

April 4, 2006

SDEC Formal Advice Letter No. FA06-05

James R. Sutton, Esq.  
The Sutton Law Firm  
150 Post Street, Ste. 405  
San Francisco, CA 94108

Re: Request for Advice Regarding Legal Defense Funds and Payment of Stipulation

Dear Mr. Sutton:

This advice letter has been prepared in response to your letter to the City of San Diego Ethics Commission dated March 21, 2006. You are seeking formal advice from the Ethics Commission on behalf of County Supervisor Ron Roberts regarding the legal defense fund provisions of the City's Election Campaign Control Ordinance [ECCO], which is contained in the San Diego Municipal Code [SDMC]. You are also seeking formal advice concerning the payment of a fine that Supervisor Roberts agreed to pay pursuant to a stipulation with the Ethics Commission.

### **QUESTIONS**

1. Are contributors to Supervisor Roberts' legal defense funds required to submit the disclosure of pending matters forms required by SDMC section 27.2965(e) in light of the fact that the Supervisor is not a City Official?
2. May a contributor intending to contribute to Supervisor Roberts' two legal defense funds write a single check so long as contribution limits are not exceeded and the contributor specifically designates in writing the purpose for the check?
3. Does a contributor intending to contribute to Supervisor Roberts' legal defense funds make the check payable to his campaign committee?
4. May Supervisor Roberts use his surplus funds to pay for costs associated with an Ethics Commission audit?
5. May members of Supervisor Roberts' campaign committee's fundraising staff reimburse Supervisor Roberts for all or a portion of the fine he agreed to pay in his stipulation with the Ethics Commission?

6. Does the Election Campaign Control Ordinance's 180-day post-election fundraising time limit apply to funds transferred from Supervisor Roberts' County re-election committee to his mayoral committee?

### **SHORT ANSWERS**

1. Contributors to Supervisor Roberts' legal defense funds are required to submit the disclosure forms required by SDMC section 27.2965(e).
2. A contributor intending to contribute to Supervisor Roberts' two legal defense funds may write a single check so long as contribution limits are not exceeded and the contributor specifically designates in writing the purpose for the check.
3. Because contributions to a legal defense fund must be deposited into the candidate's campaign committee bank account, an individual contributing to such a fund should make the contribution check payable to Supervisor Roberts' campaign committee.
4. Supervisor Roberts may use his committee's surplus funds to pay for professional services reasonably required to assist his committee in the performance of its administrative functions. Such functions include responding to an Ethics Commission audit.
5. A payment to Supervisor Roberts from a member of Supervisor Roberts' campaign committee's fundraising staff is a contribution unless it is clear from the surrounding circumstances that the payment is in exchange for full and adequate consideration. A payment made to the Supervisor's committee to resolve a bona fide legal dispute in exchange for a release from legal action would fall under this exception.
6. Any funds, including those originating in the Supervisor's County campaign account, that are accepted by Supervisor Roberts' mayoral committee would be considered a "contribution" and subject to the 180-day post-election contribution ban.

### **BACKGROUND**

Your client was a candidate for Mayor of the City of San Diego in the November 2, 2004, general election. The San Diegans for Ron Roberts Committee [Roberts Committee] is a campaign committee registered with the State of California and established to support your client's candidacy in that election. On April 5, 2005, the Roberts Committee was selected for audit at a random drawing. The audit of this committee has not yet taken place. On November 10, 2005, your client entered into a stipulation with the Ethics Commission wherein he agreed to pay a fine to settle an administrative enforcement action relating to actions of the Roberts Committee. Supervisor Roberts has not yet paid the fine. You are now seeking clarification of the provisions in ECCO that pertain to the establishment of legal defense funds to pay costs associated with the audit and the enforcement matter. You are also seeking guidance on matters pertaining to the payment of the fine.

## ANALYSIS

The Ethics Commission gives technical assistance on the laws under its jurisdiction, which include the City's campaign finance laws set forth in ECCO, but does not give advice on state law. Nevertheless, because the definitions in ECCO are intended to be consistent with those contained in the California Political Reform Act [PRA] (except where City law is more stringent), we turn to interpretations of state law from time to time for guidance in interpreting the provisions of ECCO. Some of the questions you've posed require that we look to interpretations of state law by the courts and by the state's Fair Political Practices Commission, whose regulations and advice letters often clarify the meaning of local laws. Thus, some of the analysis below is based on interpretations of ECCO through a review of pertinent provisions of state law.

