

DOING BUSINESS WITH A CAMPAIGN – AN OXYMORON?

By William J. Farah *

Modern day political campaigns, in particular presidential campaigns, have many of the trappings of a conventional business. But appearances can be deceiving, leading campaign consultants, vendors and staff to mistakenly believe they are dealing with an organization that will behave like a business in the event of a contract dispute or unpaid bill. Or, that there will be meaningful legal remedies if the campaign fails to honor its commitments. This article discusses the risks associated with doing business with a campaign, including the lack of practical remedies when a campaign does not live up to its obligations. It also offers some advice for those who make their living working for campaigns.

Since the 1970s, political campaigns have become increasingly professionalized, relying on strategists, fundraisers, pollsters, media advisers and yes, lawyers, to plan, finance and execute complex campaign strategies and to navigate the labyrinth of laws regulating modern elections. These days, it is routine for the larger campaigns to “incorporate” to limit liability, and it is not unusual for them to adopt corporate governance practices, including employee manuals and other written policies and procedures for conducting operations. Like any other business, campaigns also buy insurance coverage, attempt to comply with federal and state employment laws,¹ pay payroll taxes and even pay income taxes on investment income generated from excess cash. Campaigns also routinely negotiate discounts and make other special arrangements in selecting the hotels, office supply stores, car rental agencies and other vendors with which they do business. Of late, campaigns have even taken to assigning very corporate-sounding titles. Titles such as Treasurer, Press Secretary and Campaign Manager are largely passé. Large campaigns now offer a host of executive-sounding titles, such as Chief Financial Officer, Director of Finance, Director of Communications, Chief Technology Officer and Chief Compliance Officer.

Some of the corporatization of campaigns has to do with the campaign finance laws, which require financial accountability and transparency. Much of it, however, revolves around the large sums of money now required to run for public office and a desire to efficiently manage those funds so there will be enough available in the home-stretch to purchase as much media as may be needed. In the 2004 presidential primaries, for example, the Bush and Kerry campaigns each raised more than \$225 million² – exceeding the annual revenue required for a listing on the New York Stock Exchange. In a presidential campaign there is the added dimension of waging a nationwide campaign, which requires simultaneously establishing, operating and closing-down campaign headquarters in multiple jurisdictions. A presidential campaign also requires an operation that can move the candidate and his or her entourage around the country on a moment’s notice, planning and staging events along the way.

However, these corporate adaptations can incorrectly lead campaign consultants, vendors and campaign staff to believe their arrangements with a campaign will be treated in a business-like manner and, in the case of a legal dispute, will be adjudicated subject to meaningful legal remedies. This typically is not the case. Campaign committees are organizations created with a limited duration and for one purpose only: to win the next election.

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¹ I say “attempt” because if anyone cared to look they likely would find most (if not all) campaigns deficient in their compliance with minimum wage and overtime compensation rules.

² FEC Press Release, *2004 Presidential Campaign Financial Activity Summarized* (Feb. 3, 2005).

While the law in theory protects those who do business with a campaign, the law as applied to campaigns is inadequate in certain important respects. Even where there is a contract with a campaign, the reality is there is usually little practical recourse when a campaign reneges on an agreement. For example, assume you have a written contract with a campaign, and the campaign fails to honor it. You could file a lawsuit. A favorable judgment is not likely, however, for many months, and by then the campaign is over and most if not all of the campaign's assets will have been depleted. Attempts to sue the candidate or staff also are likely to fail, because if the campaign is incorporated, they will be shielded from liability. Without evidence of a personal guarantee by the candidate, attempting to collect a judgment is often a fruitless endeavor.

Constantly changing circumstances – political and financial – also make it risky to rely on campaign promises. It is not unusual for campaigns to ask staff and consultants to accept pay deep cuts and even work without pay for extended periods of time. This can occur with little or no notice, written agreement to the contrary notwithstanding. Again, there may be a legal claim in such cases, but it usually will be impractical given the limited lifetime and financial resources of the campaign. Also, most campaigns routinely include “at will” termination clauses in their employment and consulting agreements. This gives the campaign the legal flexibility needed to terminate an employee or consultant who is unwilling to agree to an immediate reduction or other renegotiation of the terms of his or her engagement.

Consultants and vendors are frequently left holding the bag when a campaign suddenly ends due to the candidate's withdrawal or defeat. At the end of a campaign, it is not unusual for debts to exceed the cash-on-hand. This occurs because the campaign is all about winning, and the last days of a campaign are the most expensive, with every dollar used to pay for media and voter mobilization. If the candidate prevails, the reasoning goes, the ability to raise more funds to cover any shortfall won't be difficult, because lobbyists, special interest groups and supporters will rally to the rescue. If the candidate loses, however, paying a campaign debt becomes difficult, because even those ideologically aligned with the candidate are not likely to want to give money to a lost cause; they are already thinking about their next champion. Thus, the 30 to 60 day period before an election is the most dangerous time financially for vendors and consultants, who are likely to be providing their goods and services in greatest volume at precisely the same time the campaign begins to burn through its money and throw financial caution to the wind.

