



Spending Public Money In Election Campaigns

THE FAIR CAMPAIGN PRACTICES ACT AND OTHER ISSUES

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Hypothetical #1

- ▶ The City Council reviews its capital plan in May and begins to consider a ballot question for a bond issue. The Council directs the City Manager to hire a firm to prepare a brochure describing the capital needs, showing architectural renderings of the proposed facilities and explaining that if voters want these facilities, they should vote for the bond question which the Council may submit to the voters in November. The brochure is mailed to all voters in July. The costs of the preparation and mailing are paid for in July. The Council adopts a resolution calling the election and setting the ballot title on August 15. Is this a problem? Does it make a difference if the bill is paid for on August 17? And then, in the campaign, pro bond-issue partisans use the brochure to urge a “yes” vote. Problem?

Hypothetical #2

- ▶ The City Manager's contract says her work hours are 8-5, Monday through Friday. At her regular 7 am monthly Rotary Club meeting, she presents about the tax measure that the City Council has put on the ballot and urges those in attendance to vote yes. Is this a problem? What if she presents at 8:15? What if she describes the measure and what the money will be used for, but never urges a yes vote? How about if she is not on the program, but the presiding officer notes her presence and asks if audience members have questions and she proceeds to answer questions about the election and the budget? Is the answer to all of the above different if she is a Council member and not the City Manager?

Hypothetical #3

- ▶ City Council meetings are regularly televised and streamed live over the internet. At its September City Council meeting a Council member urges voters to vote for the tax measure that the Council submitted to the voters at its August meeting. Is this a problem? How about if a candidate for mayor makes campaign speech and criticizes mayor during public comment?

Fair Campaign Practices Act (FCPA): Introduction.

- ▶ The FCPA is Article 45 of Title 1, C.R.S.; generally, concerns limits on and reporting of money in campaigns. Rewrite of Art.45 initiated in 1996 as the “Campaign Reform Act.”
- ▶ Citizens initiated Colo. Const. Art XXVIII in 2002, placing many definitions, contribution limits, sanction provisions in the Constitution, after Legislature watered down 1996 initiative.
- ▶ FCPA generally requires filing of candidate and issue committee registrations, contribution, and spending reports with the municipal clerk (reporting in non-municipal elections through Sec of State TRACER system).
- ▶ In 2019, (SB19-232) General Assembly provided that “any complaint arising out of a municipal campaign finance matter must be exclusively filed with the municipal clerk.” C.R.S. 1-45-111.7(9)(b)

FCPA, Section 117: The Rule, and who's covered.

- ▶ The Rule. C.R.S. 1-45-117 (Sec.117) prohibits a covered entity from:
 - (a) making a “contribution” or to expend “public money from any source”, (b) “to urge electors to vote for or against” candidates or ballot issues.
 - ✓ Expansive definition of “public money” was legislative intent; accordingly efforts to limit definition based on source of monies “would prove futile.” *Denver Area Labor Fed. v. Buckley*, 924 P2d 524, 527, (Colo. 1996)
 - ✓ To “urge” means “to present, advocate or demand earnestly or pressingly.” *Skruch v. Highlands Ranch Metro Dist.*, 107 P3d 1140, 1143 (Colo. App. 2004)
- ▶ Who is covered? Any “agency, department, board, division, bureau, commission or council of the state or any political subdivision of the state.” Sec 117(1)(a)(I)

FCPA, Sec 117: The policy behind the law.

- ▶ “to promote public confidence in government by prohibiting the use of moneys authorized for expenditure by political subdivisions for specified public purposes to advance the personal viewpoint of one group over another.” *Buckley*, 924 P2d at 528
- ▶ “[a] fundamental precept of this nation's democratic electoral process is that the government may not ‘take sides’ in election contests or bestow an unfair advantage on one of the several competing factions.” *Coffman v Colorado Common Cause*, 102 P3d 999 (Colo. 2004), quoting *Stanson v Mott*, 551 P2d 1 (Cal.1976)
- ▶ Commonly: Taxpayers must pay taxes; they should not thereby be dragooned into paying for government proselytizing with which they disagree.

FCPA, Sec. 117: Specific prohibitions

- ▶ **In candidate elections:** covered entities may not make any:
- ▶ Contribution or independent expenditure in a campaign involving the nomination, retention, or election of any person.
 - ✓ The terms “contribution” & “independent expenditure” defined at §1-45-103)(6) and (11), respectively.

FCPA, Sec. 117: Specific prohibitions (cont.)

- ▶ **In issue elections:** Sec 117 provides that, once certain triggers in issue elections occur, covered entities may no longer expend moneys from any source – or make contributions – to urge electors to vote in favor of or against the following ballot issues:
- ▶ A legislatively “referred measure” [as defined in 1-1-104(34.5)] that “has been submitted” to voters pursuant to Art 40 or 41 of Title 1, C.R.S., and “passed by the...governing body of any political subdivision of the state with authorization to refer matters to voters.” (latter language just added by SB23-276)
 - ✓ Art 40 is the *State* initiative and referendum law. Art 41 concerns which issues may appear on *odd-year November* local and State elections.
 - ✓ What about matters referred pursuant to Charter or Art 11 of Title 31 ?
 - ✓ What about matters referred to an election not held in November of odd numbered years?
 - ✓ Does 2023 amendment suggest “reading past” underinclusive definition?

FCPA, Sec. 117: Specific prohibitions (cont.)

- A local ballot issue that “has been submitted” for purposes of having a title fixed pursuant to section 31-11-111 (or that has had a title fixed pursuant thereto).
 - ✓ Cited statute is the municipal initiative and referendum statute.
 - ✓ What about local ballot issues that do not have titles set pursuant to this section, such as home rule charter amendments?
 - ✓ 31-11-111 also applies to counties and school districts- See Sections 22-30-104 and 30-11-103.5
- A recall measure “that has been submitted for approval for circulation on an approved petition form” by the municipal clerk.
 - ✓ 2023 amendments moved recall “trigger” to the beginning of the petition process, rather than the Clerks certification of petition sufficiency after circulation.

