Practical Considerations in Advising the Governmental Client on Campaign Finance Law

John Steiner, Integrity Officer, City of Austin, Texas[1]

Campaign finance law is a controversial area of public policy that in any context is hotly debated, often with near-religious fervor by proponents of various positions. One may find oneself as readily damned for insufficient zeal in agreement as for disagreement.

Campaign finance law directly regulates the political process by which the members of a governing body are chosen. For this reason it bears on the individual interests of the members of a governing body in a way that few other matters can match. A lawyer advising a governing body that regulates campaign finance, and whose members then campaign under these regulations, faces unique challenges in deciding when and how to provide legal services.

There are a number of distinct roles that a government lawyer may play in the field of campaign finance, for example: acting as council to a legislative body, acting as council to a regulatory body, advising individual clients, and defending a regulation against a court challenge. I will focus here on the attorney's role as an adviser.

Legislating campaign finance regulations: the role of the city attorney in making policy.

On its face, a request to advise the governing body in its legislative role on a campaign finance matter does not differ from a similar request with respect to, say, zoning, or perhaps economic development. However, campaign finance always raises special challenges.

Campaign finance rules are never politically neutral. An attorney who is nurturing a long-term relationship with a governing body must always be aware that the effectiveness of his or her legal services is measured by the trust the individual members of the body have in those services. Trust is both a rational and an emotional state. The attorney must impart technical information - warning the council of pitfalls, or advising of policy options - without seeming to take sides between members of the council, whose concerns may be tactical rather than legal.

Technical matters

In a typical campaign finance reform measure there will be a number of elements that range between clearly constitutional and clearly unconstitutional. Reformist zeal will rarely be daunted by something like on-point federal appellate law, so it is reasonable to anticipate that the finished product will include defensible and indefensible elements.

[1] I would like to thank my colleague in the Austin Law Department, Assistant City Attorney Brad Norton, for his assistance in formulating these thoughts. He is a scholar and a gentleman. All the errors, however, are mine alone.

The lawyer needs to anticipate what the final product will look like after the courts have severed the unconstitutional bits, and see if the remaining parts can be made to make sense, or, if not, at least ensure that the council is not surprised by the result.

One important rule is to use the same words and phrases that your state law uses. Using different words than your state law, or worse, the same words with different meanings, is the single greatest impediment to creating an enforceable local regulation.

Using outside counsel

Because if the esoteric and technical nature of campaign finance it is common to retain outside counsel. It is particularly important for the city attorney to consider whether the outside counsel is an outspoken reform advocate or opponent, and, if so, whether this is appropriate for the city council's needs. Will the outside counsel will be pushing a personal agenda rather than responding to the long-term needs of your city?

Initiative measures

If your city has legislation by citizen initiative you may find yourself asked to explain an initiative measure to the council while the initiative election is pending. It is not inconceivable that the council will wish to use your advice to point out legal problems with the proposed initiative measure in order to help defeat it. That probably can't be helped, but it's worth considering that if the initiative passes, it will suddenly become your duty to zealously defend it. Statements made during the campaign will bear on the city's credibility in administering the regulation should it pass.

Initiative measures are notorious for pounding a square peg into a round hole. Campaign finance measures sometimes impose a cookie-cutter measure that fails to anticipate how it will work in practice with your preexisting state law or with your current ordinances.

The regulation is in effect. Now what?

The most important aspect of a campaign finance regulation is its role in regulating the electoral process. The government properly should provide the playing field for the electoral process for its governing body, but not be a player in the process. The legitimacy of the municipal electoral process demands that the stance of the city, and of its employees in their official roles, be one of strict neutrality. Many jurisdictions have specific regulations to enforce this posture of neutrality in various contexts. (For example, Texas prohibits the use of government resources for political advertising.[2])

There are two main ways in which a government lawyer is called on to interpret campaign finance regulations outside of the formation of the policy itself; these are (1) as a lawyer acting in a regulatory role, and (2) as a lawyer called upon to advise clients.

[2] Sections 255.003 and 255.0031 of the Texas Election Code.

The regulatory role.

What if your ordinance provides you with interpretive authority?

In our state, the Texas Ethics Commission has the statutory authority to advise the general public on matters of the state campaign finance law, and the authority to issue authoritative interpretations. This resource is available to everyone with a stake in the law. Many states have similar resources for their state election laws, which affect the state itself as well as its various local governmental units. It is, of course, possible for a municipal campaign finance regulation to provide a similar service at the local level, but because of the small scale of municipal government compared to state government, it presents a special set of challenges at the municipal level.

