Drafting Campaign Finance Laws to Survive Challenges

BY DEBORAH GOLDBERG

This article was adapted from two chapters of Writing Reform: A Guide to Drafting State and Local Campaign Finance Laws, *D. Goldberg, ed. New York: Brennan Center for Justice, NYU School of Law, rev. ed. 2004.*

In today's political climate, virtually all new campaign finance laws (and even some old ones) are likely to be challenged in court. Some reformers may welcome the challenge and accept the risk of defeat, hoping to push the envelope of permissible regulation. But others will prefer to meet current legal constraints, to maximize the chance of achieving durable reform.

In either case, reformers are far more likely to succeed if they keep the prospect of challenge in mind at all times. Even before drafting begins, there is much work that can and should be done in anticipation of litigation. If the work is done thoroughly and publicized well, it may even forestall legal challenge or help to narrow the scope of any lawsuit.

Following certain basic guidelines for legislative drafting can also increase reformers' chances of success, whatever their goals. Careful drafting enhances any law's chances of survival. Moreover, careful drafting helps to ensure that a court does not use sloppy draftsmanship as an excuse to avoid substantive issues in a test case.

Even the most careful drafting will not help campaign finance reformers working on the local level, however, if the locality lacks the power under state law to enact its own campaign finance regime. This article flags some problem areas to which drafters should be sensitive. It closes with a note of caution for local campaign finance advocates.

Legislative Findings

Many statutes begin with legislative findings. The findings recite facts that help to explain why the law has been enacted.

When a campaign finance law is constitutionally challenged, a court may look to the findings for evidence of (1) a governmental interest that justifies the regulation or (2) an appropriate fit between the particular measures adopted and the purpose to be achieved. The findings should help to establish that the asserted interest is real (rather than illusory or a matter of conjecture) and that the measures adopted will promote the interest to a legally sufficient extent. For example, if the state asserts an interest in preventing corruption, the findings could summarize evidence of corruption under the status quo. The more novel the asserted interest, the more important it is to provide well-documented findings.

To develop the facts that should be reflected in findings, a state legislature can hold formal hearings on the need for a particular bill and the justification for its provisions. The legislature can also initiate formal investigation into issues of concern. These proceedings facilitate collection of at least some of the data the state will need to defend the new law, should it be challenged later.

A court may look to findings as proof that the drafters considered appropriate facts before enacting the challenged law. Although statutes can survive without findings, the prospects for survival are

WILEY InterScience® DISCOVER SOMETHING GREAT

© 2006 Wiley Periodicals, Inc.
Published online in Wiley InterScience (www.interscience.wiley.com)
National Civic Review • DOI: 10.1002/ncr.134 • Summer 2006

enhanced if the law includes them. The courts may be more inclined to defer to the judgment of the legislature, for example, if the basis for that judgment is reflected in explicit findings.

It is recommended to include a findings section in any campaign finance law. Reform-minded legislators should be encouraged to hold the hearings and conduct the investigations that help to build the factual case for the new law. If ballot initiatives are the only avenue for reform, the drafters (and those working with them) need to develop the facts that can be included in a findings section.

> Following certain basic guidelines for legislative drafting can increase reformers' chances of success, whatever their goals. Careful drafting enhances any law's chances of survival.

Findings may in fact be even more important when reform is introduced through a ballot initiative. Some courts have been more willing to second-guess the judgment of the voters than the judgment of the legislature, in part because the referendum process does not have formal hearings or other formal fact-finding proceedings. To the extent that a findings section provides evidence of fact development akin to that accomplished by legislatures, initiative proponents are likely to improve their chances of judicial deference.

As a practical matter, findings may be presented as a series of numbered sentences, each stating a separate fact that justifies legislative action (or passage of a ballot initiative). Drafters must balance the need for completeness with the need for simplicity. The point is to group facts into a reasonably short list of findings that explain the basis for the reforms adopted.

Finally, findings are far more useful if they are attuned to the specific jurisdiction in question. Boilerplate findings that could be made without any real factual investigation will not necessarily hurt an effort at reform, but they are likely to be of limited value. Drafting jurisdictionally specific findings also furnishes an incentive to develop evidence needed to defend the law should litigation ensue.

Statutory Purposes

Explicitly stating a statute's purposes may help to establish the governmental interest that the state seeks to advance in enacting a campaign finance law. Sometimes drafters include a separate section (usually following the findings) with a statement of the statutory purposes. Sometimes the findings section includes declarations that identify the goals to be achieved with the law.

The statement of purposes should be carefully matched to the provisions adopted in the body of a campaign finance law. In its decision in *Buckley v. Valeo,* the U.S. Supreme Court in 1976 initially recognized only a limited range of state interests justifying common types of regulation. The list has not grown substantially in the ensuing thirty years. Nothing in *Buckley* forecloses judicial recognition of additional justifications for reform, of course, but some courts reject the legitimacy of any purpose not explicitly blessed by the Supreme Court.

Goals that galvanize reformers and voters may not necessarily be the purposes accepted by the Supreme Court. Focus groups tend to report high positive responses to statutes aimed at equality, fairness, or "leveling the playing field," while *Buckley* rejected in no uncertain terms Congress's effort to limit spending by moneyed interests to enhance the relative voice of others.

