COSTLY Speech

Failure to Follow Legal Requirements for Political Contributions Can Mean Serious Trouble

MARK HANSEN

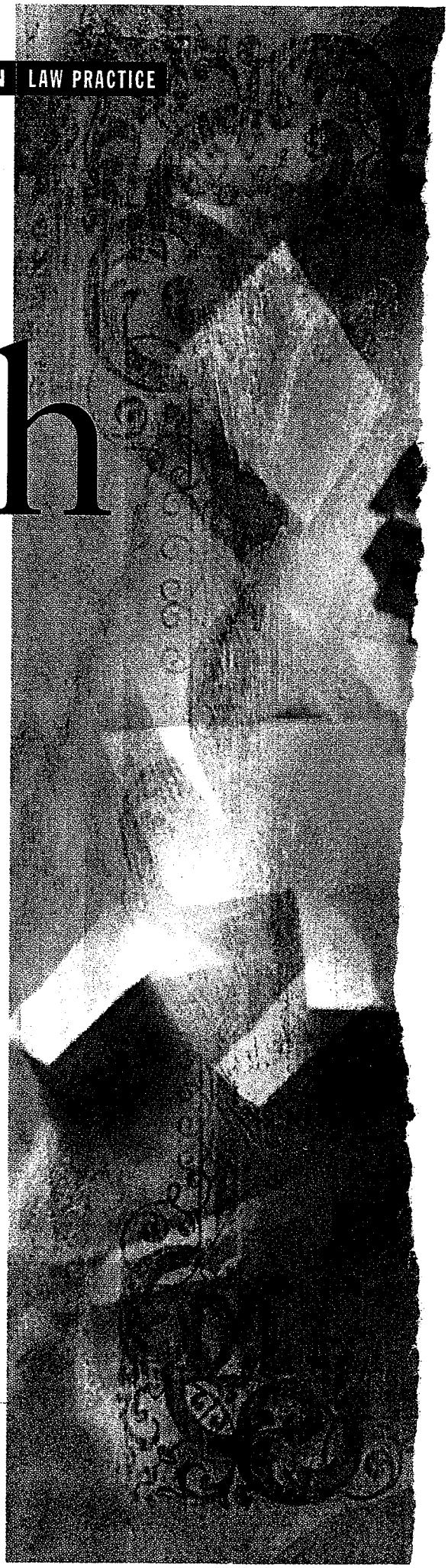

ILLUSTRATION BY TORNE WHITE

OUR SYSTEM ENCOURAGES PARTICIPATION in the democratic process, but sometimes the cost of putting in our two cents' worth on behalf of political candidates or causes can be greater than anticipated.

Suppose, for instance, that one of your clients developed a sudden interest in politics. And the client went out on his own one day and spent nearly $100,000 on television commercials calling for the defeat of a candidate for local public office.

The client just assumed he was exercising free speech rights for which he is accountable only to himself. But somebody at the ad agency said the campaign-finance law in your client's state has registration and reporting requirements, which apply to anybody who spends more than $25 on political advertising that "expressly advocates" the election or defeat of a clearly identified candidate.

The client decided he could figure out what needed to be done and do it himself. But the paperwork was more complicated than expected, and he filled it out incorrectly, leaving himself open to both civil and criminal penalties for violating the law.

Naturally, that's when the client calls to ask that you straighten the whole thing out. But doing so is probably not going to be easy.

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The scenario is not unusual in a post-Watergate age in which money plays a vital role in the political campaign process. And the layers of federal and state regulations aimed at controlling the flow of money from individuals, businesses and interest groups are becoming increasingly complex.

Just ask Mike B. Wittenwyler, an attorney at the Madison, Wis., law office of Godfrey & Kahn, who is among the small but growing number of lawyers around the United States who concentrate in the burgeoning field that some call political law. The field covers everything from campaign finance to election law, lobbying and ethics.

In the case of many political campaign contributors, says Wittenwyler, "Unless somebody tells them otherwise, they wouldn't even know this is something they should talk to a lawyer about."

That goes for corporations, labor organizations, trade associations and interest groups as well as individuals, according to Wittenwyler and other attorneys in the political law field.

The reasons, they say, are that the laws governing political activity are complex and ever-changing. The most dramatic recent example of the fluid nature of the law in this area is the Bipartisan Campaign Reform Act, which was enacted earlier this year and will take effect the day after the Nov. 5 elections. Experts say the act will bring the most sweeping change to election campaign law in a generation—if, that is, the courts uphold its constitutionality. It faces numerous legal challenges by opponents ranging from the National Rifle Association to the American Civil Liberties Union.

ABA Connection

PROGRAM

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Turn to page 42.

