

SOME OF THE SAN DIEGO MUNICIPAL CODE SECTIONS REFERENCED IN THIS LETTER WERE RE-NUMBERED AS OF JANUARY 5, 2005 (SEE COMPARISON CHART WITH "OLD" AND "NEW" SECTION NUMBERS ON THE ETHICS COMMISSION WEBSITE)

November 29, 2004

SDEC Informal Advice Letter No. IA04-08

Advice Provided to:

James R. Sutton

The Sutton Law Firm

731 Sansome St., 5th Floor

San Francisco, CA 94111

Re: Applicability of ECCO to Legal Fees Paid to Challenge Election Procedures

Dear Mr. Sutton:

This advice letter has been prepared in response to your letter to the City of San Diego Ethics Commission dated November 19, 2004. You are seeking advice from the Ethics Commission interpreting the provisions of the City's Election Campaign Control Ordinance [ECCO], which is contained in the San Diego Municipal Code [SDMC]. Your letter seeks advice concerning the impact of ECCO on individuals, nonprofit organizations, and business entities who have approached you with regard to a potential legal challenge concerning the validity of Councilmember Donna Frye's candidacy in the City's recent mayoral election. In essence, you are requesting the Commission's opinion regarding whether or not a lawsuit challenging election procedures brought by third parties triggers the provisions in ECCO concerning disclosure requirements, contribution limits, and the prohibition on organizational contributions, and whether such a lawsuit can be coordinated with a candidate. Your letter asks general, hypothetical questions, and accordingly we consider your letter to be a request for informal advice.

ANALYSIS OF LOCAL AND STATE LAW

In order to analyze the questions you have presented, we must first look to the relevant definitions of "contribution," "expenditure," and "independent expenditure," set forth in state and local law and determine how the facts you provided fit within these definitions.

A. Contributions

Both local and state law define a “contribution” as a payment, forgiveness of a loan, payment of a loan by a third party, or an enforceable promise to make a payment, “unless it is clear from the surrounding circumstances that it is not made for political purposes.” SDMC § 27.2903, Cal. Gov’t Code § 82015 (a). ECCO defines “political purpose” as the attempt to influence the action of the voters for or against a City candidate or ballot measure. SDMC § 27.2903. Because the voting for the mayoral election has concluded, the contemplated action involving a legal challenge to Donna Frye’s candidacy is an attempt to influence the courts and possibly City and County elections officials, but is not an attempt to influence the voters. Therefore, the pooling of resources by your potential clients to fund such litigation would generally not be considered “contributions” for purposes of regulation under state and local law.

It is important to note, however, that the rules that apply to your potential clients are not necessarily the same as the rules applicable to candidates and other political entities. Any and all monies received or spent by a candidate, or that candidate’s controlled committee, are considered to be for a “political purpose.” 2 Cal. Code Regs. §§ 18215, 18225. Advice and opinions issued by the FPPC clearly state that the payment of legal fees by or for a candidate in connection with an election is considered a contribution or expenditure subject to regulation. In *Schmidt* FPPC Adv. Ltr I-90-077, the FPPC was asked whether funds received at a fundraiser to retire a public official’s \$80,000 in legal fees were, in fact, contributions to that official. Noting that the legal expenses were directly related to the official’s status as an officeholder, the FPPC stated plainly: “The funds you spend to defend against the allegations are ‘expenditures.’ The funds received by you for those expenditures are ‘contributions.’” The FPPC also found that “funds raised by [a candidate] to defend litigation challenging the results of the election would be considered ‘contributions.’ The expenditures are made for the purpose of influencing the outcome of the election in favor of or against a particular candidate.” *In re Johnson*, 12 FPPC Op. 1 (1989).

Although the above authorities pertain to actions by candidates, they will apply to your potential clients as well if those clients coordinate their involvement in the proposed legal action with a candidate. The state definition of “contribution,” provides that a payment made at the behest of a candidate is a contribution to that candidate unless full and adequate consideration is received, or unless it is clear from the surrounding circumstances that the payment was made for purposes unrelated to his or her candidacy for elective office. Cal. Gov’t Code § 82015(b). Therefore, if any of your potential clients make a payment for legal fees at the behest of a candidate, such a payment would be considered a contribution to that candidate.

