

RANDALL HARVEY "RANDY" ERBEN

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CURRICULUM VITAE

Education:

University of Texas School of Law, J.D. 1981.

Champion, Kemp Smith Mock Trial Competition, 1980. Member, Board of Advocates.

Princeton University, A.B., 1978

Major: English

Thesis Topic: The novels of Ford Madox Ford

Major subjects: Modern fiction, Shakespeare, Chaucer

Minor subjects: Art History, Urban Studies, Economics, Mathematics

Employment History:

Adjunct Professor, The University of Texas School of Law, 2015-present.

Legislative Director, Office of Texas Governor Greg Abbott, January-November 2015.

Owner, Principal, and Attorney, Erben & Yarbrough, 1993-2014; Of Counsel 2016-present.

Erben & Yarbrough was a law firm primarily engaged in a state and federal governmental affairs practice, working on a broad range of issues. It also offered consulting services on ethics matters such as campaign finance, lobby filings, and financial disclosure to a number of statewide elected officials and legislators, as well as other entities.

Served as general counsel for Texans for Rick Perry, Governor Perry's primary political committee, from 2006-present. Served as general counsel for RickPerry.org, Inc., Governor Perry's presidential campaign committee from 2011-2012.

Assistant Secretary-Designate/Acting Assistant Secretary of Housing and Urban Development (HUD) for Community Planning and Development/Deputy Assistant Secretary of Housing and Urban Development for Community Planning and Development – Grant Programs, 1991-1992

Nominated by President George H.W. Bush in August 1992 to administer \$5.5 billion in federal grant programs relating to housing and community development, including the Community Development Block Grant, HOME, HOPE 3, and McKinney Act homeless programs, and to oversee over 1,000 employees across the country.

Named Acting Assistant Secretary by HUD Secretary Jack Kemp in May 1992, and Deputy Assistant Secretary in 1991.

Director, State of Texas Office of State-Federal Relations/Deputy Director and General Counsel, 1989-1991

Appointed as Director by Governor William P. Clements, Jr. and confirmed by the Texas Senate in May 1990 to head the State of Texas' office in Washington, an independent State agency which serves as the liaison between the State and federal governments.

Served as the chief lobbyist for the State's interests at the White House, Cabinet agencies, and on Capitol Hill, and was the primary point of contact for assistance for the Texas Congressional delegation and the executive and legislative branches of Texas government.

Served as Deputy Director and General Counsel for the agency prior to his Senate confirmation.

Assistant Secretary of State of Texas, 1987-1989

Managed a major state agency with 270 employees and a \$26 million biennial budget, and was responsible for planning and implementation of the 1988 "Super Tuesday" primary election and the 1988 general election for the entire state.

Primary jurisdiction over all campaign finance, lobby registration, personal financial disclosure, and ethics and elections laws in Texas.

Attorney at Law, Foster, Lewis, Langley, Gardner & Banack, Incorporated, 1981-1987

Attained Member and Shareholder status in September 1986 with one of San Antonio's oldest and largest firms.

Practice areas: commercial litigation and public law.

Professional Qualifications:

Recipient of 2019 University of Texas at Austin Presidential Citation Award from President Greg Fenves

Licensed to practice law before the Supreme Court of the United States, the United States Court of Appeals for the Fifth Circuit, the United States District Court for the Western District of Texas, and the United State Tax Court, as well as all Texas state courts.

Received AV rating from the national Martindale-Hubbell Rating System, the highest rating given for legal expertise and professional reputation.

The publication *The Best Lawyers in America* named Mr. Erben as 2011 Austin Government Relations Lawyer of the Year, and listed Mr. Erben in its 2007-2014 editions as one of Texas' best attorneys in the practice area of Government Relations Law.

U.S. News & World Report included Erben & Yarbrough in its 2010-2014 editions of "The Best Law Firms" in the area of Government Relations Practice.

Campaign and Elections/Politico Magazine listed Mr. Erben as one of the top 30 most influential Republicans in Texas in its August 2010 edition.

