

Note: the conclusions reached in this advice letter as to questions 3, 4, and 5 are superseded by the February 16, 2010, ruling issued by Judge Irma E. Gonzalez, United States District Court, Southern District, in *Thalheimer, et al. v. City of San Diego*, case No. 09-CV-2862-IEG.

Pursuant to Judge Gonzalez's ruling, SDMC section 27.2938(a) may not be interpreted to preclude a candidate from spending personal funds to support his or her own candidacy prior to the one-year pre-election period.

December 5, 2006

SDEC Informal Advice Letter No. IA06-11

John Kern
The Kern Company
3814 Radcliffe Lane
San Diego, CA 92122

Re: Request for Advice Concerning Soliciting and Accepting Contributions
Prior to the One Year Period Before a Primary Election

Dear Mr. Kern:

This advice letter has been prepared in response to your e-mail to the San Diego Ethics Commission dated November 20, 2006. You are a campaign consultant seeking advice from the Ethics Commission concerning the provisions in the City's Election Campaign Control Ordinance [ECCO] regarding time limitations applicable to the solicitation and acceptance of contributions. Because your letter seeks general advice and does not identify a specific candidate, we consider your e-mail to be a request for informal advice.

QUESTIONS

1. When does a person become a candidate in order to be subject to the provisions in the City's Election Campaign Control Ordinance [ECCO]?
2. For the City election scheduled to be held June 3, 2008, do ECCO's prohibitions against soliciting and accepting contributions more than one year before an election mean that soliciting and receiving contributions directly in support or opposition to a candidate can begin on June 3, 2007?
3. Assuming that the date in Question 2 is correct, may an individual spend his or her personal funds supporting his or her candidacy prior to June 3, 2007?
4. Assuming the date in Question 2 is correct, may an individual spend his or her personal funds on exploratory activities such as polling and seeking professional advice regarding a possible candidacy prior to June 3, 2007?
5. Assuming the date in Question 2 is correct, may an individual spend his or her personal funds on literature that does not mention a specific election date or expressly advocate for his or her election (e.g., "On June 3, Vote for Candidate X") prior to June 3, 2007?

6. Assuming the date in Question 2 is correct, may friends of a potential candidate spend their personal funds on meetings or gatherings in their homes to introduce the potential candidate prior to June 3, 2007?

SHORT ANSWERS

1. For purposes of the questions posed above, a person becomes a candidate subject to the provisions in the ECCO when he or she has received a “contribution” or made an “expenditure” with the intent to bring about his or her nomination or election to a City office.
2. Yes. Candidates who are seeking a City office that is the subject of the June 3, 2008, primary election may begin soliciting and accepting contributions on June 3, 2007.
3. An individual may not spend personal funds in support of his or her candidacy prior to June 3, 2007, unless such spending is solely related to “exploratory” activities. Such activities involve gathering information that an individual may use to decide whether or not to run for office. Activities designed to promote an individual’s qualifications or otherwise advocate that individual’s bid for elective office are not considered “exploratory.”
4. An individual may spend personal funds on polling and seeking professional advice regarding a possible candidacy prior to June 3, 2007, but only to the extent that such activities are truly considered “exploratory.”
5. An individual may not spend personal funds prior to June 3, 2007, on literature if that literature expressly or impliedly advocates for his or her election. For example, a person’s list of qualifications or achievements need not mention a particular elective office or election date in order to imply that the person is qualified for office.
6. Friends of a potential candidate may spend their personal funds prior to June 3, 2007, on meetings or gatherings in their homes to introduce a potential candidate if the total cost of each event is \$500 or less and paid for by the home’s occupants.

ANALYSIS AND DISCUSSION

Please note that many of the terms in ECCO, including “contribution” are based on, and intended to be consistent with, provisions of the state’s Political Reform Act [PRA]. SDMC § 27.2903. Accordingly, the Ethics Commission often relies on opinions and advice letters issued by the California Fair Political Practices Commission [FPPC] that interpret the PRA and its applicable regulations. Therefore, although the conclusions reached in this advice letter are based on the law contained within ECCO, you will see below that we also look to FPPC advice letters for guidance in interpreting some of these laws.

