



BALLOT ISSUES AND ELECTIONEERING BY LOCAL GOVERNMENTS AND ELECTED OFFICIALS

COLORADO COUNTIES, INC.

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Fair Campaign Practices Act and Local Governments

- ▶ FOR THE LOVE OF GOD, I'VE GOT A 4 HOUR DRIVE HOME WHY DOES CHIP WANT ME TO SIT THRU THIS?
- ▶ FCPA GOVERNS CAMPAIGN FINANCE
- ▶ WHO CAN SAY WHAT AND WHEN THEY CAN AND CAN'T SAY IT
- ▶ AVOID ALJ, INJUNCTIONS, NEGATIVE PRESS AND FINANCIAL PENALTIES
- ▶ GOVERNMENT DESERVES A VOICE TOO

LEGISLATIVE DECLARATION – COLO. CONST.

- ▶ The people of the state of Colorado hereby find and declare that **large campaign contributions** to political candidates create the **potential for corruption** and the appearance of corruption; that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and **special interest groups** to exercise a disproportionate level of **influence over the political process**; that the **rising costs** of campaigning for political office **prevent qualified citizens from running for political office**; that because of the use of early voting in Colorado timely notice of independent expenditures is essential for informing the electorate; that in recent years the advent of significant spending on electioneering communications, as defined herein, has frustrated the purpose of existing campaign finance requirements; that independent research has demonstrated that the vast majority of televised electioneering communications goes beyond issue discussion to express electoral advocacy; that political contributions from corporate treasuries are not an indication of popular support for the corporation's political ideas and can unfairly influence the outcome of Colorado elections; and that the interests of the public are best served by limiting campaign contributions, establishing campaign spending limits, providing for full and timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications, and strong enforcement of campaign finance requirements.

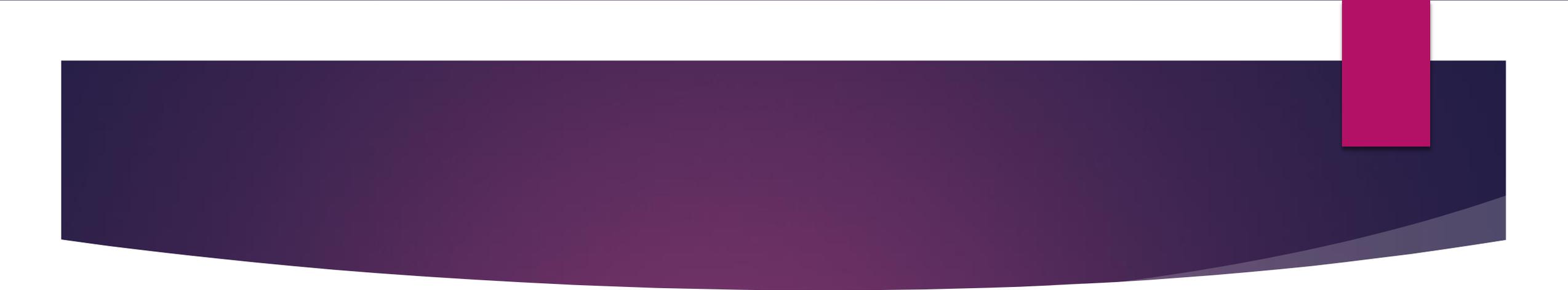
Colo. Const. art. XXVIII, § 1

LEGISLATIVE DECLARATION – C.R.S.

- ▶ The people of the state of Colorado hereby find and declare that **large campaign contributions** to political candidates allow wealthy contributors and special interest groups to exercise a **disproportionate level of influence over** the political process; that large campaign contributions create the potential for **corruption and the appearance of corruption**; that the **rising costs of campaigning** for political office **prevent qualified citizens from running** for political office; and that the interests of the public are best served by limiting campaign contributions, establishing campaign spending limits, full and timely disclosure of campaign contributions, and strong enforcement of campaign laws.
- ▶ Originally enacted as Campaign Reform Act of 1974 then re-enacted in 1996 as FCPA

ARGUMENTS IN SUPPORT OF FCPA

- ▶ Drafters and proponents of the FCPA did not limit their considerations to the legitimate governmental interests of preventing corruption and the appearance of corruption.
 - ▶ Blue Book mailed to voters didn't mention Corruption
- ▶ Proponents of the FCPA believed there was “too much money in politics,” that the “ever-increasing growth in contributions and spending was corrupting the process in Colorado,” and that special interests had too much influence on politics in Colorado.