Community Service:

Vice-Chair, Texas Ethics Commission (appointed by Speaker of the House Joe Straus in December 2017)

Board of Directors, Ex-Students Association of The University of Texas ("Texas Exes") 2018-present

Texas Exes Public Affairs Committee 2010-present, Chair 2016-2017

Annette Strauss Center for Civic Life Advisory Council, Moody College of Communications at University of Texas at Austin

University of Texas at Austin University Development Board 2016-present

St. Andrew's Episcopal School Board of Trustees 2013-2018, Chair 2016-2018

Princeton University Alumni Development Committee

Raise Your Hand Texas Policy Advisory Board

Chair, Covenant Presbyterian Church Foundation

Ordained Deacon, Covenant Presbyterian Church

Personal information:

Married: to the former Amy Lynn Heydenreich in 1991

Children: 2 daughters, Christian (23, graduate of Southwestern University, majoring in Theatre) and Emma (21, junior at The University of Texas at Austin, majoring in Plan II Honors)

Health: Excellent

Covenant Presbyterian Church, Member and Ordained Deacon.

Born: August 23, 1956 in San Antonio, Texas

REFERENCES AVAILABLE UPON REQUEST

**May 12, 2022 State Bar of Texas MCLE Presentation
Texas Ethics Commission Vice-Chair Randy Erben**

Thank you for having us today. I first want to speak generally about how the Commission is structured and how we view the regulated community. Then we will review some recent opinions and rules issued by the Commission and what trends they demonstrate, discuss some pending and “hot-button” issues, and take questions if there is time.

A. Generally.

1. **Nonpartisanship.** Since my appointment by Speaker Straus in December 2017, the first thing that struck me about how the Commission operates is how nonpartisan it is. Note I said “nonpartisan,” not “bipartisan.” Even though each of us is appointed to represent a political party, I have yet to hear any commissioner mention the words “Democrat” or “Republican” in any discussions or debates. A lot of the credit goes to our Chairs (including recent Chair Wolens), as they seek to achieve consensus on most issues. Still, I believe that the men and women on the Commission turn a blind eye to partisanship in their deliberations. For example, the Commission voted to assess fines against a GOP statewide candidate and a Democratic statewide candidate at the same meeting, both by unanimous votes. Another example was a recent vote on whether a statute had been violated by a local officeholder; the vote was 6-2 and the “no” votes were Chairman Wolens and me. This nonpartisan approach is something to which all of us are committed.
2. **Perspective of those who have been regulated.** A positive aspect of the current makeup of the Commission is that each of us has either stood for election as a candidate and/ or been appointed to office. Therefore, each of us understands the challenges faced by the regulated community, which gives us a perspective that others may not have. In my case, I have been on the ballot in Bexar County (the voters wisely chose my opponent), I have been appointed to state and federal office on a few occasions and have had to fill out the Personal Financial Statement (my favorite part of the job), and I have been a registered lobbyist filing lobby registrations and monthly reports with the Commission. All of my colleagues on the Commission have similar experience, which I believe helps us when we consider sworn complaints, Ethics Advisory Opinions, proposed rules, and other matters. We all want to achieve a system that is workable for the regulated community.
3. **Desire for input from the regulated community.** A corollary to the last point is the Commission’s desire to receive input from the regulated community. You all are on the ground, and in many cases know better than the Commission or staff what works and what does not. An example of this was a proposed rule dealing with disclaimers on political advertising on the Internet. The Commission heard from Gardner Pate and Donna Davidson on how the proposed rule could be made better, and the Commission basically invited them to work with staff on redrafting the rule to make it more workable and effective. Another example is the rule governing reporting of cryptocurrency contributions to political campaigns, which we adopted today. Suffice it to say that the Commissioners have limited expertise

in virtual currency issues. We sought and received comments and input from experts in the field, and largely followed their guidance in the final rule.

I invite you to contact us anytime you have comments or suggestions on items on the Commission agenda, and ideas on possible rule changes or opinion requests you believe could make the system work better. We know that our expertise is limited in many contexts and would welcome your ideas and input.

