not attempted to cause the city construction inspector to violate a “duty imposed by law” within the meaning of the statute. The appellate court disagreed, holding that even a municipal resolution had the force of law within the meaning of the bribery statute.¹⁶

Note that the bribery statute focuses on a defendant’s mental intent, making it an offense for a public servant to intend to accept a benefit as consideration for a violation of a duty imposed by law, even if the violation of law never actually occurs.¹⁷ In *Cerda v. State*, 750 S.W.2d 925 (Tex. App. – Corpus Christi 1988, pet. ref’d), for example, defendant received a sentence of five years’ confinement and a \$3,500 fine for having agreed to destroy government records. Cerda argued that the indictment against him failed to state an offense because Cerda never actually destroyed any records. The court disagreed, holding that an offense under section 36.02 is complete *once there is an agreement to violate a legal duty imposed by law*, even if the violation never actually occurs.

Similarly, a public servant violates the bribery statute by soliciting a bribe, even if the other party is not aware of a solicitation. In *Martinez v. State*, 696 S.W.2d 930 (Tex. App. – Austin 1985, pet. ref’d), for example, a police officer was convicted of soliciting and accepting \$150 from a motorist in exchange for not issuing a traffic ticket. At trial, the motorist, who was an undocumented immigrant with limited English skills, testified that he did not pay the officer with the understanding that the officer would take care of the tickets. The court held that despite the motorist’s apparent lack of understanding of the transaction, the offense of bribery had taken place:

We hold that where it is alleged the accused offered or solicited a benefit as consideration for an official act, it is not necessary for the State to prove the party to whom the offer was made accepted the proposition or even understood the unlawful nature of the proposition; proof that the offer or solicitation was made by the accused with the purpose to promote or facilitate the exchange of the benefit for the official action is all that is required.¹⁸

In a recent opinion, the Corpus Christi Court of Appeals discussed whether the “benefit” allegedly offered in violation of the statute was limited to “pecuniary gain.”¹⁹ There, a county commissioner was charged with allegedly promising to vote for a candidate for the office of constable in return for the candidate’s agreement to hire particular individuals as deputies. On appeal, the defense argued that the evidence at trial of the “benefit” allegedly conferred -- *i.e.*, the promise of a job – was insufficient to establish a pecuniary gain. The majority of the court of appeals disagreed, holding that the Texas bribery statute was broad enough to include “anything reasonably regarded” as a benefit. In that case, the court held that the definition of “anything

16 See TEX. PENAL CODE ' 36.02(a)(3); *Tweedy*, 722 S.W.2d at 31.

17 TEX. PENAL CODE ' 36.02(a)(3).

18 *Martinez*, 696 S.W.2d at 933.

19 See *Valencia v. State*, No. 13-02-020-CR, 2004 WL 1416239, at *3-4 (Tex. App. – Corpus Christi, June 24, 2004) (not designated for publication).

reasonably regarded” as a benefit was broad enough to include the county commissioner’s vote and the offer of a job.²⁰

Violation of the bribery law is a second degree felony, punishable by imprisonment for not less than two years or more than twenty years. A fine not to exceed \$10,000 may also be imposed. In addition, conviction of a bribery offense would make a person ineligible to hold office in the State of Texas. TEX. CONST. art. XVI, ' 5.

20 *Id.* The Texas Ethics Commission has also determined that “benefits may include gifts to public servants from cities or counties, as well as from individuals and private businesses. Op. Tex. Ethics Comm’n No. 187 (1994).