Even though *Buckley* permits leveling of the playing field through public funding systems that do not place mandatory limits on spending but rather make resources available to candidates who accept voluntary spending limits, opponents of reform invariably trot out every reference to "leveling the playing field" as proof of an impermissible state interest. To

promote survival of bills or initiatives, drafters who use the phrase should make clear that they are "leveling up" by providing public funding, not "leveling down" by limiting spending. Listing purposes that the Supreme Court has spurned is a recipe for disaster, at least until the Court reconsiders its reasoning, and there is some risk even in listing purposes that are technically open for judicial consideration but have not yet been explicitly endorsed by the Court. To the extent that drafters wish to identify state interests that the Supreme Court has not considered, the statement should be clear that those interests are supplemental to, and not a substitute for, recognized governmental purposes.

Clarity and Precision

A campaign finance law that is vague (difficult to understand) or ambiguous (subject to more than one interpretation) will be subject to constitutional attack. If individuals or groups cannot tell whether the law applies to them, or what types of conduct it covers, they may be deterred from engaging in certain activities that would actually be legal and in fact are safeguarded by the First Amendment. The deterrence factor is most serious if the law includes provision for criminal penalties. To prevent this chill of protected speech and association, statutes must be drafted so that they are clear and precise.

If statutes are not clear and unambiguous, a court has two choices. First, it may construe the offending term to eliminate the problem, as the Supreme Court did in *Buckley* with respect to the definition of *relative to* a clearly identified candidate. There is no guarantee, of course, that courts will interpret the meaning of vague or ambiguous terms as the drafters intended. The court may create new problems by eliminating the vagueness or ambiguity, as *Buckley* did. For example, *Buckley*'s attempt to "clarify" federal law resulted in the "magic words" test for express advocacy—exempting millions of dollars of ads that avoided terms such as "vote for" or "vote against" from regulatory requirements, until enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA), also known as the McCain-Feingold bill.

The court's second option when statutory language is vague or ambiguous is simply to invalidate the affected provision. If the provision is not "severable" from the rest of the law (because the law would not have been enacted without the provision), the court may strike down the entire statute.

To avoid problems of vagueness or ambiguity, key statutory terms should be defined explicitly. The definitions should use plain English and take care not to introduce new vague or ambiguous language. One set of definitions should cover all of the new legislative provisions, so that defined terms are used consistently. If the new law amends an old one, care must be taken to ensure that definitions either are consistent with existing law or expressly revise existing provisions. Minimizing the use of complex sentences can also help to improve the clarity of the statutory text.

Scope

Obviously, the needs of each state should determine the scope of any campaign finance law governing its elections. But even when the system is deeply troubled, it is not necessarily a good idea to tackle everything at once. A simple, easily administered law that focuses on the state's most pressing problems has a better chance of withstanding assault than a long and complicated statute that seeks to close every conceivable loophole. If initial steps do not cure the problems, additional provisions can be added later, and there may then be a better factual record justifying closing the loopholes at that point.

Complicated statutes invite the claim that the legal and bookkeeping costs a group must incur just to understand and comply with the law cut substantially into its electoral activity. If the "practical effect on [a political organization] is to make engaging in protected speech a severely demanding task," the

group may be entitled to an exception from the law on First Amendment grounds.

Enforcement

If a campaign finance law is to have any teeth, it must include enforcement provisions to deter violation. Reformers may choose to impose civil liability, criminal penalties, or both. Here again, pulling punches (at least initially) may be the better part of wisdom. If violations abound notwithstanding consistent civil enforcement, more punitive measures can be considered later.

Although reformers outraged by the undue influence of money on politics may want to throw the book at violators of campaign finance requirements, any statute imposing criminal liability on violators draws more intense judicial scrutiny. A criminal record is no laughing matter, and reformers cannot simply assume that governmental authorities will use criminal enforcement powers reasonably. Where criminal penalties are a possibility, courts take concern about vagueness or ambiguity very seriously and are likely to give every benefit of the doubt to opponents of reform. A punitive approach can therefore be self-defeating.

Red Flags

Although the law of campaign finance is changing all the time, certain areas are better settled than others. In particular, some kinds of regulation have been struck down in whole or in part, either by the Supreme Court or by *every* lower court considering them. Including such regulations in a new law, however attractive they may seem in principle, raises a red flag for opponents of reform.

To date, red-flag provisions have included off-year fundraising bans, mandatory limits on spending by candidates or their campaigns, and monetary limits on independent expenditures.

It is not *impossible* for a particular court to be induced to uphold such provisions, given compelling facts that distinguish the statute or initiative in question from others previously invalidated. But persuading a court to buck the clear legal trend (and perhaps to test the limits of a Supreme Court precedent) means a steep, uphill battle. Moreover, including these measures in a larger reform package could undermine the entire statute, if a hostile judge treats them as evidence of insensitivity to constitutional concerns. Maximizing the chances of having your campaign finance law upheld therefore means avoiding these measures.