4. **Good faith efforts.** The last point I want to make is that the Commission is not interested in making examples out of the regulated community, but instead takes into account whether the registrant in question has given his or her best faith efforts when deciding cases before it. One of my fellow commissioners, former Harris County District Attorney Chris Flood, says that some people used to view the Commission as a “gotcha” commission, but we have now become the “bend over backwards” commission. To be clear, we take very seriously our Constitutional and statutory responsibilities and obligations and intend to fulfill them to the best of our abilities. Still, in almost every case we have considered since I have been on the Commission, the level of effort to comply with the laws and regulations by the registrant in question is a prime factor in how the issue is decided. So – my advice to you is to make every good faith effort to comply with the laws and regulations. Even if something goes awry and you end up before the Commission (hopefully, never), that good faith effort will benefit you greatly when the Commission considers the matter.

B. Recent opinions and rules issued by the Commission, and trends they indicate.

1. **Use of public funds in political advertising and communications.** The Commission has recently issued several opinions dealing with allegations that public funds were being used to pay for political advertising, in violation of Tex. Elec. Code § 255.003 (a). By and large, the opinions largely turn on whether the communications in question provide information without promoting a public official or measure. In short, any measure of advocacy is impermissible in this context. Recent examples of such information not constituting political advertising include EAO 559, EAO 564. And EAO 565 (all involving communications relating to a political subdivision’s elections being found entirely informational). Instances of information constituting political advertising and thus potentially being in violation of § 255.003 (a) can be found in EAO 560 and 563 (cannot use public funds to identify and promote a public official in connection with a public event). In EAO 561, the Commission opined that § 255.003 (a) does not apply to district judges because they are not officers or employees of political subdivisions, but that Tex. Penal Code § 39.02 (a) (2) prohibits judges from using their courtrooms to create political advertising.
2. **Conversion of contributions to personal use.** Whether an officeholder’s activities constitute a conversion to personal use in violation of Tex. Elec. Code § 253.035 is a topic on which opinion requests are regularly submitted. EAO 566 (a judge may use contributions for expenses to seek a federal judicial office) and EAO 567 (a judge may use contributions to pay for a home security system as long as the judge reimburses the campaign for the system after the judge leaves office) allowed expenditures without violating the personal use proscription. EAO 569

provided that while an officeholder could use contributions to establish and control a GPAC, the officeholder could not convert the contributions to personal use by paying the officeholder a salary.

3. **Social media communications must be reported as legislative advertising by lobbyists.** EAO 562 addressed a topical issue: whether social media posts need to be reported by lobbyists as legislative advertising under Tex. Gov't Code § 305.006 (c). In it, the opinion requestor asked if registered lobbyists must disclose how much they spend on social media. The Commission found that such social media posts are “mass media communications” under § 305.006 (c) and must report all such expenditures if they support or oppose pending legislation or administrative action.
4. **Application of the “revolving door” prohibition in Chapter 572 of the Government Code.** The Commission has been asked to opine on the application of the “revolving door” prohibition in Tex. Gov't Code § 572.069 in several different contexts in the past few meetings. These opinions generally turn on whether the former state employee “participated” in the subject matter in question under Tex. Gov't Code § 572.054. In EAO 568, EAO 570, EAO 571, EAO 572, and EAO 573, the former state employee in question was not prohibited from the prospective employment. Please note that the specific facts in each of these cases are the determining factor in whether the proscription attaches or not.
5. **Reporting thresholds continue to increase.** Tex. Gov't Code § 571.064 requires the Commission to adjust annually the reporting and registration thresholds by the percentage increase for the previous year by the Consumer Price Index. Effective January 2022, the Commission published a battery of rules increasing these thresholds.
6. **Possible violations of the Election and Government Codes by former legislators-turned-lobbyists.** The Commission recently received an anonymous opinion request regarding whether former legislators who have registered to lobby are able to use their campaign funds for certain purposes, and, in some instances, whether they are prohibited from lobbying at all. More specifically, Tex. Elec. Code § 253.006 of the Election Code prohibits a lobbyist from making political contributions or direct campaign expenditures (DCEs) from his or her campaign committee or specific purpose PAC. § 253.007 prohibits lobbying for two years by anyone making political contributions or DCEs from his or her campaign committee or specific purpose PAC. This moratorium on lobbying runs from the date of the last contribution. Tex. Gov't Code § 305.029 prohibits a lobbyist from making a reportable lobby expenditure from his or her campaign committee or specific purpose PAC. The Commission considered an opinion draft in response to the request at today's meeting. This is an issue that may generate some attention.

Thank you again for having us today. We will be happy to answer any questions.