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- ▶ The requirements ensure that large contributions made to influence election outcomes are not concealed, and that special interest groups cannot disproportionately influence elections outcomes.

Indep. Inst. v. Coffman, 209 P.3d 1130, 1135 (Colo. App. 2008)

DIGRESSION

(WHY THE LAW IS WRONG)

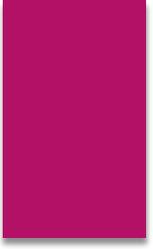
[One Man's Opinion]

- ▶ GOV'T SPEECH ON CONSTITUTION ISSUES FURTHERS NOT FRUSTRATES KEY CONSTITUTIONAL VALUES
 - ▶ TRANSPARENTLY GOVERNMENTAL CAMPAIGN SPEECH ON CONTESTED BALLOT ISSUES IS RARELY, IF EVER HARMFUL TO FIRST AMENDMENT LIBERTY OR EQUALITY INTERESTS
 - ▶ GOV'T IS SIMPLY AN ACTOR IN THE MARKET NOT A REGULATOR
 - ▶ GOV'T CAMPAIGN SPEECH IS VALUABLE TO PUBLIC
 - ▶ IT ENHANCES POLITICAL ACCOUNTABILITY BY INFORMING THE PUBLIC OF GOV'TS PRIORITIES AND PREFERENCES
 - ▶ CAN PROVIDE COUNTER TO POWERFUL, PRIVATE SOURCES (RITTER'S 2008 "TRUTH TOUR" RE: REMOVAL OF TAX CREDIT)
- ▶ I'd love to take this case up for a municipality

Fair Campaign Practices Act Prohibitions for Governments C.R.S. §1-45-117

▶ Governments may NOT:

- ▶ Make any contribution in a campaign involving the nomination, retention or election of any person to any public office; or use a third party to do so.
- ▶ Expend any public moneys from any source to urge electors to vote for or against any state-wide ballot issue, local ballot issue, referred measure or measure for the recall of any officer.



So...“making any contribution” and “expending public money” to “urge” voters are the big no-no’s....

“Contributions” and “expending” “public moneys”—

Applies to the expenditure of money and resources, including copiers, computers, cellphones, staff time....

There is no *de minimus* exception— “nothing too trivial or minor to merit consideration”

“Contributions” and “Expending” “Public Moneys”

- ▶ Sitting Mayor writes a letter of support for a candidate for another public office using City letterhead.
- ▶ The letter was mailed to constituents.
- ▶ The total expenditure of City funds in typing and sending the letter was a whopping \$2.35.
- ▶ (The Mayor paid it back right away.)
- ▶ *Does the FCPA care if it was a pittance and paid back?*

“Contributions” and “Expending” “Public Moneys”

- ▶ Nope.
- ▶ *Exception for policy makers to spend up to \$50.00 only applies to ballot issues and not campaigns.*
- ▶ *“No exception applies for de minimus expenditures, and the ALJ declines to engraft one.”*
- ▶ *Did paying it back cure the violation? Nope.*
 - ▶ *“While the minimal dollar amount involved in the case coupled with the Mayor’s action in reimbursing the City indicates the violation was ...extremely limited....it is nevertheless true that a statutory violation occurred....when the Mayor placed his endorsement letter on City letterhead and used a City employee to do so.”*

See Muller v. Burkholder, Agency Dec. OS-2002-012

“Contributions” and “Expending” “Public Moneys”

- ▶ County adopted a resolution referring a local ballot issue to approve a 5 percent excise tax on transfer of marijuana.
- ▶ Section 20 of Article X of the Colorado Constitution requires summaries of arguments “for” and “against”
- ▶ The BoCC directed the contract County Attorney to draft the “for” summary. The attorney did not bill extra; he was paid a flat monthly fee.
- ▶ FCPA complaint filed.
- ▶ **Arguable “urging” of voters?**
- ▶ *Was public money expended??*