DIRE CONSEQUENCES

INDIVIDUALS, CORPORATIONS AND OTHER ENTITIES MAKing political campaign contributions often fail to recognize that the cost of breaking the laws can be severe, in terms of statutory penalties (both civil and criminal) and, especially for corporations and organizations, public relations consequences.

Consider what happened to MSE Technology Applications Inc., a Montana-based waste disposal company. In November 2000, the company paid $19,500 in civil fines to the Federal Elections Commission for violating the laws on political contributions. The civil fine followed a plea agreement with federal prosecutors in a related criminal action in which the company was placed on probation and fined $97,500; the corporate officers also agreed to perform 200 hours of community service. The penalties stemmed from a 1998 luncheon at which the company gave 13 of its executives $750 "community incentive awards" and then suggested that the executives each contribute between $500 and $1,000 to the campaign of Sen. Christopher "Kit" Bond, R-Mo.

Then there's the case of businessman James Riady, whose family owns the Indonesia-based Lippo Group. In March 2001, Riady agreed to pay a record $8.6 million in fines after pleading guilty to charges of conspiring to defraud the United States. Riady was accused of using foreign corporate funds to reimburse contributors to several Democratic campaigns, including Bill Clinton's 1992 presidential campaign.

Jan Witold Baran, a partner at the Washington, D.C., firm of Wiley Rein & Fielding, says the general public, including many in business and the professions, has little appreciation for how convoluted the rules governing political campaign activities have become.

"There are 10 people [in my firm] who depend on this kind of stuff for a living," says Baran, author of *The Election Law Primer for Corporations*, published by the ABA Section of Business Law (the third edition was due out in September).

Despite the risks, individuals, corporations and interest groups are eager to show their support for political candidates through financial contributions.

"It's part of the democratic process," says Wittenwyler. Corporations, for instance, "want to advance their business interests, and most are pragmatic enough to know they can't favor one side or the other. They see it as a practical reality of operating in a highly regulated environment. To them, it's just part of the cost of doing business."

Individuals often are motivated by their political beliefs to support candidates, but corporations generally enter the field out of at least a measure of self-interest, says Kenneth Gross, who heads the political law department in the Washington, D.C., office of Skadden, Arps, Slate, Meagher & Flom.

Nevertheless, says Gross, "It's not an area where most clients are looking to push the envelope. They don't want to end up on the front page of *The New York Times* because they did something that was perfectly legal but too cute."

Because the potential ramifications of a client's political campaign contributions are so far-reaching, attorneys in the field say it is vital to be clear on what the client wants to accomplish through those contributions.

"You need to know what the client's objectives are before you can figure out how to achieve those objectives within the bounds of the law," says Wittenwyler.

Gross says the first thing he tries to determine is whether the client's objective is legal under federal or state campaign funding statutes. The answer to that question, he says, depends on both the nature of the client and the nature of the ultimate recipient of the contribution. Gross says it also is important to recognize how the client's actions will be perceived.

Wittenwyler says the second question he asks is where the client wants the contribution to go at the end of the

day. "Everything depends on who's giving and who's receiving the money," he says.

If the client is a corporation, the tax codes may come into play, says Wittenwyler. Under federal tax law, for instance, a for-profit corporation may not deduct a campaign contribution as a business expense. And nonprofit corporations face all sorts of tax code restrictions on what they can do with their money.

LAYERS OF REGULATION

CAMPAIGN FINANCES ARE NOW CLOSELY REGULATED PRIMARILY at the federal and state levels, although a growing number of local ordinances are being passed, as well. In California, for instance, a number of municipalities and counties have imposed limits on contributions that may be made to candidates running for local office.

At the federal level, political contributions are governed primarily under the Federal Election Campaign Act of 1971, as amended. 2 U.S.C. § 431, et seq. The amendments, which were prompted at least in part by the Watergate scandal that led to President Nixon's resignation, introduced limits on campaign contributions.

The 1974 amendments also included limits on how much candidates for federal office could spend, but those were struck down by the U.S. Supreme Court in *Buckley v. Valeo,* 424 U.S. 1 (1976), as restrictions on political speech in violation of the First Amendment. The justices did not see similar problems with restrictions on campaign contributions, which they upheld as a reasonable legislative effort to prevent contributors of large amounts from having undue influence on candidates.

Ethics rules governing the conduct of public officials in regard to gifts, travel and conflicts of interest have been enacted in virtually every jurisdiction in the country. And regulations on lobbying, introduced at the federal level in 1995, have expanded to every state, as well as many cities and counties.

Unfortunately, the rules and regulations governing political activity vary greatly from one jurisdiction to the next, say Baran and other experts in political law—and there's nothing intuitive about any of them. Moreover, a legacy of *Buckley* is that different rules apply for individuals on the one hand, and corporations, labor organizations and other groups on the other.

