the YOUNG LAWYER

American Bar Association
Young Lawyers Division

Volume 13 ▪ Number 1
October 2008

When a Contribution Becomes a Crime

A CAMPAIGN FINANCE LAW CONUNDRUM

By Seth D. Uram

The conundrum. It's Monday morning, you are contemplating your twentieth consecutive 70-hour work week as a first-year associate, and you receive the following e-mail from the founding partner of your firm:

> "To all attorneys, paralegals, and support staff:
>
> A former senior partner of the firm is running for the United States Senate. I have agreed to be her campaign finance chairperson. I expect everyone in the firm wants to contribute $2,300 to this candidate. If anyone cannot afford $2,300, the firm will reimburse them by issuing a $2,300 bonus check (net after payroll tax deductions) at the end of the quarter."

What do you do? What can you do without violating federal campaign finance law? Before making a decision, you decide a brief review of campaign finance law is in order.

Campaign finance law overview. A political contribution is a gift of anything of value that is given to influence a federal election. The Federal Election Campaign Act of 1971 (FECA), which regulates the financing of federal elections, limits individual contributions to a federal candidate to $2,300 during the current election cycle.

Federal campaign finance laws are designed to minimize the corrupting influence of money in politics and on elections. They do this by limiting the size of contributions, by prohibiting contributions from entities that have historically attempted to exert potentially corrupting influence on federal elections, and by imposing strict disclosure requirements on politicians, their campaigns, and their political parties.

The list of entities prohibited from making contributions is long and reflects entities that have a history of abusing funds to improperly influence elections or a general concern that contributions from entities are inappropriate, or both. The prohibited entities include corporations, labor unions, national banks, government contractors, and foreign nationals. In 2002, FECA was substantially amended by the Bipartisan Campaign Reform Act, which eliminated loopholes relating to "soft money" and "issue ads" and enhanced the criminal penalties for FECA crimes.

Campaign finance crimes. All criminal violations of federal campaign finance laws require proof beyond a reasonable doubt that the violator acted knowingly and willfully in violation of the laws, which means that the violator knew what the law required or prohibited but acted contrary to the law. This level of criminal intent is also sometimes described as the intentional violation of a known legal duty. Most significant federal campaign finance crimes are now felonies with potentially lengthy periods of imprisonment and substantial fines.

The contribution prohibition an associate is most likely to encounter concerns contributions through conduits, which is one of FECA's most frequently violated prohibitions. Pursuant to 2 U.S.C. § 441f, it is unlawful for any person to make a contribution in the name of another or for any person to permit his or her name to be used to make such a contribution. The anti-conduit section also prohibits any person, most importantly the candidate himself or herself or his or her campaign representatives, from knowingly accepting a contribution made by one person in the name of another.

Conduit contributions typically occur in two settings. The first is the fundraising event, where a supporter of a candidate recruits friends, family, and business associates to attend the $2,000-a-plate "rubber chicken" dinner that is typically followed by a speech from the candidate and photographs with the candidate. Each conduit usually buys the event ticket with his or her own check or credit card, and then the political supporter immediately reimburses each conduit. The

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If the founding partner uses law firm funds to reimburse personnel for contributions, he would subject himself, the law firm, and the candidate's campaign committee to criminal liability.

5 Reasons Not to Attack Opposing Counsel in Pleadings

By David R. Keene II

During the course of your career you will encounter opposing counsel who will frustrate you. Perhaps they are overly argumentative, fail to follow through on their promises to provide certain documents, file motion after amended complaint after pre-response discovery request after motion, or are simply poor practitioners. When you encounter such attorneys, there's nothing you would like better than to point out their ineptness or uncooperativeness in pleadings.

As satisfying as that might be, there is nothing to be gained by attacking opposing counsel in pleadings. Below are five good reasons not to do it.

1. You're a professional. The first, best, and only necessary reason not to attack opposing counsel in writing is that it is unprofessional. As an officer of the court and licensed professional, you should rise above petty personal disputes. A professional does not spend time worrying about how to work in a jab at opposing counsel in pleadings; rather, a professional focuses on serving client interests and allows the strength of written arguments to speak for themselves.

2. You're creating a permanent record. There will *always* be a record of your attack on opposing counsel. Anything in writing can be sent around courthouses, cities, and the world with the click of a mouse. If your document isn't already in electronic format, it can easily become so; in short time your document with the nasty little poke you took at opposing counsel can be available on the World Wide Web. If your case is in federal court, you will have to submit it through ECF, which makes it that much easier for all interested persons to find what you've written.