“Contributions” and “Expending” “Public Moneys”

- ▶ *Arguable “urging” of voters? Yes.*
- ▶ *Was public money expended?? Not on these facts.*
- ▶ *“[T]here is no evidence that the county incurred any additional expense in having the county attorney draft the comments....[the county attorney] is a private attorney paid a flat monthly fee.... Because the County did not pay [the attorney] any additional fee to draft the comments, the ALJ cannot conclude that public funds were spent to support the ballot issue.”*

See Cyiraks v. Anderson, et al, Agency Dec. OS-2016-0029

“Contributions” and “Expending” “Public Moneys”

- ▶ Sitting County Commissioner openly supports a current candidate for the State Legislature and suggests that the County BoCC hearing room would be a great place to hold a campaign event. Although there is no written policy, usually for after hours public events in County buildings, IT staff stays late to help with audio-visual needs.
- ▶ *Where are your pitfalls in light of the FCPA?*

“Urging” electors to vote for or against ... a ballot issue or referred measure

- ▶ Big Lesson: we can absolutely violate this provision without **overtly advocating....**
- ▶ Once the measure submitted for fixing of ballot title, proceed with extreme caution
- ▶ “Urging” is interpreted very broadly by ALJ’s

“Urging” electors to vote for or against ... a ballot issue or referred measure- case example

- ▶ In 2013 County in dire financial straits referred a ballot measure to increase the mill levy.
- ▶ On the same day, the BoCC hired a consultant to “provide leadership” and prepare and present information about dire financial condition and sustainability at town hall meetings.
- ▶ 4 town hall meetings were held with a Commissioner in attendance. (cont'd)

“Urging” electors to vote for or against ... a ballot issue or referred measure- case example

- ▶ The County Attorney knew the FCPA and read a disclaimer.
- ▶ One slide listed options: “*cut services or raise revenue.*”
- ▶ *Ballot question never overtly discussed.*
- ▶ FCPA complaint filed....whaaaaaaa???

WAIT---- WE DID A DISCLAIMER! THE COUNTY ATTORNEY WAS **THERE FOR CRYIN’ OUT LOUD!?! (VIOLATION?)**

“Urging” electors to vote for or against ... a ballot issue or referred measure

- ▶ **Yep– and not even a tough call.** “Express advocacy not required”
- ▶ It is not enough to simply not mention the ballot issue, or to have your attorney state a disclaimer....
- ▶ *“Given that the town hall meetings painted a dire one-sided picture of the county’s financial condition and were held just before the election, the proposed tax increase was clearly ‘the elephant in the room.’”*
- ▶ **Intent to not violate simply didn’t matter** See, *Duvall v. Rowland et al*, Agency Decision

Timing is Everything



Timing of when a candidate is a candidate

- ▶ “Candidate” means any person who seeks nomination or election to any state or local public office that is to be voted on in this state at any primary election, general election, school district election, special district election, or municipal election. “Candidate” also includes a judge or justice of any court of record who seeks to be retained in office pursuant to the provisions of section 25 of article VI. **A person is a candidate** for election **if** the person has **publicly announced** an intention to seek election to public office or retention of a judicial office **and** thereafter **has received a contribution or made an expenditure** in support of the candidacy. A person **remains a candidate** for purposes of this article so long as the candidate **maintains a registered candidate committee**. A person who maintains a candidate committee after an election cycle, but who has not publicly announced an intention to seek election to public office in the next or any subsequent election cycle, is a candidate for purposes of this article.

Colo. Const. art. XXVIII, § 2

Ballot Measures & Questions

- ▶ (A) **Statewide ballot issue** that **has been submitted for** the purpose of having a **title designated and fixed** pursuant to section 1-40-106(1) or that has had a title designated and fixed pursuant to that section;
- ▶ (B) **Local ballot issue** that has been **submitted for the purpose of having a title fixed** pursuant to section 31-11-111 or that has had a title fixed pursuant to that section;
 - ▶ Colo. Rev. Stat. Ann. § 1-45-117 (West)

Referred Measure

- ▶ Immediately upon Referral

EXAMPLE

- ▶ County A wants to build a new Courthouse
- ▶ County A wants to put a referred sales tax measure on the November Ballot in August
- ▶ County refers measure to the ballot at their first August meeting
- ▶ County A hires consultant in May and pays him in May, June, July and stops his employment paying his July time at their 2nd August meeting
- ▶ Is this ok?

