Developments in Campaign Finance: How to Update Your City's CFRO

Wednesday, May 2, 2018 General Session; 3:15 – 4:45 p.m.

Karen A. Getman, Remcho, Johansen & Purcell
Lisa A. Vidra, Senior Deputy Attorney, Culver City

DISCLAIMER: *These materials are not offered as or intended to be legal advice. Readers should seek the advice of an attorney when confronted with legal issues. Attorneys should perform an independent evaluation of the issues raised in these materials.*

Notes:

CAMPAIGN FINANCE LAW DEVELOPMENTS THAT MAY AFFECT YOUR LOCAL CAMPAIGN FINANCE REFORM ORDINANCE – AND PRACTICE TIPS FOR YOUR REVIEW

Karen Getman
Remcho, Johansen & Purcell, LLP

Lisa Vidra
Senior Deputy City Attorney
City of Culver City

May 2018

Remcho Johansen & Purcell LLP

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. DEVELOPMENTS IN CAMPAIGN FINANCE LAW 1

A. Expenditure Limits 1

1. Limits on expenditures by candidates 1

2. Limits on independent expenditures by corporations and unions 2

3. Limits on expenditures for issue advocacy 3

4. Voluntary expenditure limits 3

5. Expenditures by public agencies 4

B. Contribution Limits 5

1. Contribution limits must be closely drawn to combat corruption, and adjusted for inflation 5

2. Aggregate limits on contributions are suspect 6

3. Contributions by political parties to candidates 7

4. Restrictions on contributions by corporations, contractors, lobbyists and other special groups 7

5. Contribution limits for ballot measures 9

6. Public financing 9

7. Temporal limits on contributions 10

C. Disclosure Requirements 11

D. Relying on FPPC Definitions, Rules and Forms 12

E. Audits and Enforcement 12

III. PRACTICE POINTERS 13

I. INTRODUCTION

Almost everyone knows that the U.S. Supreme Court issued an important campaign finance case called *Citizens United* – but few know what that case actually means, or that it was only one of many opinions issued by that Court in the last fifteen years that have radically upended this area of law. In that time period, the Court has shifted from appearing friendly toward contribution and expenditure limits (*e.g.*, *McConnell v. Fed, Election Comm'n*, 540 U.S. 93, 188-89 (2003)), to being increasingly willing to strike down restrictions on campaign activity or at the very least subject them to vigorous judicial scrutiny (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010)).

Given these important changes, cities that have enacted campaign finance reform ordinances should consider whether they need an update to comply with current law and minimize the risk of future litigation. This paper summarizes important legal developments in the law of campaign finance and suggests areas where local ordinances may need to be revisited and updated.

II. DEVELOPMENTS IN CAMPAIGN FINANCE LAW

A. Expenditure Limits

1. Limits on expenditures by candidates

Limits on campaign expenditures are almost always unconstitutional, as they are direct limits on speech and subject to strict scrutiny. *Randall v. Sorrell*, 548 U.S. 230, 246 (2006); *Buckley v. Valeo*, 424 U.S. 1, 45 (1976). The Supreme Court "'has rejected expenditure limits on individuals, groups, candidates, and parties.'" *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 692 (9th Cir. 2010) (citation and emphasis omitted). The one possible exception is when a candidate's acceptance of public funds is conditioned on her acceptance of expenditure limits. *Buckley*, 424 U.S. at 57, n.65.

The courts have also struck down provisions that have the effect of limiting campaign expenditures, even if not couched in such terms. Thus in *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1114, 1129 (9th Cir 2011), the Ninth Circuit struck down a city's temporal limit on campaign fundraising insofar as it precluded candidates from spending their own funds on their election campaign more than 12 months prior to the election.[1] And on a number of occasions, California courts

[1] The Ninth Circuit's decision in *Thalheimer* concerned a motion for preliminary injunction that had been granted in part and denied in part by the district court. Based on the Ninth Circuit's ruling, on remand, the district court entered summary judgment
(continued . . .)