Potential financial exposure can be minimized in a number of ways. Ideally, some security deposit or a retainer should be required from the campaign that must be replenished when depleted. Telephone companies, burned over the years, often require campaigns to post collateral with a bank before any phone lines will be installed. Banks will not extend credit to a campaign without adequate collateral (this also is a legal requirement). And broadcasters typically will not air ads if they have not been paid in advance by wire transfer (no checks please).

Of course, telephone companies, banks and broadcasters are large, diversified businesses that offer essential services to campaigns and do not rely on them exclusively for their financial success. Campaign vendors and consultants who make a living working for campaigns are not in the same bargaining position. They must be more amenable to campaign demands and often are expected to assume greater financial risk. This risk can be managed, however.

First, submit timely invoices, and make certain they are unambiguous. Do not give the campaign an excuse to challenge an invoice, which can delay payment. Campaign recordkeeping should never be relied upon. Keep good records that are readily available if an invoice is challenged.

Second, monitor campaign payments. Do not let the campaign fall behind, if possible. As previously noted, a campaign's financial condition tends to deteriorate as election day draws closer. Keeping the campaign's outstanding balance under control is critical to avoiding a devastating write-off. Where a campaign is unable to pay in full, ask for a partial payment. If there is a debt at the close of a campaign, you may be asked to settle for a percentage of that amount. Better for it to be 50 percent of \$7,500 than 50 percent of \$10,000. Put simply, don't let things get out of hand.

If a campaign ends suddenly and money is owed to vendors and consultants, their first reaction may be to demand payment and threaten to sue. But such demands and threats typically have little effect, especially in cases where the campaign is incorporated. A better approach may be to contact the campaign as soon as possible, inquire about the campaign's debt retirement plans and offer to work-out a payment schedule. A hard-nosed approach may lead the campaign to put a consultant or vendor at the end of the payment line. ("Why pay him anything, if he's going to be unhappy and/or sue us anyway.") Suing also can be counter-productive, because the legal fees will consume campaign funds that could be used for paying campaign debts.

Some consultants and vendors mistakenly believe they can use the threat of bad publicity to convince a campaign to pay -- perhaps even force the candidate to dip into personal funds. This usually doesn't work. After an election, there is not much media interest in who a campaign failed to pay. In fact, more seasoned political reporters will wonder why anyone would be foolish enough to extend credit to a campaign. Nonpayment of debts can become a campaign issue in a subsequent election, but the circumstances would need to involve particularly sympathetic figures. A campaign's failure to pay a pollster or media adviser is not likely to elicit public sympathy.

However, don't be too willing to write-off campaign debt. In fact, in federal elections, special debt settlement procedures must be followed and approved by the Federal Election Commission ("FEC") to avoid prohibited contributions. *See* 11 C.F.R. Pt. 116. And campaigns do have assets (*e.g.*, mailing/e-mail lists, computers and furniture) that can be sold, and the proceeds used to pay debts. Even if a candidate doesn't appear inclined to work to retire campaign debt, this may change. Everyone is exhausted after an unsuccessful campaign, and the candidate may be thinking "never again." But time and circumstances can change a candidate's mind, particularly as he or she contemplates the political future and wrapping-up the campaign in a fair and orderly manner becomes more desirable.

When pricing campaign goods or services, an appreciation of the financial risk is critical. Working with too narrow a profit margin can put a consultant or vendor out of business if the campaign fails to pay or demands concessions mid-way through the campaign. Consultants and vendors should consider this when pricing their goods and services, and never rely on campaign income to pay the mortgage or rent.

Finally, having suggested that most lawsuits involving campaigns are impractical and/or difficult does not mean that a lawsuit is never a good course of action. If the time and resources are available, and if the campaign is not as careful as it should have been, a lawsuit can be successful. This was demonstrated by Karl Rove, when he successfully sued former Attorney

General Richard Thornburgh who was a candidate for the U.S. Senate in 1992 for unpaid direct mail charges and legal fees. Rove won, because the Thornburgh campaign had not incorporated and Rove convinced the court that Thornburgh had personally assented to his contract. See Karl Rove & Co. v. Thornburgh for Senate, 824 F. Supp. 662 (W.D. Tex. 1993), *affirmed at* 39 F. 3rd 1273 (5th Cir. 1994). Even more telling, the Rove case also clearly debunks the myth that if you sue a campaign you'll never work in politics again.