Based on the authorities set forth above, it seems clear that funds raised for legal fees, either supporting or opposing the legitimacy of Councilmember Frye’s candidacy, are contributions if they are given to a candidate or if they are otherwise spent at the behest of a candidate.

B. Expenditures

Both ECCO and the Political Reform Act [PRA] define “expenditure” to mean “a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes.” SDMC § 27.2903, Cal. Gov’t Code § 82025. As mentioned above, ECCO defines “political purpose” as an attempt to influence the voters. At this point in time, the mayoral election has already taken place so voter influence is not at issue. Therefore, any payments made with regard to the litigation surrounding that election would be designed to influence the courts, not the electorate. See *Yes on Measure A v. City of Lake Forest*, 60 Cal. App. 4th 620 (1997); *Sutton* Advice Letter A-00-226 (December 13, 2000). Although these authorities pertain to ballot measure elections rather than candidate elections, they do

establish the basic premise that payments not designed to influence the electorate are not “expenditures” for the purposes of FPPC Regulation 18225(a)(1).¹

The FPPC, however, in drafting the above *Sutton* Advice Letter explicitly pointed out that its analysis did not address subsection (a)(2) of Regulation 18225. Subsection (a)(2) provides that a payment is made for “political purposes” if it is made by (1) a candidate, unless unrelated to his or her candidacy or status as an officeholder; (2) a controlled committee; (3) an official committee of a political party; or (4) “an organization formed or existing primarily for political purposes as defined in subsection (a)(1), including, but not limited to a political action committee established by any membership organization, labor union or corporation.” 2 Cal Code Regs. § 18225(a)(2). Similar to the provisions of state law that provide that monies given to a candidate and other political entities are necessarily “contributions” (see discussion regarding FPPC Regulation 18215, above), section 18225(a)(2) provides that monies spent by these entities are generally considered “expenditures.” For this reason, if your potential clients fall within the scope of section 18225(a)(2), their payment of legal fees to challenge the validity of Council member Frye’s candidacy would be considered an “expenditure.” On the other hand, if your potential clients do not fall within the categories listed in subsection (a)(2), i.e., they are not a candidate, controlled committee, political party, or PAC, then their litigation expenses would not be an “expenditure” under section 18225(a)(2).

Your letter indicates that one or more of your potential clients may be an “Issues PAC” (that solely supports or opposes ballot measures) or a “Candidate PAC” (that solely supports or opposes candidates). Based on a plain reading of FPPC regulation 18225, it appears that both types of PACs fall within subsection (a)(2)’s category of “organizations formed or existing primarily for political purposes.” Thus, payments made by these organizations for the legal purposes you’ve identified would be considered “expenditures.”

You also indicated that one or more of your potential clients may be a “Major Donor,” an individual or entity that makes monetary or nonmonetary contributions (including loans) to state or local officeholders, candidates and committees totaling \$10,000 or more in a

calendar year.” Such individuals and entities do not fall within the categories set forth in subsection (a)(2), and accordingly their litigation expenses would not be considered an “expenditure” under section 18225(a)(2).

Finally, your letters states that your potential clients may include “one of the three Mayoral candidate’s political committees.” Clearly, any such committee would be a “controlled committee” and therefore fall within the scope of section 18225(a)(2). Any payment made by such a committee is an “expenditure.”

Expenditures also include payments made by persons for “communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates, or the qualification, passage or defeat of a clearly identified ballot measure.” 2 Cal Code Regs. § 18225(b). It is not readily evident that litigation expenses challenging the validity of a candidate are “communications” that are “expressly advocating” the “defeat” of the candidate. Although it is arguable that such litigation expenses could fall within the scope of section 18225(b) because the result of the litigation may involve the “defeat” of a candidate, it is equally arguable that these types of legal expenses are substantially dissimilar from payments made for campaign advertisements, which are the clear and obvious target of subsection (b). Although the *Lake Forest* court was well aware of the language in subsection (b), having recited it in its decision, it did not consider legal challenges to the validity of a ballot measure to be a communication expressly advocating the defeat of the measure, finding instead that because the legal challenge to the ballot measure was “not designed to influence voters for or against the measure, the

reporting requirements of the act do not attach.” *Lake Forest*, 60 Cal. App. 4th at 626.