A source of official interpretive authority is usually given some "independent" status. Often this authority is exercised through a board whose members are appointed according to a scheme designed to equitably apportion its members among the active political factions in a community. (In a city that has non-partisan elections, where political factions form and re-form around the issue of the moment, this can be very tricky to accomplish and sustain.)

Except for the largest cities, which may have resources equivalent to some state governments, cities generally lack the means, or the necessity, to staff and maintain a full-time public resource on campaign finance issues. For most states, there will be elections occurring year-round: cities, school districts, special-purpose districts, counties, and the state itself are each likely to have their own election calendars. This demand justifies a year-round staff, and also provides an opportunity to quickly build a body of precedent on which to rely. (This continuity can somewhat deflect the accusation that decisions are being made to advantage or disadvantage one side or the other in an ongoing election.)

Cities, on the other hand, rarely have general elections more often than annually, and most cities have general elections no more often bi-annually.[3] This makes it likely that a commission would lie fallow most of the time and only become active during a campaign season. In such a circumstance, the members of the commission would have little opportunity to become familiar with the regulations, and would have to rely heavily on staff, i.e., the city attorney, who the rest of the year maintains a close association with the elected governing body. Even a full-time commission at the state level with its own lawyers on staff, answering only to the commission itself, cannot completely avoid accusations of conflict and partisanship. A city attorney advising an intermittently-active board on a part time basis faces a powerful potential to create a perception of conflicted interest.

[3] Austin, proudly keeping itself weird, has a three-year cycle, with elections in the first two years, and skipping the third.

In drafting a regulation that includes prosecution by a city attorney, or that creates a regulatory body with enforcement powers, it is worth considering a provision that delays the initiation of a enforcement action until after the conclusion of the election.[4]

Advising clients.

An attorney in government service, whether at the state or local level has a much different role to play in advising clients on campaign finance matters than an attorney in private practice. In private practice, the attorney is typically called on to take an assertive position that at least arguably permits (or, after the fact, justifies) the client's activities. Of course, this approach sometimes requires interpreting the regulation in a way diametrically opposed to its purpose. One of the few reliable effects of any campaign finance regulation is the creation of a cottage industry dedicated to defeating the regulation's purpose while arguably complying with its letter.

An advocacy approach that would be appropriate, and expected, in private practice is generally inappropriate for the government lawyer whose duty is to uphold the regulation, and give effect to the intent of the governing body that enacted it. However, what approach is appropriate for the government lawyer will depend on the circumstance in which the issue arises.

When confronted with an inquiry regarding campaign finance, a city attorney should take a moment to define the attorney's role in the particular context in which the issue arises. Are you being called upon as a legal advisor, a regulator, a member of the city manager's staff, or a policy maker? Your role will affect the way in which you respond, the substance of your response, and, not least, the privileged nature of the communication.

It also helps to take a minute to identify the situational role of your client, indeed to identify whether a person who ordinarily is your client is, in fact, your client with respect to this particular inquiry. Is the person initiating the inquiry as a policymaker, as an advocate for another person, or as a candidate (not to imply these are the only possibilities). A person who is your client as a member of the governing body may not be your client as a candidate for that office.

The Restatement (Third) of the Law Governing Lawyers says the following about the identity of the government lawyer's client:

[4] *Cf.* Texas Government Code § 571.134. DELAY OF REFERRAL. If an alleged violation involves an election in which the alleged violator is a candidate, a candidate's campaign treasurer, or the campaign treasurer of a political committee supporting or opposing a candidate and the complaint is filed within 60 days before the date of the election, the commission shall delay referral until:
(1) the day after election day;
(2) the day after runoff election day if an ensuing runoff involving the alleged violator is held; or
(3) the day after general election day if the election involved in the violation is a primary election and the alleged violator is involved in the succeeding general election.

> No universal definition of the client of a governmental lawyer is possible. For example, it has been asserted that government lawyers represent the public, or the public interest. However, determining what individual or individuals personify the government requires reference to the need to sustain political and organizational responsibility of governmental officials, as well as the organizational arrangement structured by law within which governmental lawyer work. Those who speak for the governmental client may differ from one representation to another.

Although similar in many respects to representation of a client in private practice, representation of a governmental client may significantly differ in some respects. For example, a lawyer who represents a governmental official in the person's official capacity must conduct the representation to advance public interests, and not, if different, the personal interest of the occupant of the office. Restatement, *supra*, Section 97, comments c and f.

