



Campaigning for Re-Election: Legal and Ethical Red Flags

www.ca-ilg.org/document/running-re-election

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- "How to Run a Clean Campaign" (www.ca-ilg.org/win).
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Question: *I'm running for re-election and anticipate a very competitive campaign. I want to succeed but I don't want to violate any legal or ethical boundaries. What are some of the issues I should be alert to?*

Answer: Candidates can encounter ethical and legal issues that serve as red flags in at least two contexts:

1. The laws and ethical considerations related to **how you run your campaign** for office.
2. As you run for re-election, **you still have to function as an office-holder**. This can create its own set of issues, including some of the following.

Issues of Campaign Contributions

Some people donate to a candidate's campaign because they believe in the candidate and share his or her vision for the community. Others do so with the hope of influencing the candidate's actions as a public official.

Generally, the ethics laws regarding campaign contributions emphasize disclosure rather than disqualification.¹ The emphasis on disclosure enables the public to assess for itself the degree to which an official could be influenced by campaign contributors who appear before the agency.

Restrictions on Campaign Fundraising

It's not a good idea to ask for or accept campaign contributions from people who have business pending before an office-holder's agency — or will in the foreseeable future. Soliciting your agency's vendors for contributions to your re-election campaign is also a poor practice. The goal is to avoid any inference that receiving a

campaign contribution will influence your actions, whether it's a vote on a policy matter or a decision to use the contributor's company or firm to provide goods or services to your agency.

A fairly narrow category of circumstances characterizes the situations (related to pending license, permit or entitlement proceedings) in which certain local agency officials legally may not receive or ask for significant campaign contributions (more than \$250).² The restriction applies while the proceeding is pending and for three months afterward.³

Generally speaking, this prohibition does *not* apply to officials directly elected to the board of local agencies while they are acting in the scope of the office to which they were elected. However, this prohibition *does* include elected officials when they sit as members of other boards to which they were not elected, such as joint powers agencies, regional government entities or local agency formation commissions; the prohibition *does* apply to planning commissioners and other appointed officials.⁴

Nevertheless, it may be good practice to voluntarily avoid asking those with matters pending before the agency for contributions, given that the law is a floor, not a ceiling, for ethical conduct.

A number of state laws protect staff from being pressured to participate in campaign activities. For example, state law prohibits elected officials from seeking campaign contributions from staff.⁵ State law also forbids candidates and officials from making the support of a person's candidacy a condition of employment or compensation decisions.^{6,7}

The prohibition against seeking campaign contributions from staff does not apply to broadly based requests for contributions that happen to include staff or to contributions that staff may make without being asked to do so. Be aware, however, that as part of their professional codes of ethics,⁸ a number of local agency professionals will not make campaign contributions in their jurisdictions regardless of their views on a candidate's merits.

Beware of the Quid Pro Quo

Be alert to situations where potential contributors try to put you in the position of linking your actions as a decision-maker to their contributions to your campaign. This kind of "if you do this for me, I will do that for you" (or quid pro quo) violates both state and federal criminal laws.⁹

Endorsement Issues

Agreeing to take an action in return for a person or group's endorsement is just as much a violation of criminal laws against bribery as making commitments in return for campaign contributions.

Be sensitive to how meetings are structured with groups that make endorsement decisions. Recently, a local newspaper criticized one group of incumbents for having met "secretly" with a union as part of an interview process for the union's endorsement. The concern was that a quorum of the decision-making body may have been engaging in collective discussion about issues related

to the agency's labor relations policies. The newspaper charged that such discussions, if they were occurring, violated the Brown Act's open meeting requirements. Meeting individually with potential endorsers is a better approach.

Of course, the ethical issue most candidates face at one time or another is just how far they are willing to go in terms of securing a group's endorsement. Whenever a group asks you to take a position that conflicts with your sense of what best serves your constituents' interests, you are in a danger zone. You may be tempted to think that you need the group's endorsement — or a series of groups' endorsements — to get elected and do good things for your community. This type of "the ends justify the means" thinking presents another ethics red flag.

Issues Related to the Use of Public Resources

The law prohibits using public resources for political purposes.¹⁰ This includes using anything that has been paid for with public dollars — agency office equipment (including agency photocopiers, office supplies, letterhead, postage, laptops or cell phones), office space and staff time.

Decisions on how to use staff time can be especially tricky during campaign season. As an ethical matter, here is a good rule of thumb: If you wouldn't ask staff to look into a matter if you *weren't* running for re-election, it isn't appropriate to ask staff to look into it because you *are* running for re-election.