have struck down restrictions on candidates transferring funds between their campaign committees, on the theory that this operates as a restriction on the candidate's campaign expenditures. *See*, *e.g.*, *Migden v. Fair Political Practices Comm'n*, No. 2:08-CV-00486-EFB (E.D. Cal. 2008) (injunction prohibiting the FPPC from enforcing a Political Reform Act provision that unconstitutionally restricted individuals from spending campaign funds left over from prior elections); *Franklin v. Correa*, Orange County Sup. Ct. No. 03CC11220 (2004) (successful anti-SLAAP motion brought against candidate's opponent's attempt to stop him from transferring campaign funds from a prior campaign committee); *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 721 F. Supp. 1172, 1175 (E.D. Cal. 1989) (declaring unconstitutional provision of Political Reform Act precluding expenditure of "carryover" campaign funds).

2. Limits on independent expenditures by corporations and unions

State law defines an independent expenditure as one made "in connection with a communication which *expressly advocates* the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, *unambiguously urges* a particular result in an election but which is not made to or at the behest of the affected candidate or committee." Cal. Gov't Code § 82031, emphasis added. By definition, independent expenditures are not coordinated with the candidate. That definition is commonly incorporated in local ordinances, and is substantially the same as federal law.

In *Citizens United*, 558 U.S. at 365, the Court held unconstitutional the long-standing federal ban on corporations and labor unions using their general treasury funds to make independent expenditures on behalf of federal candidates. The Court expressly overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and in particular disapproved *Austin's* rationale that there is a government interest in preventing the distorting effects of corporate speech on the political marketplace. *Citizens United*, 558 U.S. at 348-52. The Court held that the only rationale constitutionally acceptable as a basis for upholding expenditure limits is to *prevent corruption or the appearance of corruption*. *Id.* at 908-11. Because independent expenditures are not coordinated with the candidate, the risk of corruption is alleviated.

While state law does not prohibit corporations and unions from making independent expenditures in support of or in opposition to candidates, several cities

---

(. . . continued)
striking down much of San Diego's campaign finance reform ordinance, including the ban on individual and corporate/union contributions to independent expenditure committees. *Thalheimer v. City of San Diego*, 2012 U.S. Dist. LEXIS 6563 (S.D. Cal. Jan. 20, 2012).

and other local public entities have tried to enact such bans. In *Thalheimer*, 645 F.3d at 1117-21, the Ninth Circuit enjoined San Diego's ban on corporate contributions to independent expenditure committees. Other federal courts of appeal that have reviewed a ban or limit on corporate contributions to independent expenditure committees have similarly concluded such a limitation is unconstitutional. *E.g.*, *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm'n v. Barland*, 664 F.3d 139, 153-54 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 693-95 (D.C. Cir. 2010) (en banc).

3. Limits on expenditures for issue advocacy

While advertisements that expressly advocate for the election of a candidate or ballot measure are subject to regulation, there are limits on the government's ability to regulate "issue ads," which discuss an issue of importance in an upcoming election but do not clearly advocate for or against a particular candidate or measure. In *McConnell*, 540 U.S. at 204-06, the Supreme Court rejected a facial challenge to a federal law prohibiting corporations and unions from using their general treasury funds to broadcast communications that name a federal candidate shortly before an election. Four years later, however, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 481 (2007), the Court held unconstitutional the application of that provision to a nonprofit corporation's television advertisements urging viewers to contact their Senators regarding the filibuster of judicial candidates. The Court held that the government could not regulate issue advocacy, but instead could regulate only express advocacy or its "functional equivalent." *Id*. It found that an ad is the functional equivalent of express advocacy only when "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70.

State law, as interpreted by the Fair Political Practices Commission ("FPPC"), also only regulates express advocacy or its functional equivalent. Cal. Gov't Code § 82031. Taking a cue from the Federal Election Commission's detailed work in this area, state law defines in great specificity what it means to "expressly advocate" for or against a candidate, when a communication "unambiguously urges a particular result" in the election, and when a communication falls within a "safe harbor" and thus cannot be regulated. Cal. Gov't Code § 82015. Local jurisdictions should apply a similar analysis as does the FPPC to distinguish between express advocacy and issue advocacy in order to stay within constitutional bounds.