The issues pertinent to this analysis were at the heart of an FPPC Opinion, *In re Buchanan*, 5 FPPC Op. 14 (1979). In *Buchanan*, a suit was filed to remove candidate Glidden from the ballot for the general election. The FPPC opined that “since the litigation expense payments are aimed at maintaining Mr. Glidden’s status as a candidate, they are clearly related to his candidacy and should be reported on his candidate’s statement as an expenditure.” *Id.* at 15. The FPPC explained its position as follows: “Although payments for the costs of litigation are not generally thought of as having any connection with political campaigns, in the circumstances presented here and in similar circumstances, the litigation costs are just as key to the success of the campaign as traditional costs such as mailings and media advertisements.” *Id.* at 15-16. The FPPC noted that when expenditures are made to “challenge the results of an election, the expenditures are made for the purpose of influencing the outcome of the election in favor of or against a particular candidate or measure and should be reported. *Id.* at p. 16.

FPPC Opinions and Advice letters issued subsequent to *Buchanan* reinforce that opinion’s ruling and clearly establish that litigation expenses related to election contests may be considered expenditures subject to state and local reporting obligations. See e.g., *In re Johnson*, 12 FPPC Op. 1 (1989). “Because the circumstances surrounding your legal expenses cannot be said clearly to be for personal purposes unrelated to your candidacy, the payments will be ‘expenditures’ as that term is defined in the Act. *Giacchino* FPPC Adv. Ltr. A-02-235. “Payments incurred in ‘challenging the results of an election’ are also reportable ‘expenditures’ within the meaning of § 82025.” *Haubert* FPPC Adv. Ltr. I-03-212.

As a result of the foregoing, it is clear that payments made by a candidate, or by any of the entities that fall within the categories identified in FPPC Regulation 18225(a)(2), for legal fees associated with an election challenge would be considered expenditures subject to the regulations set forth in state and local law. If your potential clients do not include candidates or any of the other entities identified in this FPPC Regulation, then it does not appear that their legal expenses would be considered expenditures.

C. Independent Expenditures

In addition to prohibiting candidates from accepting contributions in excess of \$250 per election, ECCO prohibits committees from accepting contributions in excess of \$250 for the purpose of making “independent expenditures” supporting or opposing a City candidate. SDMC § 27.2941. ECCO defines “independent expenditure” as follows:

“Independent expenditure” means any expenditure made by any person in connection with a communication which:

- a. expressly supports or opposes the nomination, election, defeat or recall of a clearly identified candidate; or
- b. expressly supports or opposes the qualification for the ballot, adoption or defeat of a clearly identified measure; or
- c. taken as a whole and in context, unambiguously urges a particular result in a City election.

An expenditure that is made to or at the behest of a candidate or a committee is not an independent expenditure.

SDMC § 27.2903.

The state definition of “independent expenditure” is almost identical: “an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.” Cal. Gov’t Code § 82031.

As discussed above, it does not appear that the legal fees contemplated by your potential clients would be considered “expenditures” as defined by state and local law unless one or more of them fall within the categories identified in FPPC Regulation 18225(a)(2). If these fees are not considered “expenditures,” then they cannot be considered “independent expenditures” according to the above definitions. Consequently, they would not be subject to ECCO’s limitations on the source and amount of contributions.

Additionally, even if your potential clients did fall within the scope of section 18225(a)(2), it does not appear that their “expenditures” for the legal purposes identified in your letter would rise to the level of an “independent expenditure,” i.e., a payment for a communication that supports or opposes a candidate or urges a particular result in an election. In a post-election contest, such expenditures may be subject to reporting requirements, but they do not clearly fall within the scope of the definition of “independent expenditure.” Moreover, if a payment is not an “independent expenditure,” the source and amount limits for contributions under ECCO do not apply.

Although it is arguable that a legal challenge to Frye’s candidacy is an attempt to oppose her “nomination” as a candidate, or that the contemplated lawsuit “urges a particular result in a City election,” such a construction is incongruous with ECCO’s overall intent and purpose of regulating campaign activity, and would result in the absurd requirement that all materials published (e.g., legal pleadings) by the potential clients include the required statement that they were “not authorized by the candidate” as required by SDMC section 27.2951. As stated above, legal expenses associated with a challenge to an election procedure are substantially dissimilar from a campaign advertisement, which is clearly the focus of state and local regulations concerning independent expenditures. In light of the foregoing, it appears that payments by your potential clients for legal fees and costs would not be considered “independent expenditures” and therefore not subject to ECCO’s contribution source and amount limitations.