How to avoid becoming a political football.

Arguably there is a public purpose in providing interpretive advice to the public on campaign finance regulations. And, of course, it is possible to provide advice to challengers as well as to incumbents. In the absence of a finding by the city council that this role is appropriate and an enabling ordinance to go with it, though, the city attorney is taking a lot upon himself or herself to make this policy decision unilaterally.

A city attorney should consider the whether it is possible to interpret and advise on campaign finance provisions while preserving the integrity of the electoral process. In my experience, if city attorneys become referees of the electoral process, it is sooner, rather than later, that we will be depicted as favoring one candidate over another. Or we will be called upon to scold one candidate for non-compliance, an implied endorsement of that candidate's opponent. A city attorney who opines on the application of a campaign finance regulation can expect to be cited in the press, or in a political ad, saying "the city attorney says that Candidate X hasn't complied with the law." Then you're part of the political contest, and it seems the city has taken sides.

You will be blamed for any deficiency in a filing, and you will be expected to answer all questions about what's required. And, under most campaign-finance regulatory schemes, these questions can't be answered in the abstract. You have to know things that only the candidate knows. For the most part, campaign finance disclosure requirements are self-reporting laws, with the emphasis on *self*. The idea is that these reports are what the candidate says, not what city staff says.

During my tenure at the City of Austin, our Law Department has consistently advised our council members that they must rely on their own legal counsel on matters relating to their obligations under state and local campaign finance law, since those obligations are personal and not the obligations of the city. We base this advice on the idea that to advise

incumbents is to misuse city resources for a personal political purpose.[5] (Challengers just don't have the same access to us.) We also base this on the notion, noted above, that we have to be strictly neutral politically and stay out of council elections. Charges and counter-charges relating to campaign finance are often campaign issues. If we take a position, we are appearing to favor one candidate over another.

This position has, in my experience, been reasonably well received and understood by our incumbents, if not always enthusiastically welcomed. Remember too, that today's challenger can be tomorrow's council member, and you will have to have a firm basis for your role as a trusted advisor to the potential new council member as well as to the current one.

If you advise incumbents on these matters you, and they, should consider whether your advice will remain confidential should things go wrong. For example, in *In re: A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289 (7th. Cir. Ill. 2002) federal prosecutors issued a subpoena to a lawyer who had provided legal counsel and advice to state officials as they carried out their public duties. One of the officials invoked the attorney-client privilege in his effort to block the government from requiring the attorney to testify before the grand jury. The Seventh Circuit Court of Appeals held that the privilege between a government attorney and his official client does not extend to criminal proceedings, such as grand jury investigations. The court noted the role of the public interest in the matter:

> It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power. Therefore, when another government lawyer requires information as part of a criminal investigation, the public lawyer is obligated not to protect his governmental client but to ensure its compliance with the law.

The interaction of campaign finance law with other laws.

Sometimes it is necessary to consider campaign finance law in providing general-purpose advice to a governmental client. For example, in considering whether corporate funds may be used by the city to defray travel expenses of a councilmember it may be necessary to consider whether those funds would be considered a "contribution" under your state and local regulations.

Advising clients other than candidates.

Sometimes campaign finance regulations can apply to the city itself, as, for example, Texas' prohibition on the use of municipal funds for political advertising, mentioned

[5] See Texas Constitution, Art. III, sec. 52; Texas Penal Code, Section 39.02; and Austin City Code, Section 2-7-62(J) "No City official or employee shall use City facilities, personnel, equipment or supplies for private purposes, except to the extent such are lawfully available to the public."

above. And, if your city clerk, or a similar officer, is charged with accepting campaign finance disclosure filings, you will necessarily advise the clerk in the discharge of these duties. (It is useful to achieve an understanding with the clerk about when being helpful to "customers" becomes practicing law.)

The Noble Eightfold Path of Campaign Finance Law for the City Attorney

1. Identify your client, and your client's role.

2. Identify your role and your duty with respect to the client in each circumstance.

3. Understand that in making policy your clients are thinking tactically, not legally.

4. In drafting a regulation, accept that the whole package will contain defensible and indefensible elements, and plan for it if you can.

5. Use the same words, phrases, and definitions as your state law.

6. If a regulation is imposed on your city by initiative, remember that you will have to defend it if it is adopted by the electorate.

7. Do not become a player in the electoral process.

8. Be consistent, and preserve your relationship of trust with your clients.