4. Voluntary expenditure limits

While government-imposed mandatory expenditure limits are almost always unconstitutional, sometimes the government will try to encourage a candidate to voluntarily limit her expenditures by offering some type of perk or advantage for doing so. In *Buckley*, the Supreme Court upheld the use of voluntary expenditure limits as a condition of receiving public financing. 424 U.S. at 57, n.65. If a city wishes to continue its voluntary expenditure limits, it should ensure that any "sweetener" used to encourage acceptance of the limit is truly voluntary and not coercive. As the Supreme Court recently reiterated, "[t]he resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (striking down the "Millionaire's Amendment," discussed further *infra*).

At the state level, and in some local jurisdictions, acceptance of voluntary expenditure limits allows candidates to publish a candidate statement in the voter information pamphlet. Cal. Gov't Code § 85601. State law also addresses what happens when candidates change their mind about the spending limits at later stages in the process, and local jurisdictions would be wise to do so as well. *Id*. §§ 85401-85402.

Several cities have allowed candidates who accept voluntary expenditure limits to receive contributions that are larger than those allowed for candidates who decline to limit their spending. This poses a risk; in *Davis*, 554 U.S. at 743, the Court stated that it has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *See also id.* at 744 ("the unprecedented step of imposing different contribution and . . . expenditure limits on candidates vying for the same seat is antithetical to the First Amendment.").

Even before *Davis*, however, a federal district court in Sacramento struck down as unconstitutional a state law – Proposition 208 – that provided differing contribution limits depending solely on whether the candidate had accepted voluntary expenditure limits. The district court reasoned that if the higher limits for candidates who accepted the spending limits were sufficient to combat corruption, then the lower limits must be "constitutionally infirm." *Cal. Prolife Council PAC v. Scully*, 989 F. Supp. 1282, 1296 (E.D. Cal. 1998).

5. Expenditures by public agencies

Sometimes it is the government itself whose expenditures are scrutinized in the midst of an election campaign. In *Vargas v. City of Salinas*, 46 Cal.4th 1, 8 (2009), the California Supreme Court reaffirmed the long-standing principle that, under the California Constitution, the government is precluded from using public funds "for materials or activities that reasonably are characterized as campaign materials or activities." Note that this is a different standard than the "express advocacy" standard that is used to determine whether the activities of private persons and entities can be regulated.

The *Vargas* Court confirmed that public agencies are allowed to "publish a 'fair presentation of facts' relevant to an election matter." *Id*. at 25 (quoting *Stanson v. Mott*, 17 Cal. 3d 206, 222 (1976)). The Court treated certain expenditures as presumptively campaign-related (*e.g.*, "bumper stickers, posters, television and radio advertisements," *id.* at 32) and others as presumptively informational (*e.g.*, taking a position on a measure at an open and public meeting, and preparing staff reports analyzing the measure's impacts, *id*. at 36). For activities that fell in-between, the Court reviewed the "style, tenor and timing" of the activity to determine whether it was a valid expenditure of public funds. *Id.* at 27. The *Vargas* opinion includes as an appendix the materials prepared by the City of Salinas that the Court found to be informational and therefore permissible. *Id*. at 47. These can be a helpful guidepost against which to measure publicly funded materials.

The FPPC has imposed fines on local agencies that spend public funds on materials deemed to fall within the *Vargas* presumption of campaign materials. For example, in January 2015 it fined the City of Rialto $6,000 for, among other things, sending 200 or more pieces of mail that unambiguously urged a yes vote on a local ballot measure. *City of Rialto*, Stipulation, Decision, and Order, FPPC No. 12-869 (2015).

B. Contribution Limits

1. Contribution limits must be closely drawn to combat corruption, and adjusted for inflation

Unlike expenditure limits, contribution limits are far more likely to be upheld as constitutional. This is because the courts do not treat contribution limits as limits on direct speech, and thus subject them to a less rigorous, though still exacting, standard of review. Moreover, the courts generally defer to the legislative body's determination of where to draw the line on an appropriate contribution limit.