3. Opposing counsel will NEVER forget what you've done. Maybe opposing counsel is completely unprofessional and "deserves" the insult. Then again, maybe counsel is just

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Supreme History Lessons

By Colin Darke and David J. Nowaczewski

"If you [ain't] got nothing, you've got nothing to lose," *See* Bob Dylan, *Like A Rolling Stone*, on HIGHWAY 61 REVISITED (Columbia Records 1965). With this quote, U.S. Supreme Court Chief Justice Roberts added some color in a dissent to an otherwise dry case and apparently became the first Justice, let alone a Chief Justice, in the Supreme Court's history to quote a rock lyric. If you enjoy historical tidbits, the Supreme Court's 2007–08 term was right up your alley. In historically relevant cases, the Court gave exhaustive history lessons. Below is a summary of the Court's decision regarding the right to bear arms, and in *The Young Lawyer* online (www.abanet.org/yld/publications.html) you'll find a summary of the Court's decision regarding the right of habeas corpus. In both of these cases, the Court dug deep into the historical underpinnings of these rights. If you like statutory construction, this past term was also right up your alley. *TYL* online also summarizes two decisions that focus on statutory interpretation of U.S. Bankruptcy Code and the federal Securities and Exchange Act of 1934.

Dueling Guns

One of the more controversial cases decided in the Spring Term was *District of Columbia, et al., v. Dick Anthony Heller*, 554 U.S. ____ (2008) in which the Court opined on the scope of Second Amendment rights.

The Court held that the Second Amendment's right "to keep and bear arms" encompasses an individual's right to possess a firearm outside of service in a militia. The Court further held that the right extends to use of a firearm for traditionally lawful purposes, such as self-defense within the home. Conflicting with this ruling, the District of Columbia laws that prohibited the possession of handguns, forbade their registration, provided that in certain circumstances handguns could be licensed for special purposes, and mandated that such handguns be kept either unloaded or locked while stored in a home were found unconstitutional.

Dick Heller, a special D.C. police officer who was authorized to carry a handgun while on duty, applied for a registration certificate for a handgun that he wished to keep at home. The District refused to issue the certificate, and Mr. Heller filed suit on Second Amendment grounds to enjoin the enforcement of the ban on the registration of handguns and the licensing requirement that prohibited the use of functional firearms within homes.

Justice Scalia, writing for the majority that included Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, held that the original meaning of the Second Amendment incorporated the individual right to keep and bear arms. As that right was understood when codified in the Bill of Rights, its primary meaning was to allow individuals to possess arms in order to protect themselves and their possessions. Thus, the first clause of the Second Amendment—"A well regulated Militia, being necessary to the security of a free State"—gives context to, but does not limit, the individual right enshrined in the Second Amendment. One of the consequences of this individual right was that militias could be assembled in short order. However, the right itself was not dependent upon a militia being in existence already. One of the primary concerns of the drafters of the Second Amendment was that a government, by dispossessing individuals of their right to bear arms, effectively destroyed the possibility of a militia.

Justices Breyer and Stevens (joined by Justices Ginsburg and Souter) each issued dissenting opinions. Justice Stevens, doing his own bit of historical research, concluded that the Second Amendment only protects militia-related interests but not self-defense alone. Justice Breyer's dissent argued that Second Amendment rights are not absolute and need to be balanced in light of the objectives that the D.C. laws sought to implement.

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Read more at www.abanet.org/yld/publications.html.

Campaign Finance Law

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supporter sometimes lays the groundwork for a defense to a criminal charge by calling the reimbursement a loan for which he or she has no actual intention of seeking repayment.

The second common conduit setting occurs in a business office. Law firms are fertile ground for this conduct because lawyers are often the most politically active members of the business community. Associates may very well find themselves in the above situation being asked to contribute to a campaign. As many law firms are incorporated, reimbursement of employee contributions from the firm's general operating account or payroll account violates the prohibition against corporate contributions.

Because conduit schemes attribute contributions to the wrong individuals, the financial disclosure reports each candidate must file (usually quarterly) with the Federal Election Commission will be false. This means participants in the scheme and campaign officials who know about the scheme can be charged with causing a materially false statement to be made to a federal agency in violation of 18 U.S.C. § 1001. Moreover, conduit crimes sometimes result in federal charges against violators that allege conspiracy to defraud the United States.