ANSWER

County can contract for and pay for the Consultant up till August. But no bills can be paid after August Referral.

Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4, 107 P.3d 1140 (Colo. App. 2004)

EXCEPTIONS– what CAN we do as a County organization?

1. We CAN dispense a factual summary “which shall include arguments both for and against the proposal.”
2. We CAN pass a Resolution taking a position of advocacy and advertise the passage in the normal course.
3. We CAN answer unsolicited questions.

EXCEPTIONS— Dispensing a factual summary—

- ▶ No conclusions or opinions allowed.
- ▶ Limited to issue that will appear on ballot in your jurisdiction.
- ▶ *Operative question*: whether the summary, “taken as a whole,” urges electors to vote in favor of or against the ballot issue; improperly contains a conclusion or opinion in favor of or against the proposal; and is “sufficiently balanced and even-handed.”
 - ▶ See, Bruce v. City of Colorado Springs, Agency Decision, OS 2003-005

EXCEPTIONS— what CAN we do as a County organization?

- ▶ Pass a Resolution or Take a position of Advocacy—
 - ▶ Includes Resolutions or Proclamations
 - ▶ Use of staff time is proper

AND...Report the passage of or distribute the resolution through “*established, customary means, other than paid advertising, by which other information about the Board’s proceedings is regularly provided.*”

EXCEPTIONS– what CAN we do as a County organization?

- ▶ The Nov. '00 election included a state-wide ballot initiative to require the state to set aside revenues each fiscal year for the State Education Fund.
- ▶ Before the election, the Treasurer criticized, and urged the defeat of, the proposed amendment at a press conference and in three press releases, prepared and issued during official work hours and through use of public funds.
- ▶ Among other things, the Treasurer argued this was a “resolution”
hmmmm

EXCEPTIONS– what CAN we do as a County organization?

- ▶ A person cannot pass a resolution. 😊
- ▶ “A resolution is ‘[a] formal expression of the opinion or will of an official body or public assembly, adopted by vote; as a legislative resolution.’ *Black's Law Dictionary* 1178 (5th ed.1979). Thus, a resolution generally requires action by a voting body.”

▶ See. *Colorado Common Cause v. Coffman*, 85 P.3d 551 (2003), affirmed 102 P. 3d 999 (Colo. 2004)

EXCEPTIONS– what CAN we do as a County organization?

Report the passage of or distribute the resolution through
*“established, customary means, other than paid advertising,
by which other information about the Board’s proceedings is
regularly provided.”*

Can you put it on the County website?

Send *via* email to press contacts?

EXCEPTIONS– what CAN we do as a County organization?

Answer *unsolicited* questions....self explanatory.

Tip– have one person dedicated to take the calls if possible.

Pitfalls for PIO's– what if the unsolicited question comes on camera??

EXCEPTIONS– what CAN we do as a County organization?

- ▶ In 2015, County referred a ballot issue to allow a water district to convert to a metro district.
- ▶ Before the election, the Local Paper published an article and attributed the following statement to the PIO:

“If passed, the County would pay a third of the costs associated with fixing the roads. This would greatly diminish the cost for ...neighbors. This is also a great example of the relationship the County is trying to foster with unincorporated subdivisions.”

Does this ‘urge’ a vote one way or another?

Does it violate the FCPA?

INDIVIDUAL EXCEPTIONS

WHAT CAN I AS AN INDIVIDUAL COMMISSIONER DO

- ▶ MAY VOICE PERSONAL OPINION ON ANY “ISSUE”
- ▶ NOTICE ABSENCE OF WORD “CANDIDATE”
 - ▶ *In the Matter of the Complaint Filed by Hal Shroyer Regarding Alleged Violations of the Fair Campaign Practices Act on the Part of Helen Hill, Adams County Treasurer and Clyde Spero, Candidate for Adams County Treasurer (Case No. OS 2002-024, ALJ Judith F. Schulman, April 11, 2003).*