A. Definition of Candidate

The term “candidate” is defined in ECCO as follows:

Candidate means any individual who:

- (a) is listed on the ballot for elective City office; or
- (b) has begun to circulate nominating petitions or authorized others to do so on his or her behalf for nomination for or election to a City office; or
- (c) has received a contribution or made an expenditure or authorized another person to receive a contribution or make an expenditure with the intent to bring about his or her nomination for or election to any City office; or
- (d) is a City officeholder who becomes the subject of a recall election. A City officeholder “becomes the subject of a recall election” on the earlier of:
 - (1) the date a notice of intention to circulate a recall petition is published pursuant to the recall provisions of this article; or,
 - (2) the date a statement of organization for a committee to recall the officeholder is filed with the City Clerk or the Secretary of State pursuant to state and local law.

SDMC § 27.2903.

Because your questions concern various scenarios involving collecting and spending money for a City election campaign, subsection (c) contains the language most applicable to you. Thus, under ECCO, an individual generally becomes a “candidate” once he or she collects or spends money in furtherance of running for a City elective office. This provision is applicable regardless of whether the individual collects or spends the money personally, or does so indirectly through his or her controlled committee. In addition, whether or not an individual has announced his or her candidacy is not significant in determining whether a payment constitutes a contribution or expenditure. *In re Rosenthal*, FPPC Adv. Ltr. A-97-063b. As discussed later in this letter, however, there are some specific circumstances (e.g., “exploratory” activities) under which candidacy-related payments may be made without being considered a contribution or expenditure.

B. Time Limits on Accepting Contributions

Under the provisions of ECCO, candidates and their controlled committees are subject to time limitations on when they may collect contributions. In particular, section 27.2938(a) states:

It is unlawful for any candidate or controlled committee seeking elective City office to solicit or accept contributions prior to the twelve months preceding the primary election for the office sought.

As you have indicated, there is a City primary election scheduled for June 3, 2008. In accordance with section 27.2938(a), any person who is seeking office at the June 3, 2008, election may not solicit or accept any contributions until June 3, 2007. Contributions include monies paid to a candidate by his or her supporters, as well as the candidate’s own money used to support his or her candidacy. SDMC § 27.2903; FPPC Regulation 18215(b)(2). Accordingly, a person intending to run for City office at the June 3, 2008, election may not accept any money from anyone else for that purpose until June 3, 2007, and also may not use his or her own money for such purposes until June 3, 2007. On June 3, 2007, however, a candidate may begin to accept contributions from individual supporters up to the amount of the applicable contribution limits (SDMC § 27.2935(a)), and may also begin to accept unlimited contributions from his or her own personal funds (SDMC § 27.2935(b)).

C. Exploratory Activities

As stated above, a person becomes a “candidate” when he or she receives a contribution (even from oneself) or makes an expenditure in connection with seeking elective City office. Your questions raise the issue of when a payment for goods or services becomes an “expenditure.” The FPPC has advised that payments for strictly “exploratory” activities are not expenditures.¹ Such activities include conducting polls and surveys (1) to determine the issues that are important to voters; (2) designed to determine the degree of name recognition an individual may have and (3) designed to determine the percentages of voters who might vote for a particular individual. *In re Powell*, FPPC Advice Letter A-85-241. On the other hand, if a poll or survey lists the person’s qualifications, implies that the person is qualified for a particular office, or lists the names of individuals who support or would vote for the person, then the payments for that poll or survey are considered “expenditures.” *Id.*

In essence, exploratory activities are a way for a prospective candidate to gather information upon which to base a decision regarding whether or not to run for office. Such activities are not for the purpose of giving information about a prospective candidate to prospective voters. Thus, with regard to whether “seeking professional advice” constitutes an exploratory activity, the answer depends on the nature of the advice being sought. If the advice pertains solely to whether or not a person should run for office, then the exploratory exception would apply. On the other hand, if the advice sought concerns the development of campaign strategies, then a payment for that advice would constitute an expenditure outside the scope of exploratory activities.