However, contribution limits are not immune from constitutional challenge. In *Randall*, 548 U.S. at 261-62, the U.S. Supreme Court struck down Vermont's contribution limits of $400 per 2-year election cycle for gubernatorial candidates, and lower limits for other state offices, because they were so restrictive as to impede the ability of challengers to raise sufficient funds to mount a meaningful campaign.

The *Randall* Court also criticized Vermont's failure to index the contribution limits to inflation, with cost of living adjustments. 548 U.S. at 261. Such adjustments can have a significant impact over time. For example, the contribution limits for California state candidates are adjusted every odd-numbered year to reflect any increase or decrease in the Consumer Price Index, then rounded to the nearest hundred. Cal. Gov't Code § 83124. The state limit of $3,000 for most state candidates, first set in the year 2000, now stands at $4,400 with inflation adjustments. *Id.* § 85301(a); *see California State Contribution Limits*, http://www.fppc.ca.gov/learn/campaign-rules/state-contribution-limits.html (last visited Mar. 14, 2018).

Before the *Randall* Court's decision, a federal district court in Sacramento similarly found limits of $100 to $500 for state candidates too low to allow those candidates to mount an effective campaign. *Cal. Prolife Council PAC*, 989 F. Supp. at 1298-99.[2] More recently, after protracted litigation, the Ninth Circuit upheld a Montana law limiting contributions to state senate candidates to $340, and limiting contributions to gubernatorial candidates to $1,320. *Lair v. Motl*, 873 F.3d 1170, 1174 (9th Cir. 2017). The court concluded that Montana had demonstrated the risk of quid pro quo corruption in the state was more than "mere conjecture," and that the limits were not so low as to prevent candidates from amassing sufficient funds. *Id*. at 1178, 1187. Central to the court's analysis was an examination of the contribution limits "as a percentage of the cost of campaigning" for elected office in Montana. *Id*. at 1187. The court upheld Montana's relatively low contribution limits in part because the cost of campaigning in Montana was relatively modest compared to other states. *Id.*

If a city's contribution limit is challenged, the city council would be well served by having legislative findings and a factual record – *e.g.*, evidence of past improper *quid pro quo* arrangements, voter approval of contribution limits, etc. – to demonstrate that the city has a sufficient interest in preventing corruption or the appearance of corruption to justify the particular limit. *Lair*, 873 F.3d at 1178-79; *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 652-54 (9th Cir. 2007); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 393-95 (2000). City councils also would be wise to demonstrate that in setting the limit, they took into account the size of the city, historical records of how much it typically costs to run for election there, the costs of media and staffing in the area, and other facts particular to the jurisdiction.

2. Aggregate limits on contributions are suspect

Some local ordinances impose an aggregate contribution limit, under which a person who makes direct contributions to local candidates cannot also make contributions to other local candidates or to committees that will make contributions to the local candidates. These aggregate limits are constitutionally suspect.

In *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, 1462 (2014), the U.S. Supreme Court struck down as unconstitutional a federal law that capped the total amount of contributions that one person could make to all federal

---

[2] On appeal, the district court's preliminary injunction was affirmed and the case was remanded for the court to conduct a full trial on the merits. *Cal. Prolife Council PAC v. Scully*, 164 F.3d 1189, 1190-91 (9th Cir. 1999). While the case was on remand, the voters passed Proposition 34, which repealed Proposition 208's contribution limits and enacted new, larger limits adjusted for inflation. The plaintiffs subsequently dismissed their challenge to the Proposition 208 limits as moot.

candidates and committees in a single calendar year. The Court rejected the Government's argument that aggregate limits serve to combat corruption, holding that only activity that constitutes the appearance of or actual *quid pro quo* corruption suffices as a governmental interest sufficient to warrant a restriction on the First Amendment rights of donors. *Id*. at 1451. The Court also rejected the notion that the aggregate limits were necessary to prevent circumvention of the base contribution limit by persons channeling funds through various committees. *Id*. at 1453.