Safely Endorsing an Individual Candidate

- ▶ When Can I voice opinion
 - ▶ Personal time versus Republican/Democrat Women's Luncheon
 - ▶ AVOID inadvertent use of public funds
 - ▶ Drive county car to lunch?
 - ▶ Wear Badge paid for by County while at lunch?
 - ▶ Can not intertwine with "official" business

LIMITED EXPEDITURES BY POLICY MAKERS

- ▶ INDIVIDUALS WITH POLICY MAKING RESPONSIBILITIES MAY EXPEND PUBLIC MONEY TO EXPRESS THEIR OPINION ON PARTICULAR **ISSUE**
 - ▶ \$50.00 Limit on Expression
 - ▶ Letters, telephone calls, etc.
 - ▶ Cost of envelopes, letterhead, postage and staff time.
 - ▶ Salaried elected officials do not have to count the value of their time
- ▶ NO \$50.00 EXCEPTION FOR CANDIDATE CAMPAIGNS
 - ▶ *In the Matter of the Complaint Filed by Michael Muller Regarding Alleged Violations of the Fair Campaign Practices Act on the Part of Steve Burkholder, Lakewood City Mayor (Case No. OS 2002-012, ALJ Judith F. Schulman, Dec. 9, 2002).*
- ▶ No Pooling – Not \$150 for 3 member BoCC

1ST AMENDMENT RIGHTS STILL APPLY

- ▶ GOVERNMENT OFFICIALS AND EMPLOYEES MAY SUPPORT CANDIDATES AND ISSUES ON PERSONAL TIME WITH PERSONAL FUNDS
- ▶ Exempt vs. Non-Exempt employee rules
 - ▶ Exempt should use vacation or leave time for campaign activities

Quiz

- ▶ County Public Works Director is a candidate for Sheriff and wants to campaign over lunches? Can she? What safeguards would you impose?
- ▶ County Assessor runs for County Commission. Any difference in the issues?

So...what happens if we violate the FCPA.....pretty fast process....

- ▶ A written complaint may be filed with the Secretary of State within 180 days of the date of violation
- ▶ Sec'y must refer the matter to an administrative law judge within 3 days of the filing
- ▶ The ALJ has 15 days within which to hold a hearing
- ▶ The ALJ must issue a written opinion within 15 days and must include sanctions if violation is found
- ▶ Appeal to the Colorado Court of Appeals
- ▶ Enforcement by the Sec'y of State or by the private individual

So...what happens if we violate the
FCPA.....sanctions...it just depends....

- ▶ Civil penalty of at least double and up to five times the amount “contributed, received or spent....”
- ▶ Candidates are personally liable
- ▶ Can order restitution to the County
- ▶ Restraining orders and injunctive relief as appropriate
- ▶ If a Board violates, an individual commissioner may be ordered to reimburse, as long as it is not more than any other commissioner who voted in favor of or authorized the expenditure.

Example Sanctions

- ▶ For the \$2.35 letter– the ALJ imposed no sanction.
- ▶ In a 2015 case where a school administrator linked to a school board candidate's Facebook page and generated likes, the ALJ ordered the Facebook link taken down (it WAS a thing of value).
- ▶ In *Coffman*, fine was \$334 individually.
- ▶ In *Rowland*, the Commissioner was fined \$1,000 by the ALJ.
- ▶ Recent fines up to \$15,000– double the amount of government resources alleged to have been used.

Even Worse.....

- ▶ Alleged violations of the FCPA are a common campaign tool
- ▶ Even alleged violations make great headlines
- ▶ An ALJ finding supporting a violation, even if by an individual, can cast dispersions on the County as a whole
An appeal just keeps the matter “above the fold”
- ▶ Risk loss of public confidence

Other issues/cases of note

- ▶ Watch out for Facebook!: Principal of school's creation of a link on school website to a newspaper article about a candidate for the school board which generated "likes" and "shares" was a "thing of value" for the purpose of promoting the candidacy— namely favorable publicity.
- ▶ The evidence did not establish a monetary amount, but the ALJ still concluded it was a **"thing of value"** to a campaign.
 - ▶ *Barela v Liberty Common School, Agency Decision, OS 2015-005.*

QUESTIONS???