CONCLUSIONS

In light of the above-referenced definitions and corresponding analyses, we have reached the following conclusions with respect to your questions:

1. Filing Responsibilities

As you know, ECCO requires “candidates and committees” to file campaign statements in the time and manner required by state law. SDMC § 27.2931. Therefore, any person or group of persons who qualify as a committee² is required to file campaign disclosure reports pursuant to the semi-annual and pre-

election schedules outlined in state law.

As discussed above, it does not appear that the payments for legal fees contemplated by your clients would be considered contributions unless they were made at the behest of a candidate. Moreover, based on the definitions set forth above, it does not appear that the payments for legal fees would be considered independent expenditures. Therefore, your clients would not qualify as a committee, and would not have any associated filing responsibilities. As explained above, this analysis would not apply if any of your proposed clients were one of those entities identified in Regulation 18225(a)(2), i.e., a candidate, a controlled committee, an official committee of a political party, or an organization formed primarily for political purposes. Because state law indicates that all expenditures made by these entities are considered “expenditures” made for political purposes, any payments made by these entities for legal fees associated with an election challenge would likely be subject to the reporting requirements of the PRA.

2. Applicability of Contribution Limits

ECCO prohibits a candidate, or a committee supporting or opposing a candidate, from accepting contributions in excess of \$250 per election. This provision specifically states that these contribution limits apply to a candidate’s controlled committee and to a committee that makes independent expenditures in support of a candidate. SDMC § 27.2941. As discussed in detail above, the contemplated payments for legal services might be considered expenditures if any of your potential clients are one of the entities identified in FPPC Regulation 18225(a)(2). However, such payments would not be considered “independent expenditures” because they are not communications that expressly advocate for the election or defeat of a candidate. In addition, as discussed above, the contemplated payments for legal services would not be considered contributions to a candidate unless they were made at the behest of a candidate. Therefore, provided that the payments are not made at the behest of a candidate, the funds raised and spent by your potential clients are not subject to the contribution limits set forth in ECCO.

3. Prohibition on Contributions from Organizations

ECCO prohibits a candidate controlled committee, or a committee that makes independent expenditures in support of or in opposition to City candidates, from accepting contributions from any person other than an individual. SDMC § 27.2947. The analysis in the section above concerning the applicability of contribution limits is relevant to this prohibition as well. Because the contemplated payments for legal services would not be considered “independent expenditures,” and because they would not be considered contributions to a candidate unless made at the behest of a candidate, ECCO’s prohibition on contributions from organizations does not apply to the funds pooled by your potential clients.

4. Coordination of Expenditures with a Candidate

As discussed above, any payments made at the behest of a candidate are considered contributions to the candidate. According to the FFPC advice letters and opinions discussed above, a candidate’s payments for legal fees associated with an election challenge are considered contributions and expenditures subject to the PRA. Therefore, any payments made to, or at the behest of, a candidate would be considered contributions subject to regulation, even if they do not expressly advocate for the election or defeat of a candidate.

Although California Code of Regulations sections 18225.7 and 18550.1 provide extensive guidance in determining whether a payment is made “at the behest” of a candidate or committee, and whether an

expenditure is considered independent or coordinated, it is doubtful that issues surrounding the logistical coordination of multiple attorneys in an election contest was contemplated during the drafting of either of these regulations. Therefore, while local law would clearly prohibit your clients from making payments for legal fees upon the request or at the explicit direction of a City candidate, we do not believe that this prohibition extends to all aspects of coordination that necessarily take place between parties involved in litigation. In other words, it would be anticipated that, as the legal representative of your potential clients, you might be required to communicate with an attorney representing one of the mayoral candidates. As long as this communication did not result in your potential clients taking action at the request of the candidate or the candidate's representative, it would not be considered a contribution to the candidate.

I hope the foregoing sufficiently responds to the questions you have raised. If you have any additional questions, please contact our office.

Sincerely,

Stacey Fulhorst

Executive Director

SF/s

¹ FPPC Regulation 18225(a)(1) provides that a payment is for "political purposes" if it is "for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure."

² Both local and state law define a "committee" as any person or group of persons who (1) receive contributions totaling \$1,000 or more in a calendar year, (2) makes independent expenditures totaling \$1,000 or more in a calendar year, and (3) makes contributions totaling \$10,000 or more in a calendar year to or at the behest of candidates or committees.