Note that under federal law, donors who contribute the maximum amount to a candidate cannot contribute to a committee primarily formed to support that candidate, or to a committee that they know will make a substantial contribution to the candidate; they can, however, contribute to a committee that "likely" will support that candidate as well as others. *Id.*

3. Contributions by political parties to candidates

The U.S. Supreme Court's decision in *Randall*, 548 U.S. at 256-59, found unconstitutional state contribution limits that severely restricted a political party's ability to help its candidates win elections. The limits treated national parties and all of their affiliates as a single entity to which the contribution limit for individuals applied. *Randall* distinguished an earlier Supreme Court decision that had upheld federal limits on political party expenditures that were coordinated with candidates (*Fed. Election Comm'n v. Colorado Republican Federal Campaign Comm'n*, 533 U.S. 431, 456, 487 (2001)), because the party limits under federal law were much higher than limits on individual contributions. *Randall*, 548 U.S. at 258.

Relying on *Randall*, the Ninth Circuit enjoined a city limit of $1,000 on contributions by political parties to candidates for nonpartisan city offices. *Thalheimer,* 645 F.3d at 1126-28. On remand, the district court struck down the city's limit on contributions to political parties as so low that it was tantamount to an outright ban. *Thalheimer*, 2012 U.S. Dist. LEXIS 6563, at *58.

4. Restrictions on contributions by corporations, contractors, lobbyists and other special groups

Local ordinances sometimes prohibit contributions from corporations, or persons who have contracted with the city, or who lobby city officials, or who are engaged in particular business activities. State law does not restrict contributions from those who contract with the state, but it has had a variety of lobbyist contribution restrictions over the years, some of which have been declared unconstitutional. If a city has or contemplates these types of restrictions, it should articulate a valid justification and should narrowly tailor the restriction to meet that justification.

Federal law continues to limit direct contributions to candidates by corporations and labor unions; this was not addressed in *Citizens United*, and thus an earlier case upholding the federal ban remains controlling, though its reasoning has been undermined by more recent developments. *Federal Election Commission v. Beaumont*, 539 U.S. 146, 159-60, 163 (2003); *see also United States v. Danielczyk*, 683 F.3d 611, 618-19 (4th Cir. 2012). In 2011, the Ninth Circuit upheld a San Diego city ban on direct candidate contributions from entities other than natural persons, i.e. corporations and unions. *Thalheimer*, 645 F.3d at 1124.

A recent decision struck down an Illinois law that banned medical cannabis cultivation centers and dispensaries from making contributions to state candidates. *Ball v. Madigan*, 245 F. Supp. 3d 1004, 1016-17 (N.D. Ill. 2017). The court found that while the state had a sufficiently important governmental interest in preventing actual corruption or the appearance of corruption from licensed industries, this ban, with its focus on a single industry, was so narrow as to call into doubt whether it advanced that interest. *Id.* The court distinguished two cases that had upheld state bans on contributions from the casino industry, where those bans were supported by legislative findings and evidence of actual corruption. *Id.* at 1015 (citing *Casino Ass'n of La. v. Foster*, 820 So. 2d 494 (La. 2002); *Soto v. New Jersey*, 565 A.2d 1088 (N.J. Super. Ct. 1989)).

Most courts that have considered a ban or limit on contributions from government contractors have upheld it if closely drawn to prevent *quid pro quo* corruption. *Green Party of Conn. v. Garfield*, 616 F.3d 189, 205 (2d Cir. 2010) (upholding contractor ban); *Ognibene v. Parkes*, 671 F.3d 174, 196-97 (2d Cir. 2011) (upholding lower limit on contractor contributions); *Yamada v. Snipes*, 786 F.3d 1182, 1185 (9th Cir. 2015) (upholding contractor ban). *But see Dallman v. Ritter*, 225 P.3d 610, 640 (Colo. 2010) (striking down as vague and overbroad a constitutional amendment enacted by the voters that banned contributions to candidates by state contractors and their immediate family, for the duration of the contract and for two years thereafter).

Most recently, the D.C. Circuit Court of Appeals, sitting *en banc*, upheld a federal law prohibiting contributions to federal candidates by federal government contractors, finding that it was justified to protect against *quid pro quo* corruption and was closely drawn because of its temporal limits. *Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 22-23 (D.C. Cir. 2015), *cert denied*, 136 S. Ct. 895 (2016). The ban applied only during the time period between commencement of contract negotiations and completion of the contract's performance, and the law allowed for other forms of unrestricted political participation by federal contractors.