FCPA, Sec. 117: Actions expressly permitted

- A member or employee of a covered entity may respond to questions about any ballot issue, so long as the question is “not solicited.”
 - ✓ Provision was added to avoid entrapment of public officials in order to generate complaints.
- A member or employee of a covered entity who “has policy-making responsibilities” may spend not more than \$50 of public money in the form of letters, telephone calls, or other activities “incidental” to expressing their opinion on any issue.
 - ✓ “Plain meaning” of “incidental” is “a matter happening as a result of or in connection with something more important.” *Coffman*, 102 P3d 999, 1007 (Colo. 2004).
 - ✓ Incremental cost of adding article to newsletter that was to be printed anyway less than \$50.; no violation. *Regents of U of Colo. v Meyer*, 899 P2d 316 (Colo App 1995).

FCPA, Sec. 117: Actions expressly permitted (cont.)

- ▶ A covered entity may spend public money to (a) create and (b) dispense a “factual summary” which shall include arguments both for and against the proposal and shall not contain a conclusion in favor of or against the issue.
 - ✓ General Assembly intended to allow local “Blue Book” style materials.
 - ✓ Must concern a matter of “official concern,” which are limited to issues that will appear on an election ballot in the jurisdiction.
 - ✓ One-sided “brochure did not qualify; effect was to urge electors as to how to vote; Sec 117 violated. *Skruch*, 107 P3d at 1144
- ▶ The right of elected officials expressing their personal opinion on any issue, and the right of officers and employees of covered entities to spend their own money on issue election advocacy are expressly preserved.
- ▶ A covered entity may pass a resolution or take “a position of advocacy” on any ballot issue, and may report the passage of the resolution “through established customary means,” exclusive of paid advertising.

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FCPA, Sec 117: Complaints.

- ▶ The complaint provisions for the FCPA were rewritten in 2019 and are now located at C.R.S. 1-45-111.7.
- ▶ Many municipalities adopted local complaint processes similar to those set forth in Sec. 111.7, after the 2019 legislation provision directing that campaign finance complaints in municipal elections be filed with the municipal clerk.
- ▶ Independent hearing officer is used.
- ▶ The complaint process focuses on initial review of a complaint for adequacy and possible cure as a means of avoiding hearings and further enforcement proceedings. The emphasis is on gaining compliance rather than imposing fines. Penalties are assessed when a violation cannot be cured, or a violation is not cured.
- ▶ Standard for cure is “substantial compliance” with FCPA requirements.
- ▶ Cure option recognized in Sec 117 cases.

FCPA, Sec 117: Sanctions

- ▶ Sec 117(4)(a): violations of Sec 117 are “subject to [penalties in Colo. Const. Art XXVIII(10(a)] **or** any appropriate order or relief, including an order directing that [the violator] reimburse the fund...of the political subdivision...from which such money was diverted.” (emphasis added).
 - ✓ Injunctive relief and restraining orders are also allowed.
 - ✓ In *Sheritt v Rocky Mt Fire Dist.*, 205 P3d 544 (Colo. App.2009), court rejected a claim that the severe Constitutional penalties (2-5X amt spent) were required in Sec 117 cases, citing disjunctive language of Sec. 117(4)(a)
- ▶ Sec 117(4)(b): members of a public body “who voted in favor of or otherwise authorized” the violation of Sec. 117 may be ordered to share in reimbursement of public funds.
- ▶ Emphasis on “cure” in FCPA complaints, together with express provisions for reimbursing public funds in Sec. 117 may indicate trend, at least in non-egregious cases.

Colorado Federal Courts Weigh In.

- ▶ *Mountain States Legal Found. v. Denver Sch. Dist. # 1*, 459 F. Supp. 357, 360-361 (D.Colo.1978):

The freedom of speech and the right of the people to petition the government for a redress of grievances are fundamental components of guaranteed liberty in the United States. (citation omitted). A use of the power of publicly owned resources to propagandize against a proposal made and supported by a significant number of those who were taxed to pay for such resources is an abridgment of those fundamental freedoms. Specifically, where the proposal in question [is] placed before the voters in the exercise of the initiative power.... [p]ublicly financed opposition to the exercise of that right contravenes the meaning of both the First Amendment to the United States Constitution and Article V, Section 1 of the Constitution of Colorado.

- ▶ *Mt States* was endorsed by the 10th Circuit in *Campbell v. Joint Dist. 28-J*, 704 F2d 501 (10th Cir. 1983). The above language from *Mt States* was again quoted in *Colorado Taxpayer's Union v Romer*, 750 F. Supp. 1041 (D. Colo. 1990), wherein the court also said:

There is a difference between the conduct of public officials in speaking out on controversial political issues and their use of governmental power to affect the election. Coercion is the core of power in government. Whether that coercion is applied directly through compulsory or prohibitory laws or indirectly through taxation and expenditure, the use of that power is limited by constitutional controls, including the First Amendment.

FCPA: Local Option for Home Rule Municipalities

- ▶ 1-45-116. (in pertinent part) - Home rule counties and municipalities.
“Any home rule county or municipality may adopt ordinances or charter provisions with respect to its local elections that are more stringent than any of the provisions contained in this act. ... The requirements of article XXVIII of the state constitution and of this article shall not apply to home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address the matters covered by article XXVIII and this article.”
- ▶ In the context of Sec 117, is this a gift we really don't need? An invitation to “anti-gummint” types to impose further restrictions?



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