On another front, keep in mind that a public agency uniform is also a public resource. State law prohibits officers and employees from participating in political activities while in uniform.¹¹ Using the symbols, or indicia, of your office — for example, the agency seal, your title as an office-holder or perhaps a facsimile of agency letterhead that the campaign pays for — in campaign materials is not a good idea. Many agencies have policies against using such indicia for personal or political gain.

Even if no existing policy prohibits such uses, there are ethical issues associated with using something that might mislead voters into thinking that a candidacy has been endorsed by the agency whose indicia is used in campaign material. At a minimum, it's a good practice to be clear that any such communication hasn't been paid for with public funds and that any use of an official title is for identification purposes only.

Other Related Resources

Also visit these links to view other related documents:

- "A Leader's Dilemma: Ethics Versus Expediency."(cailg.s465.sureserver.com/meansversusends)
- "Dealing With a Grandstander"(cailg.s465.sureserver.com/document/dealing-grandstander)
- "When an Elected Leader Feels Passionately About an Issue: Fair Process Requirements in Adjudicative Decision-Making"(cailg.s465.sureserver.com/bias)
- "When a Council Member Skirts the Law and Scandal Looms"(cailg.s465.sureserver.com/document/when-elected-official-skirts-law-and-scandal-looms-0)

Other types of public resources that can get misused during campaign season by incumbents and challengers alike include time during public meetings, particularly televised public meetings. Be alert to the temptation to say things you wouldn't ordinarily say — for example, attacking staff — if you were not running for re-election.

Incumbents often complain about perceived misuses of public comment time in public meetings by those running for election. Keep in mind that this is not a situation where two wrongs make a right.

Making Statements about Your Positions

As a general practice, making statements about your positions prior to a public hearing can be risky. However, the courts have suggested that there is an exception for statements made during a campaign.¹²

The fact that a candidate made campaign statements about a matter is not likely in and of itself to legally disqualify the official from participating in the hearing. It still can be a good practice to indicate that although you have concerns about a particular matter, you will weigh all the evidence presented on it (because of your commitment to fairness) before making a final decision.

Complying With Local Regulations

As a public official, complying with locally adopted regulations about campaign-related conduct is especially important. In fact, such compliance applies to *all* locally adopted regulations and not just during campaign season.

For example, most local agencies prohibit signs in the right of way. The conscientious public official makes sure that his or her campaign staff is aware of such restrictions so that scarce public resources aren't consumed in removing such signs.

Again, this is not a situation where two or more wrongs make a right. If other candidates are violating the agency's restrictions, the remedy is to work with staff to make sure all the candidates know about the restrictions. The agency can also consider providing the public with the estimated cost of removing an illegal sign — a cost borne by the taxpayers. Ideally this creates an incentive for all candidates to walk the usual campaign talk of professing to be a careful steward of taxpayer resources.

Conclusion

In the heat of a campaign, it can be tempting to cut legal and ethical corners to win an election. Some candidates rationalize this by telling themselves that the worthy end of holding elective office justifies questionable means.

In a democracy, the *means* by which one achieves goals matters as much or even more than the goal itself. Such means speak to the character of those who would serve in public office. Moreover, the essence of character is being willing to do the right thing even when it potentially involves a cost.

It's clear from your question that you have made the decision *not* to compromise your commitment to ethics and following the law in your re-election campaign. Determining your boundaries before you encounter situations that could test your resolve is perhaps the best way to remain true to your values.

About the Institute for Local Government

This resource is a service of the Institute for Local Government (ILG) whose mission is to promote good government at the local level with practical, impartial, and easy-to-use resources for California communities. ILG is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities and the California State Association of Counties.

For more information and to access the Institute's resources on ethics visit www.ca-ilg.org/trust.

The Institute welcomes feedback on this resource:

- Email: ethicsmailbox@ca-ilg.org Subject: Campaigning for Re-Election: Legal and Ethical Red Flags
- Mail: 1400 K Street, Suite 205 ▪ Sacramento, CA ▪ 95814

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References and Resources

Note: Sections in the California Code are accessible at <http://leginfo.legislature.ca.gov/>. Fair Political Practices Commission regulations are accessible at www.fppc.ca.gov/index.php?id=52. A source for case law information is www.findlaw.com/cacases/ (requires registration).