With respect to limits on lobbyist contributions, the Second Circuit held that Connecticut's ban violated the First Amendment, because there was limited evidence of corruption involving lobbyists and their family members, and thus the ban was not closely drawn to meet a sufficiently important government interest. *Green Party of Conn.*, 616 F.3d at 206-07. It did, however, leave open the possibility that a contribution limit for lobbyists might pass constitutional muster. *Id*. at 207. This contrasts with a ruling from the Eastern District of California upholding California's ban on personal contributions to candidates by individuals who are registered to lobby the candidate's agency, finding the law narrowly tailored to serve the State's important interest in avoiding the potential for corruption. *Inst. of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1193-94 (E.D. Cal. 2001). The California Supreme Court had earlier struck down as overbroad a statute that sought to ban contributions arranged or recommended by lobbyists. *Fair Political Practices Comm'n v. Superior Court*, 25 Cal.3d 33, 43-45 (1979).

5. Contribution limits for ballot measures

Contribution limits for ballot measure committees have long been held unconstitutional. The reason is that there is no governmental interest in preventing corruption in the support for or opposition to a ballot measure comparable to support for an individual candidate. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297-99 (1981).

6. Public financing

Until recently, only charter cities could enact public financing of election campaigns in California. Recent state legislation changed that, and now public financing of candidate campaigns is allowed for all counties, districts, general law cities, and the State. Cal. Gov't Code § 85300 (as amended by Stats. 2016, ch. 837, sec. 2).

Public financing schemes have often included provisions that increase public funding for candidates who face unlimited spending by a self-funded candidate or by independent expenditure groups. The Supreme Court recently has declared two such provisions unconstitutional. In *Davis*, 554 U.S. 724 736, 742-44, the Supreme Court struck down the so-called "Millionaire's Amendment" which permitted the opponent of a federal candidate who spent over $350,000 of his personal funds to collect triple the normal contribution amount, while the candidate who spent the personal funds remained subject to the original contribution cap. The Court held that the law unduly burdened the First Amendment right to spend personal funds on campaign speech and was not justified by a compelling governmental interest. *Id.* at 742-44.

In *Arizona Free Enterprise v. Bennett*, 564 U.S. 721, 728 (2011), the Court applied that same reasoning to strike down a state "matching funds" provision. The Arizona law granted additional public funds to a candidate who had accepted public financing and whose privately financed opponent's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to the publicly financed candidate, exceeded the publicly financed candidate's initial state allotment. *Id.* at 728-30. Once matching funds were triggered, the publicly financed candidate would receive roughly one dollar for every dollar raised or spent by the privately financed candidate, including that candidate's expenditure of his own funds, and one dollar for every dollar spent by the independent groups. *Id.* at 728. Once again, the Court found that the law unduly burdened the First Amendment rights of the privately funded candidate, and was not justified by a compelling governmental interest. *Id.* at 749-50.

In 2013, the District Court for the Southern District of New York upheld New York City's more narrowly tailored public financing scheme. *Ognibene v. Parkes*, 2013 U.S. Dist. LEXIS 49083, *1 (S.D.N.Y. April 4, 2013). Under the New York City law, a participating candidate who agrees to abide by voluntary expenditure limits "receives public matching funds for all eligible individual private contributions by New York City residents of up to $175, at a rate of six dollars in public funds for every dollar in private contributions." *Id.* at *7. If and when the local campaign finance board determines that a candidate who is not participating in the voluntary expenditure limit program has more than half of the applicable expenditure limit for that office, then the expenditure limit of any candidate participating in the voluntary expenditure limit program goes up by 150 percent. *Id.* If a non-participating candidate "raises or spends more than three times the applicable expenditure limit for the relevant office," the expenditure cap for participating candidates is lifted. *Id.* at *8-9.

