



August 15, 2023

**To:** Special Committee on Governmental Ethics Reform, Campaign Finance Law

**From:** Jillian Block, Research Analyst

**Re:** Campaign Finance Law

## **CORRUPT POLITICAL ADVERTISING**

This memorandum provides an overview of statutes and Kansas Governmental Ethics Commission (Commission) opinions regarding corrupt political advertising in Kansas.

### **Express Advocacy**

Definitions of corrupt political advertising utilize the phrase “Expressly advocate the nomination, election, or defeat of a clearly identified<sup>1</sup> candidate” (express advocacy). The Campaign Finance Act (Act), in [KSA 25-4143](#), defines the phrase to mean any communication that uses phrases including but not limited to:

- “Vote for secretary of state”;
- “Re-elect your senator”;
- “Support the democratic nominee”;
- “Cast your ballot for the Republican challenger for Governor”;
- “Smith for Senate”;
- “Bob Jones in ‘98”;
- “Vote against Old Hickory”;
- “Defeat” accompanied by a picture of one or more candidates; and
- “Smith’s the one.”<sup>2</sup>

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1 [KSA 25-2407](#) does not include the phrase “clearly identified” in the definition regarding election crimes; however, it cites [KSA 25-4143](#) and amendments thereto, which does use “clearly identified.”

2 These eight phrases are pulled from a footnote from the U.S. Supreme Court opinion *Buckley v. Valeo*, 424 U.S. 1 (1976).

## Campaign Finance Act

The Act, in [KSA 25-4156](#), defines corrupt political advertising to mean certain communications or causing of communications that contain express advocacy for a candidate for state or local office without including a statement explicitly stating the name of the sponsoring person responsible or the sponsoring organization and chairperson or treasurer of such organization. These communications include:

- Publishing in a newspaper or other periodical;
- Broadcasting by any radio or television station;
- Telephoning, including but not limited to any device using voice over internet protocol or a wireless telephone<sup>3</sup>; and
- Publishing any brochure, flier, or other political fact sheet<sup>4</sup> when the cost of such exceeds an aggregate amount greater than \$2,500.

Making a website, email, or other type of internet communication is also included, with additional carve-outs. The prohibition on corrupt political advertising applies only to websites, emails, or other types of internet communications that are made by the candidate, the candidate's candidate committee, a political committee, or a party committee and are viewed by or disseminated to at least 25 individuals. Further, restrictions on telephone and internet communications do not apply to communications made over any social media provider with a character limit of 280 characters or fewer.

The Act defines corrupt political advertising as a class C misdemeanor.

## Election Crimes

The statutory article regarding election crimes has a separate definition for corrupt political advertising. Similar to its definition in the Act, corrupt political advertising is still defined as certain communications or causing of communications that contain advocacy without disclosing the sponsor of such communication. However, unlike in the Act, there are separate provisions regarding paid matter containing express advocacy for the nomination, election, or defeat of any candidate, and paid matter intended to influence the vote of any person or persons regarding a question submitted for a proposition to amend the *Kansas Constitution*, to authorize the issuance of bonds, or any other question submitted at an election (issue advocacy). The following five types of communications are covered in [KSA 25-2407](#):

- Publishing in a newspaper or other periodical any paid matter containing express advocacy for a candidate;

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3 The Governmental Ethics Commission Opinion 2020-2023 finds text messages are a means of contacting a person telephonically.

4 KAR 19-20-4 defines "brochure, flier, or other political fact sheet" to include business cards, door hangers, windshield fliers, post cards, fundraiser invitations, traditional brochures, fliers or mailers, and websites, emails, and other types of internet communications.

- Broadcasting by any radio or television station any paid matter containing express advocacy for a candidate;
- Publishing in a newspaper or other periodical any paid matter containing issue advocacy;
- Broadcasting by any radio or television station any paid matter containing issue advocacy; and
- Publishing any brochure, flier, or other political fact sheet containing issue advocacy.

In election crimes, corrupt political advertising is defined as a class C misdemeanor.

### **2023 Bills Regarding Corrupt Political Advertising**

In the 2023 Session, no bills were sent to the Governor amending the statutes on corrupt political advertising. However, several bills were introduced.

#### ***HB 2166***

HB 2166, as amended by the House Committee on Elections, would have updated the definition of corrupt political advertising in statutes defining election crimes. The new definition would have matched the definition in the Campaign Finance Act, as well as included telephone and internet communications containing issue advocacy. Further, the bill would have defined “candidate” to mean a candidate for elected office who is not subject to the provisions of the Campaign Finance Act, and “clearly identified candidate” to mean a candidate identified by the use of their name; use of a photograph, drawing, or video; or unambiguous reference to the candidate, regardless of whether the name, photograph, drawing, or video of such candidate is used.

HB 2166 was removed from the calendar by Rule 1507.

#### ***HB 2206***

HB 2206 would amend the Act’s definition of “Expressly advocate the nomination, election, or defeat of a clearly identified candidate” to include a “reasonable person test,” meaning other phrases, images, or graphics, when taken as a whole with limited reference to external events, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates. This would align the Act with the federal standard for express advocacy and closed a loophole known to the Commission.

HB 2206 had a hearing on February 2, 2023, and remains in the House Committee on Elections.

## ***HB 2207***

HB 2207 would amend the definitions of corrupt political advertising in the statutes both on election crimes and in the Act. In regards to election crimes, it would add to the definition telephone communications containing express advocacy and telephone communications containing issue advocacy to the definition without disclosing the sponsor of such communication to the definition. It would add “or text messaging device” to the definition regarding telephone communication in the Act’s definition.

HB 2207 did not receive a hearing and remains in the House Committee on Elections.