Compared to the rules for corporations and organizations, the federal campaign contribution rules for individuals are relatively straightforward, says Baran.

The current law limits contributions an individual may make to candidates for federal office to $1,000 per candidate per election. An individual must limit his or her total annual contributions to all candidates for federal office to $25,000.

Most states also limit individual contributions to state and local candidates. Those limits currently range from a low of $100 per election for candidates in local races in Montana to a high of up to $30,700 for candidates running for statewide office in a general election in New York.

Contribution limits may apply to a single calendar year or an entire election cycle. And there may be other restrictions on when a contribution can be made. A number of states, for instance, bar contributions to certain candidates when the legislature is in session.

Things quickly get more complicated when it comes to corporate contributions, according to Baran and other political law experts. The same rules that govern for-profit corporations also generally apply to nonprofit corporations, labor unions, trade associations and other membership organizations, national banks and incorporated cooperatives (such as businesses owned by their member-customers).

Under federal law and some state statutes, corporate contributions to candidates are prohibited. Other states allow corporate contributions but limit how much a corporation may give to any one candidate or group of candidates in any given year or election cycle. A few states allow corporate contributions without limits.

Restrictions on corporate contributions often are related to the type of work the company does, says Trevor Potter, a former chairman of the Federal Elections Commission who now practices at Caplin & Drysdale in Washington, D.C.

Potter, who is a member of the ABA Standing Committee on Election Law, recounts, for instance, that a client, whose gas station in Florida sells food, was prohibited from raising or spending more than $100 on an election for the state agricultural commissioner because the client receives a food license from the state agriculture department.

"That's the kind of thing you wouldn't ... expect when you get into these types of regulations," notes Potter.

PAC-ING IT IN

THERE IS A FAIRLY MAJOR LOOPHOLE IN THE CAMPAIGN laws that in effect allows corporations to engage in political activities even though they are prohibited from making direct contributions to candidates. Those provisions permit a corporation or other organization to set up a "separate segregated fund"—better known as a political action committee, or PAC—that may collect voluntary personal donations, and make contributions to candidates and political committees.

Under federal law, PACs can be connected to a sponsoring organization or be independent. They also may operate on behalf of a single candidate or multiple candidates. And all PACs must register with the Federal Elections Commission, designate a treasurer and file periodic reports of their finances.

There are separate limits on contributions to PACs and how much they may in turn give to candidates. Under federal law, a PAC may receive up to $5,000 per year from any one contributor. A multicandidate PAC (a registered committee with contributions from more than 50 donors that supports at least five candidates) may contribute up to $5,000 per candidate per election. Otherwise, a PAC may contribute up to $1,000 per candidate per election.

And corporations still are free to contribute money to groups that engage in political communication that does

not expressly advocate the election or defeat of a specific candidate. Experts say, however, that corporate spending on issue advocacy continues to be a controversial area, and they caution that the status of regulations governing such activity must be monitored carefully and continuously.

Federal law prohibits contributions from government contractors, contributions made in the name of someone other than the true contributor, and cash contributions in excess of $100. Federal law also prohibits national banks and corporations authorized by acts of Congress from making contributions to campaigns at any level.

Ethics regulations are nearly as complicated as rules regulating campaign finances.

In another key restriction, federal law prohibits foreign nationals from contributing to election campaigns at any level. An individual is a foreign national if he or she is a citizen of another country and has not been admitted for permanent residence in the United States.

The same prohibition applies to a corporation formed or headquartered in another country.

Ethics regulations, which apply to the conduct of public officials while they are in office, have become nearly as complicated as the rules regulating campaign finances.

Under federal law, for instance, executive branch officials may receive—but may never solicit—gifts valued at less than $20. Members of Congress and their staffs may accept gifts worth $50 or less, provided the total amount of gifts from one giver does not exceed $100 in a calendar year. Gifts valued under $10 are not governed by the limits, nor are meals of $10 or less.

Under the law, the cost of gifts is set according to their market value, not the price actually paid by the donor. And the recipient of a gift is not allowed to pay the difference if the value of a gift exceeds the dollar limits of the rule. If multiple, divisible gift items worth less than $50 each are offered, the intended recipient may accept one item, but must buy or refuse the others.

Here's how the law works in a practical setting: If a constituent offers his or her congressional representative two tickets to a pro football game, and each ticket has a face value of $45, the representative may accept one ticket as a gift, but would have to buy or decline the other one. If, however, the constituent offers the representative two tickets that each have a face value of $65, the representative would have to turn them both down.

Then there are the regulations on lobbying, which are now in effect at the federal level as well as in all states and even a growing number of municipalities, such as New York City and Los Angeles.