The *Oginbene* court distinguished *Arizona Free Enterprise* by emphasizing the limited relief available under the New York ordinance. *Id.* at *20. Unlike in Arizona, participating candidates in New York City who faced well-financed opponents did not receive additional public funds; instead, a participating candidate's voluntary expenditure cap was raised or lifted to match the amount of money spent by their opponent, but it remained up to the participating candidate to raise the funds necessary to compete. *Id.* The *Oginbene* court also noted that there was no evidence that the non-participating candidate's speech would be chilled by increasing the voluntary expenditure limit of the participating candidates. *Id.* at *23-24.

7. Temporal limits on contributions

In *Thalheimer*, 645 F.3d at 1122-24, the Ninth Circuit mostly upheld[3] a city's temporal limit that prohibited the making of campaign contributions to a candidate more than 12 months prior to the candidate's election (except to the extent it precluded expenditures from a candidate's own funds). The court's decision was based in part on the fact that city officials had in the past been corrupted by contributions timed to coincide with the donor's business before the city. *Id.* at 1123, n.3.

[3] As previously discussed, the Ninth Circuit's decision in *Thalheimer* concerned a motion for preliminary injunction that had been granted in part and denied in part by the district court. On remand, the district court entered summary judgment based on the Ninth Circuit's ruling. *Thalheimer*, 2012 U.S. Dist. LEXIS 6563.

However, an earlier decision in the Ninth Circuit struck down temporal limits as creating an undue burden on challengers. In *Service Employees Int'l Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1321-22 (9th Cir. 1992), the Ninth Circuit held that Proposition 73, which would have set contribution limits on a fiscal year basis (instead of election cycle), unconstitutionally discriminated in favor of incumbents (and against challengers). The court reasoned that under the fiscal year contribution scheme, challengers would be "unable to engage in fundraising during each fiscal year between elections [. . . .]" *Id*. at 1315. The district court in *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282, 1291-92 (E.D. Cal. 1998), aff'd, 164 F.3d 1189 (9th Cir. 1999), considered a similar argument, but determined that the very low limits at issue there created problems for both incumbents and challengers alike, and therefore did not unconstitutionally discriminate against challengers.

C. Disclosure Requirements

Campaign disclosure laws are not subject to strict scrutiny, but instead are reviewed under an "exacting scrutiny" standard, requiring "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366. To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis*, 554 U.S. 744 (quoting *Buckley*, 424 U.S. at 64) ("'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment'" and thus disclosure requirements are "closely scrutinized."); *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (California has compelling interest in requiring disclosure of contributions and expenditures made to support or oppose ballot measures).

Many disclosure requirements have been upheld against constitutional challenges. For example, federal disclaimer and disclosure requirements for televised advertisements were upheld in *Citizens United*, 558 U.S. at 366-68. The Court also held that the disclosure of the names and addresses of signers of controversial referendum petitions is constitutional, although it left open the possibility of an as-applied challenge if plaintiffs could prove they faced a realistic threat of harassment by disclosure. *Doe v. Reed*, 561 U.S. 186, 201 (2010). When ruling on a preliminary injunction, the District Court for the Northern District of California came to a similar conclusion regarding the disclosure of names and other personal information of individuals who contributed $100 or more to support Proposition 8 in the November 2008 election. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1199 (E.D. Cal. 2009).

State law imposes a complicated series of disclosure requirements for campaign advertisements that are tailored to the type of advertisement and the type of sender. *E.g.*, Cal. Gov't Code §§ 84501-84511 (the Disclose Act). The recently enacted Disclose Act imposes particularly stringent disclaimer requirements on independent expenditures. *E.g.*, *id*. §§ 84502, 84506.5. Under the PRA, local jurisdictions are permitted to enact *more* stringent disclaimer requirements for committees that are active exclusively in their jurisdiction (*e.g.*, City Council, Mayor). For example, under the Disclose Act some committees are now required to include their top three donors over $50,000 on their disclaimer; a city could pass an ordinance requiring committees to disclose their top three donors over $10,000. *Id*. § 84503.

Recently, the FPPC and the Attorney General have succeeded in gaining non-public access to information about the donors to nonprofit organizations that were engaged in election-related activities. *Americans for Prosperity Foundation v. Harris*, 809 F.3d 536 (2015); *Fair Political Practices Comm'n v. Ams. for Responsible Leadership*, No. S206407, 2012 Cal. LEXIS 10964 (Nov. 4, 2012). The courts found that disclosure of the information to the enforcement agencies in these circumstances did not unduly chill the First Amendment rights of the donors to remain confidential.