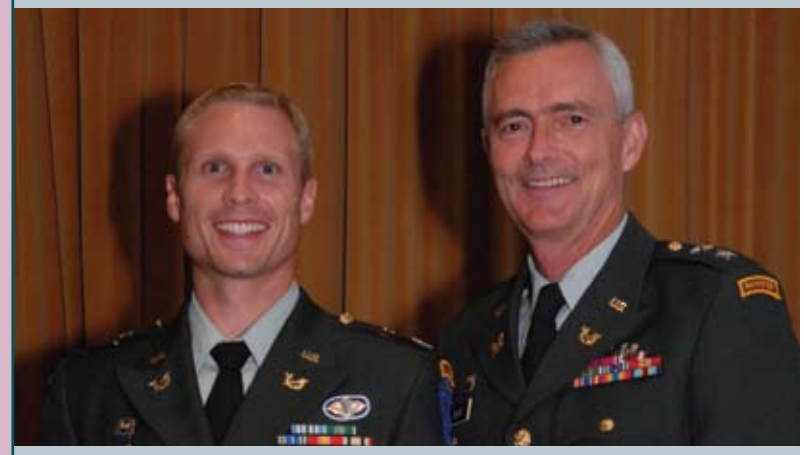
The right answer. Despite the pressures inherent in the founding partner's e-mail, a prudent associate will decline the opportunity to be reimbursed by the law firm for making a contribution to the Senate campaign of the former partner. If the founding partner uses law firm funds to reimburse law firm personnel for contributions, the founding partner would subject himself, the law firm, and the candidate's campaign committee to criminal liability for violating FECA's anti-conduit provision. And, each individual in the law firm who agreed to be reimbursed will potentially subject himself or herself to criminal liability because almost all federal campaign committees require contributors to sign a statement attesting that the funds they are contributing are their own funds and do not come from a third party. As a result, even if an associate or a paralegal at the law firm did not know about FECA's anti-conduit provision before making the contribution, their signatures on the anti-conduit statement supply the knowledge necessary to commit a criminal violation.

Seth D. Uram has been a federal prosecutor for seventeen years and in 2006 prosecuted the first individual convicted under FECA's enhanced anti-conduit provision. Mr. Uram, with permission, borrowed extensively from materials created by the Department of Justice's Public Integrity Section in writing this article.

DID YOU KNOW?

At the 2008 ABA Annual Meeting in New York this August, the ABA Young Lawyers Division recognized five individuals with the Outstanding Young Military Service Lawyer Award:

- U.S. Army: Captain Andrew K. Kernan
- U.S. Navy: Lieutenant Commander Dustin E. Wallace
- U.S. Marine Corps: Captain Jennifer S. Parker
- U.S. Air Force: Captain Jason S. Robertson
- U.S. Coast Guard: Lieutenant Commander Donald Brown



Captain Andrew K. Kernan, U.S. Army, receives the Outstanding Young Military Service Lawyer Award from Major General Scott C. Black, the Judge Advocate General of the Army, at the 2008 Annual Meeting.

5 Reasons Not to Attack

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having a bad month or personal problems, and the last thing that the attorney needs is your attack in writing. Rest assured, your name will never be forgotten, and in the future, you can forget about receiving reciprocal "professional courtesy." You need additional time to file a response? Tough, a deadline is a deadline. You don't want to miss your kid's soccer game, and you need to reschedule that deposition? Too bad. You're swamped with work and need a break? So sorry. Take a jab at someone in writing, and you've made a permanent enemy.

4. Other attorneys will read what you've written. Over the course of your career you will want fellow attorneys to refer clients to you. Further, you will want a positive reputation when leadership positions in the community or bar become available. You want to be known as a tough but fair lawyer, not an inflexible or contentious one. By taking shots at opposing counsel in writing, you're blackballing yourself from future opportunities.

5. The judge is smarter than you think and knows who's causing trouble. Young attorneys often think that the court is unaware of who is creating problems in a particular case or who is being unnecessarily contentious, and they feel the need to point it out. The court, however, is smarter than you think. I found this to be true a few years ago when I was engaged in a discovery dispute with opposing counsel, who was interfering with my third-party subpoena. As is my habit, I faxed and mailed documents to the addressee, but only mailed documents to those receiving copies. I copied opposing counsel on a letter; thus, he only received a copy in the mail. When opposing counsel realized my practice, he went ballistic and accused me in writing of committing fraud and lying to the court. He copied the court on the letter, despite the judge's written instructions that he *not* be copied on correspondence. Following a conference call with the judge to discuss the discovery dispute, he issued an order that opposing counsel stop interfering with my subpoena. The last line of the order included a single sentence, reminding counsel that the court is never to be copied on correspondence. Clearly, the court knew who the troublemaker was without me taking a shot.

> By taking shots at opposing counsel in writing, you're blackballing yourself from future opportunities.

Remember, in all aspects of your practice, not just pleadings, it's always best to be professional. You'll be well-served by always taking the high road.