The federal rules, for instance, require that any individual or organization that intends to spend a certain amount of money on lobbying ($20,500 for in-house lobbyists and $5,000 for retained outside lobbyists) to register with the secretary of the Senate and the clerk of the House of Representatives. Periodic reports also must be filed that identify the people doing the lobbying, the issues being lobbied, the branch of government being lobbied and the amounts spent on lobbying activities.

LEGAL RUMBLES OVER NEW ACT

TRUE TO THE FLUID NATURE OF POLITICAL LAW, THE next big change could be right around the corner if the Bipartisan Campaign Reform Act of 2002 goes into effect as scheduled on Nov. 6, the day after the 2002 elections. A number of legal challenges, however, could prevent that from happening.

The centerpiece of the act, which President Bush signed into law in the spring after both the House and Senate passed it by comfortable margins, is a ban on "soft money"—contributions made by corporations, labor organizations and wealthy individuals to political parties rather than candidates.

Soft-money contributions have long been controversial because of the huge amounts of funds they have produced for the major political parties and because of allegations that some soft money is used on behalf of individual candidates in violation of the spirit, if not the letter, of the Federal Election Campaign Act. (The ABA's policy-making House of Delegates in 1998 voted to oppose soft-money contributions and the use of soft money in presidential and congressional election campaigns.)

The act contains two other key provisions:

- Corporations, labor organizations and other groups may not run paid advertisements that refer to specific candidates in the 60 days prior to a general election or within 30 days of a primary.
- Individuals may contribute higher amounts to specific candidates. An individual now may contribute $2,000 to a candidate each election, compared to the $1,000 cap that has been in effect since 1974. The new limit will be indexed for inflation starting in 2003. An individual's total contributions to all candidates during any two-year election cycle will be limited to $95,000.

The act also allows state and local parties to accept limited soft-money donations of up to $10,000 per individual per year for get-out-the-vote drives and voter registration campaigns.

Opponents of the act, including a potpourri of interest groups from across the political spectrum, are challenging it on a variety of constitutional grounds. They allege that the act directly regulates core political speech, unconstitutionally favors some speakers over others, and imposes impermissible burdens on the activities of political parties, officeholders, candidates and tax-exempt organizations.

Anticipating those challenges, Congress authorized an expedited court review of the law with any challenge heard first by a three-judge panel of the U.S. District Court for the District of Columbia, followed by an appeal directly to the U.S. Supreme Court.

Eleven separate suits have been filed, starting on the

day President Bush signed the act into law. The suits have been consolidated as *McConnell v. Federal Election Commission*, No. 02-582 (D.D.C.).

Under the timetable adopted by the three-judge panel that is hearing the case, discovery is set to wrap up before the end of October. Oral arguments are scheduled for Dec. 4, and the panel is expected to issue a ruling soon afterward.

That means any appeal could be filed with the U.S. Supreme Court before the end of the year, and the court conceivably could issue a decision before the close of its current term in June, say Wittenwyler and other lawyers watching the case.

Baran, one of the lead attorneys for the legal challenges, says there is enough in the new law to offend just about everybody. "The reformers, as I like to say, are uniters, not dividers," he says.

To date, much of the battle has focused on the soft-money prohibition and the curbs on advertising. But one complaint alleges that the act's new $2,000 cap on contributions to candidates is excessive and gives wealthy individuals a disproportionate ability to support candidates of their choice in violation of the equal-protection rights of others. And a complaint filed by two congressmen claims that their equal-protection rights are violated by the act's ban on corporate contributions to political parties to facilitate get-out-the-vote drives.

The dispute over the act has fostered some strange political alignments. The official position of the ACLU, for instance, is that much of the act violates the First Amendment. Meanwhile, however, nine former top officials of the ACLU, including Burt Neuborne, the organization's former legal director who now serves as legal director of the Brennan Center for Free Speech at New York University School of Law, have come out in support of the act.

"That just highlights the difficulty of the issues this case presents in striking the proper balance between free speech on one side and representative government on the other side," says Deborah Goldberg, deputy director of the Brennan Center's democracy program.

Meanwhile, the act is running into difficulties with the Federal Elections Commission, which is empowered to develop rules implementing the act's provisions. Proponents of the act, including its chief sponsors—John McCain, R-Ariz., and Russ Feingold, D-Wis., in the Senate; and Christopher Shays, R-Conn., and Martin T. Meehan, D-Mass., in the House—say the regulations adopted by the FEC undermine and compromise the main provisions of the act.

The lawmakers say they will back a proposed lawsuit to overturn the FEC's regulations, as well as proposed legislation to revamp the structure of the commission.

The four FEC commissioners (out of six) who approved most of the controversial regulations have vigorously defended their actions, arguing that their interpretations of the act were grounded in the language of the law and reflected the views of many lawmakers who voted for the legislation.

Stay tuned. This one is too close to call. ■