D. Relying on FPPC Definitions, Rules and Forms

The provisions of the Political Reform Act, and FPPC regulations and forms, have undergone many changes in recent years. Local ordinances that rely on or incorporate FPPC definitions, rules and forms may unknowingly also have changed as a result. As just one example, legislation passed in 2015 changed the definition of "recipient committee" (a person or group of persons who receive campaign contributions) by increasing the qualifying monetary threshold from $1,000 in contributions to $2,000 in contributions. Cal. Gov't Code § 82013(a) (as amended by Stats. 2015, ch. 364, sec. 1). Cities that incorporate the Political Reform Act definition of "committee" may want to revise their ordinances if they wish to maintain the lower threshold and continue imposing disclosure obligations on committees that raise $1,000 or more.

E. Audits and Enforcement

Many jurisdictions have no provision for periodic or random audits of local campaign committees. Such audits can be time-consuming but are an important tool to proactively identify potential violations and to ensure that the local ordinance is continuing to work as intended.

Local ordinances often have harsh enforcement provisions – *e.g.*, misdemeanor charges and forfeiture of office. The City Attorney is most likely to function as the investigator and prosecutor of any violations, but provision has to be made for investigations of the City Attorney in instances where she also is an elected official, and for instances where the City Attorney believes outside assistance is warranted.

Many local ordinances provide for citizen enforcement actions if the City Attorney chooses not to proceed. Some, but far from all, allow for disgorgement of improperly received contributions, and give authority to seek injunctive relief. Some jurisdictions have sought and received statutory authorization from the State to refer violations of local campaign finance reform ordinances to the FPPC for investigation and prosecution. *See* Cal. Gov't Code §§ 83123-83123.7.

III. PRACTICE TIPS FOR REVIEWING A CITY'S CAMPAIGN FINANCE ORDINANCE

Campaign Expenditures

- ☑ Limits on independent expenditures are never okay
- ☑ Limits on a candidate's expenditure of his or her own funds are never okay unless acceptance of the limit is voluntary
- ☑ Voluntary expenditure limits cannot be coercive and acceptance should not result in a higher contribution limit for some candidates compared with others
- ☑ Cannot provide extra public funds to match personal expenditures by an opposing candidate
- ☑ Be wary of other restrictions (*e.g.*, temporal limits, transfer limits) that could be construed as an expenditure limit
- ☑ Distinguish between "express advocacy" or its equivalent and "issue advocacy"; only the former can be regulated
- ☑ Governments cannot spend public funds on campaign materials or activities, but they can be used for informational materials on a ballot measure

Contribution Limits

- ☑ Contribution limits cannot be too low for the candidates to mount an effective campaign
- ☑ Contribution limits should have a cost of living adjustment
- ☑ Contribution limits should be supported by a factual record demonstrating the need to prevent corruption or the appearance of corruption and the cost of local campaigns
- ☑ Differing contribution limits are highly suspect
- ☑ Aggregate contribution limits are highly suspect

- ☑ Must have a justification for, and narrowly tailor, special limits for corporations, contractors, lobbyists and the like

- ☑ Cannot limit contributions to independent expenditure committees or ballot measure committees

Disclosure Requirements

- ☑ Must be substantially related to a sufficiently important governmental interest, but likely to be upheld if not unduly burdensome.

- ☑ May need to be updated based on changes to the Political Reform Act

- ☑ Local requirements can be stricter than state law, if justified and not unduly burdensome

Other Considerations

- ☑ Allow plenty of time for the process of City Council discussions and community input, well before your next election

- ☑ Consider having a City Council subcommittee to engage with the City Attorney's office early in the process

- ☑ Involve your City's Elections Official, who can review spending and contribution disclosures from prior elections to determine the cost of running for office in your City

- ☑ Use the FPPC and the manual for local candidates as a resource ("Information for Local Candidates, Superior Court Judges, Their Controlled Committees and Primarily Formed Committees for Local Candidates")

(00336348-7)