One of your questions concerns payment for literature that does not mention a specific election date or expressly advocate for a person’s election to office. Just because a piece of literature does not contain these items does not mean that it qualifies for the “exploratory” exception. Literature that indirectly or impliedly advocates a person’s election to office falls outside the scope of an exploratory activity. For example, although a mailer that lists a person’s qualifications for holding office may not mention an election date or contain express advocacy language, that mailer would nevertheless be considered a form of advocacy and would therefore fall outside the scope of the exploratory activities exception.

As set forth above, a person seeking to run for City office at the June 3, 2008, primary election may spend personal funds on exploratory activities prior to June 3, 2007. Outside this narrow exception, however, a person may not use personal funds prior to June 3, 2007, to pay for goods or services in connection with seeking that elective City office.²

D. Payments by Friends

You have also asked whether friends of a potential candidate may spend their personal funds prior to June 3, 2007, on meetings or gatherings in their homes to introduce a potential candidate. Generally,

¹ Note that if a person pays for exploratory activities and ultimately decides to become a candidate, all of the payments that person made in connection with the exploratory activities must be disclosed in a campaign statement. *In re Powell*, FPPC Advice Letter A-85-241.

² All personal funds used to promote the election of a candidate must be deposited in a campaign checking account (and thus become contributions) prior to expenditure. Cal. Gov’t Code § 85201(d). All campaign expenditures must be made from that account. Cal. Gov’t Code § 85201(e). Note that these provisions do not apply to a candidate’s filing fee, or to candidates who do not accept contributions or make expenditures exceeding \$1,000 within a calendar year.

when meetings or gatherings are made at the behest of a potential candidate, the funds used to pay for those events are considered in-kind (or non-monetary) contributions to that candidate. As stated above, a candidate for the June 3, 2008, election may not accept contributions, including in-kind contributions, prior to June 3, 2007. There is an exception, however, for payments made by the occupant of a home or office for costs related to meetings held in the occupant's home, but only if the total cost of the meeting is \$500 or less. SDMC § 27.2903; FPPC Regulation 18215(c)(3). Goods or services donated to the event by anyone other than the occupants of the home or office would be considered an in-kind contribution, and accordingly would constitute an unlawful contribution if made before June 3, 2007. For more information on the rules applicable to these types of events, please refer to our Fact Sheet on Home or Office Fundraisers for City Candidates, a copy of which is enclosed with this letter.³

CONCLUSION

The provisions of ECCO do not permit a candidate or a prospective candidate to accept contributions for the City's June 3, 2008, primary election prior to June 3, 2007. This prohibition applies to contributions that a candidate may wish to give to support his or her own candidacy. A person cannot spend money to seek elective office until that money has been contributed to his or her campaign. Thus, the time limits on soliciting and accepting contributions effectively prohibit a prospective candidate from spending his or her personal funds on an election bid until one year before the primary election. There are two exceptions applicable to the questions you've raised. First, there is an exception for payments made for purely "exploratory" activities, i.e., payments to help a person decide whether or not to run for office. Second, there is an exception for meetings hosted by friends in their homes, so long as the costs are borne by the occupants and do not exceed \$500.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

If you have any additional questions, please do not hesitate to contact our office.

Sincerely,

Cristie McGuire
General Counsel

By: Stephen Ross
Program Manager-Technical Assistance

³ Keep in mind that the fundraising discussed in this Fact Sheet may not occur until one year before the applicable primary election. This prohibition, however, does not prevent friends and neighbors from attending a social gathering to meet a candidate.