On the other hand, some jurisdictions may want to push the envelope of reform. Before 2000, a contribution limit of less than $1,000 qualified as a red-flag provision. But Missouri persevered in defending its limits ($275 for a representative, $550 for a senator, and $1,075 for a statewide office) and won. With the U.S. Supreme Court's decision in *Nixon* v. *Shrink Missouri Government PAC,* the limits have been reinstated and other courts have upheld contribution limits as low as $100 for legislative candidates in some states. Low contribution limits might not have come off our red-flag list if states had not been willing to risk having such limits overturned.

Disclosure statutes that were not limited to express advocacy were a red flag until recently. With the decision in *McConnell* v. *FEC* in 2003, it is now clear that states can regulate campaign advertising in the preelection period, even if the ads do not use magic words. In *McConnell,* the congressional sponsors of BCRA defended the statute's "electioneering communications" provisions in the Supreme Court and overturned adverse lower court decisions in most of the country.

In 2005, the Supreme Court decided to review *Randall* v. *Sorrell,* a case challenging Vermont's mandatory spending limits—another red flag. In the Vermont case, a federal appeals court ruled that *Buckley* did not impose a rule per se against such limits, and that Vermont had compelling interests in

enacting them. We will have a decision in that case by the end of June 2006.

Severability Clauses

A severability clause expresses the drafters' intent to preserve parts of a campaign finance law that are found constitutional even if other parts are invalidated. In deciding whether to include such a clause, or how it should be drafted, reformers should consider carefully the potential consequences of partial invalidation. Some critics of *Buckley* argue, for example, that the "arms race" created by contribution limits in the absence of expenditure limits is worse than no campaign finance regulation at all. Whether drafters want to implement any statutory provisions that survive scrutiny or prefer instead to have certain provisions stand or fall together, the intent should be explicit in the text of the law.

It is also possible to have fallback provisions, in case part of a statute is invalidated. Such a strategy may be desirable when testing known red-flag provisions. In BCRA, for example, Congress posed a bright-line test for electioneering communications that was ultimately upheld by the Supreme Court. Had it not been upheld, BCRA contained a back-up definition offering a second-best alternative for regulating sham issue ads. The fall-back provision would also have been subject to challenge, of course, but typically the back-up is designed to be less constitutionally questionable than the principal provision.

A Note on Local Legislation

Local reform efforts raise a concern not encountered in state-level campaign finance reform. Unlike states, municipalities are not sovereign in their own right. Localities are chartered entities limited to the powers that the state confers upon them. Some states give broad authority to local government through provision of home rule laws. Others retain tighter or even complete state control. The scope of home rule may be discerned from the state constitution, state statutes, and judicial decisions interpreting those laws.

Local activists thus should not automatically assume that their municipality has the power to enact the campaign finance provisions of its choice. Reformers wishing to draft laws relating to financing of elections in any jurisdiction smaller than the state (counties, cities, towns, villages) should first confirm that such an enterprise is authorized. State law may preclude political subdivisions from adopting laws pertaining to elections or require consultation with the state. State law will also govern the procedures that may be used to adopt and amend local laws, including campaign finance measures. If the state has its own campaign finance legislation, that law may limit the scope of local reform. If a locality is severely constrained by miserly home rule provisions, its only option may be legislative action at the state level or a state constitutional amendment.

> Local activists should not automatically assume that their municipality has the power to enact the campaign finance provisions of its choice.

Where local reform is possible, some localities have been successful in enacting constitutionally questionable provisions. As long as opponents of campaign finance reform conclude that local laws are not worth the trouble of litigation, the questionable reforms stay on the books. For example, Albuquerque, New Mexico, had mandatory spending limits that went unchallenged for decades. But as campaign finance reform gained traction throughout the country, moneyed interests stepped up their opposition, and even local laws—including Albuquerque's—have come under attack (successful, in the case of this city).

Local reformers therefore should be vigilant to ensure that their laws are constitutional and consistent with state law, unless they are seeking to mount a challenge to existing legal constraints. Mounting such a challenge at the local level carries special risks. If the law is passed by means of initiative, the

locality may be unwilling to defend it vigorously when it is challenged in court. If the local legislature enacts the law, the locality may have trouble defending against high-powered opposition.

Ultimately, of course, proponents of reform must decide what risks they are willing to take. To make the decision wisely, however, reformers must first understand fully what those risks are. For help in understanding constitutional constraints, reformers might consult *Writing Reform: A Guide to Drafting State and Local Campaign Finance Laws* (Brennan Center, 2004; http://www.brennancenter.org/programs/prog_ht_manual.html). Attorneys at the Brennan Center are also available at 212/998–6730 to offer assistance.

References

Bipartisan Campaign Reform Act of 2002, H.R. 2356.

Buckley v. *Valeo,* 424 U.S. 1 (1976) (*per curiam*).

Nixon v. *Shrink Missouri Gov't PAC,* 528 U.S. 377 (2000).

McConnell v. *FEC,* 540 U.S. 93 (2003).

Deborah Goldberg is director of the Democracy Program at the Brennan Center for Justice at NYU School of Law.

For bulk reprints of this article, please call (201) 748-8789.