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READY RESOURCES

- Dealing with Difficult People. PC # 1620030. 2004.
- Letters for Litigators: Essential Communications for Opposing Counsel, Witnesses, Clients, and Others. PC # 5150291. 2004. General Practice, Solo and Small Firm Division

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OCT. 1– 31, 2008
DOMESTIC VIOLENCE AWARENESS MONTH

OCT. 2-4, 2008
2008 ABA YLD FALL CONFERENCE | SAN DIEGO, CA
www.abanet.org/yld/fall08/

- Expand your network: Meet over 300 young lawyers from across the country
- Sharpen your legal skills: Earn CLE credit
- Serve the Public: Learn about the YLD Domestic Violence Prevention and Awareness Public Service Project

OCT. 15, 2008
SUPREME COURT ROUNDUP 2008 | TELECONFERNCE
www.abanet.org/cle/connection.html#october

OCT. 22–24, 2008
BANKING LAW BASICS, NATIONAL INSTITUTE| BOSTON, MA
www.abanet.org/cle/programs/n08blb2.html

OCT. 27–29, 2008
NATIONAL INSTITUTE ON INVESTMENT MANAGEMENT BASICS | BOSTON, MA
www.abanet.org/cle/programs/n08imb1.html

OCT. 28, 2008
THE UNCERTAINTIES OF DEATH AND TAXES: PREPARING AND DEFENDING ESTATE TAX RETURNS
Part Two of the Essential Issues in Trust and Estate Law 2008 Teleconference Series
www.abanet.org/cle/programs/t08tud1.html

NOV. 18, 2008
ETHICAL ISSUES IN FIDUCIARY REPRESENTATION
Part Three of the Essential Issues in Trust and Estate Law 2008 Teleconference Series
www.abanet.org/cle/programs/t08eif1.html

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www.abanet.org/yld/meetings.html

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the YOUNG LAWYER
Volume 13
Number 1
October 2008

THE YOUNG LAWYER IS PROVIDED FREE TO ALL ABA YOUNG LAWYERS DIVISION MEMBERS.

THE YOUNG LAWYER [ISSN 1090-6878] is published eleven times a year, by ABA Publishing for the Young Lawyers Division, American Bar Association, 321 N. Clark Street, Chicago, IL 60654-7598. Nonmember annual subscriptions: $29.95. The views expressed herein are those of the authors and not necessarily those of the American Bar Association, its Young Lawyers Division, or the employers of the authors.

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The Search Is On!
THE BENEFITS OF ONLINE CLE

By Kristi L. Bergemann

In the hustle and bustle of a young attorney's busy life, there are many expectations and tasks to fulfill but never enough time to complete them all. One responsibility is searching for programming to satisfy continuing legal education (CLE) requirements. Fortunately, in today's computer-connected world, there are many opportunities for attorneys to obtain CLE credits (or to find out how) on the Internet. The benefits of online CLE include the ability to meet your jurisdiction's requirements on your own schedule and from the convenience of a Wi-Fi hotspot in an airport, hotel room, or your bedroom. Additionally, because there are many different online CLE topics to choose from, including highly specialized subjects that are not typically addressed in live programs, you can learn about topics that interest you but that may fall outside your practice area.

When choosing online CLE, you should factor in your jurisdiction's CLE requirements. First, you should make sure that online CLE is valid in your jurisdiction; for example, many jurisdictions accept ABA-sponsored online program credits but may have special reporting requirements. Second, you should make sure that online CLE counts toward meeting specific requirements in your jurisdiction as some jurisdictions require live CLE on certain topics while other jurisdictions do not permit young lawyers to receive distance-learning CLE at all.

Online CLE has an added benefit for young lawyers when it comes to cost, especially for those attorneys whose employers do not fund CLE. There are many Web sites that post free or inexpensive CLE. For example, ABA-CLE offers the complimentary CLE NOW! programs online (www.abanet.org/cle/clenow), and the ABA YLD provides free online CLE opportunities (www.abanet.org/yld/clematerials.html) in audio or video formats with accompanying written course materials. In your search for free and inexpensive online CLE, you may find advertisements for bar associations, professional organizations, law schools, publishers, and sometimes even firms offering free online CLE and free live CLE programs in your area (live programs also can be great networking opportunities!). You also can check out your state bar Web site to determine its online CLE providers as some programs may be offered at a discount to members. For every CLE registration, it is worth noting whether there is a discounted rate for young attorneys or government attorneys.

In addition to being convenient and affordable, online CLE is often at the cutting edge of technology. Many CLE Web sites, including ABA-CLE, offer innovative delivery methods, such as podcasts, MP3s, and interactive webcasts that are often complementary to everyone and even more convenient than traditional Web-based approaches. In many jurisdictions, attorneys can both earn and view their CLE credits online so they can better ensure they are meeting requirements.

Online CLE is worth at least one search for young attorneys who enjoy convenience, low prices, and high technology. You never know what may spark a career interest, allow you to make a new contact, or enable you to spend time learning at the beach rather than in a cold and crowded conference room.

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