- 1 These are requirements of the Political Reform Act. *See generally* Cal. Gov't Code §§ 87200 and following.
- 2 *See* Cal. Gov't Code § 84308(b).
- 3 *See* Cal. Gov't Code § 84308(b).
- 4 *See* Cal. Gov't Code § 84308(a)(3); 2 Cal. Code Regs. § 18438.1.
- 5 *See* Cal. Gov't Code § 3205.
- 6 *See* Cal. Gov't Code § 3204, which reads as follows:

No one who holds, or who is seeking election or appointment to, any office or employment in a state or local agency shall, directly or indirectly, use, promise, threaten or attempt to use, any office, authority, or influence, whether then possessed or merely anticipated, to confer upon or secure for any individual person, or to aid or obstruct any individual person in securing, or to prevent any individual person from securing, any position, nomination, confirmation, promotion, or change in compensation or position, within the state or local agency,

upon consideration or condition that the vote or political influence or action of such person or another shall be given or used in behalf of, or withheld from, any candidate, officer, or party, or upon any other corrupt condition or consideration. This prohibition shall apply to urging or discouraging the individual employee's action.

- 7 See Cal. Gov't Code § 3205.5, which reads as follows:

No one who holds, or who is seeking election or appointment to, any office shall, directly or indirectly, offer or arrange for any increase in compensation or salary for an employee of a state or local agency in exchange for, or a promise of, a contribution or loan to any committee controlled directly or indirectly by the person who holds, or who is seeking election or appointment to, an office. A violation of this section is punishable by imprisonment in a county jail for a period not exceeding one year, a fine not exceeding five thousand dollars (\$5,000), or by both that imprisonment and fine.

- 8 See ICMA Code of Ethics, Tenet 7 (ICMA members shall "Refrain from all political activities which undermine public confidence in professional administrators. Refrain from participation in the election of the members of the employing legislative body."), available at <http://icma.org/main/bc.asp?bcid=40&hsid=1&ssid1=2530&ssid2=2531>; see also City Attorneys Department Ethics Principles, Principle 3 (No Politicization) and Example 3 ("The city attorney or persons seeking to become city attorney should not make campaign contributions to or participate in the campaigns of that city's officials, including candidates running for that city's offices or city officers running for other offices. For private law firms serving as city attorney or seeking to become city attorney, this restriction should apply to the law firm's attorneys."), available at <http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/City-Attorney-Ethics-Resources/Ethical-Principles-for-City-Attorneys>.

- 9 For example, conditioning favorable decisions on receipt of campaign contributions can violate the federal fraud laws. Under federal wire and mail fraud laws, the public has the right to the "honest services" of public officials. 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services). The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary. That duty is violated when a public official makes a decision that is not motivated by his or her constituents' interests but instead by his or her personal interests. *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350, at 362-63 (Justice Stevens, dissenting). In *Skilling v. U.S.*, 130 S.Ct. 2896, 2931(2010), the court held that in order to avoid unconstitutional vagueness, 18 USC § 1346 only criminalizes bribes and kick-back schemes.

A demand for campaign contributions can also constitute extortion. Extortion occurs when someone obtains money through threat of harm or under color of official right. 18 U.S.C. § 1951. To be chargeable as a *federal* offense, the act must affect interstate commerce.

Under California law,

(a) Every executive or ministerial officer, employee, or appointee of the State of California, a county or city therein, or a political subdivision thereof, who asks, receives, or agrees to receive, any bribe, *upon any agreement or understanding that his or her vote, opinion, or action upon any matter then pending, or that may be brought before him or her in his or her official capacity, shall be influenced thereby*, is punishable by imprisonment in the state prison for two, three, or four years and, in cases in which no bribe has been actually received, by a restitution fine of not less than two thousand dollars (\$2,000) or not more than ten thousand dollars (\$10,000) or, in cases in which a bribe was actually received, by a restitution fine of at least the actual amount of the bribe received or two thousand dollars (\$2,000), whichever is greater, or any larger amount of not more than double the amount of any bribe received or ten thousand dollars (\$10,000), whichever is greater, and, in addition thereto, forfeits his or her office, employment, or appointment, and is forever disqualified from holding any office, employment, or appointment, in this state.

See Cal. Penal Code § 68 (emphasis added). *See also* Cal. Penal Code § 7 (definition 6), which defines a bribe as the following:

The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.

10 Cal. Gov't Code § 8314.

11 Cal. Gov't Code § 3206.

12 *City of Fairfield v. Superior Court*, 14 Cal.3d 768, 537 P.2d 375, 382-83, 122 Cal. Rptr. 543, 549-551 (1975) (noting that it would be contrary to democratic principles to disqualify those who made pre-election statements).