### *1. Disclosure Form*

Section 27.2965(e) of the San Diego Municipal Code provides that an individual may make a contribution to a legal defense fund only if the contribution is accompanied by a "disclosure form identifying the particulars of all matters, if any, that such individual has pending before the board, commission, department, or agency of which the City Official or candidate maintaining the legal defense fund is a member or employee." You question whether or not this language applies to Supervisor Roberts because he is not a "City Official."

Section 27.2965(e) does not apply solely to "City Officials." It also applies to "candidates." As a candidate in the primary and general mayoral elections in 2004, your client is clearly a "candidate" under ECCO. According to a plain language interpretation of this ECCO provision, every individual making a contribution to a candidate's legal defense fund must comply with the disclosure requirements of section 27.2965(e). The fact that a disclosure may not involve a City matter, but would, in Supervisor Robert's case, involve a County matter, does not alter this conclusion. When an individual chooses to make a contribution to a City candidate, that person must comply with the entire statutory framework the City has adopted for the making of contributions. Just as an individual who resides in Chula Vista or La Mesa may not disregard the City's contribution limits when contributing to a City of San Diego candidate, individuals with "County" matters before that candidate may not ignore the provisions of section 27.2965(e). The public interest in disclosures that are directly related to a City candidate does not stop at geographical boundaries. Moreover, the legislative record reveals no suggestion that the City Council intended that this provision be interpreted so narrowly as to apply only to matters before City agencies. We are also unaware of any legal authorities that would preclude the application of section 27.2965(e) to matters that come before your client in his capacity as a County Supervisor.

### *2. Single Check for Multiple Legal Defense Funds*

You ask whether or not a contributor intending to contribute to Supervisor Roberts' two legal defense funds may write a single check if contribution limits are not exceeded and the contributor specifically designates in writing the purpose for the check. As you know, legal defense funds under ECCO must operate out of an existing campaign committee, and must use that committee's one campaign checking account for the deposit of its contributions. SDMC § 27.2965(f)(2). Accordingly,

when a candidate has two legal defense funds, a single committee checking account will serve as the repository for both funds. Because the Roberts Committee was the subject of an Ethics Commission enforcement action, and because the Roberts Committee was selected for audit, it is lawful for your client to have two legal defense funds operating out of that committee. Under ECCO, all checks submitted for the two legal defense funds must be deposited in the Roberts Committee campaign checking account.

Although ECCO does not require that a separate check be written for each legal defense fund, it does require that such checks be “accompanied by a written designation from the contributor indicating that the contribution is a contribution for the legal defense fund.” SDMC § 27.2965(f)(1). Under the legal defense fund provisions of ECCO, therefore, a contributor may write a single check to the Roberts Committee to make contributions to both legal defense funds so long as the contributor accompanies that check with a written designation that instructs the committee to use the funds in a manner that does not cause the legal defense fund contribution limits to be exceeded.

### *3. Legal Defense Fund Checks Payable to Committee*

You have also asked whether or not legal defense fund contributions may be made payable to the Roberts Committee. As indicated in the previous section, all legal defense fund contributions must be received by the committee in which the applicable fund resides. Accordingly, legal defense fund contributions related to the actions of the Roberts Committee may be in the form of a check made payable to the Roberts Committee for deposit in that committee’s campaign checking account.

### *4. Using Surplus Funds for Audit*

Your letter also seeks guidance on the issue of whether or not surplus funds may be used to pay costs associated with the Ethics Commission audit of the Roberts Committee. The City’s surplus funds rule, which is set forth at SDMC section 27.2924, states that such funds may be used “to pay for professional services reasonably required by the candidate or committee to assist in the performance of its administrative functions.” When a committee is selected for audit, that committee may reasonably be expected to require the professional services of a treasurer and/or attorney to appropriately respond to the audit. A candidate committee’s response to an Ethics Commission audit necessarily involves “administrative functions,” which may include producing records, responding to audit findings, and interpreting relevant laws. Therefore, the applicable provisions of ECCO permit your client to use existing surplus funds to pay for professional services reasonably required to assist his committee in responding to an Ethics Commission audit.

### *5. Fundraiser Staff Reimbursement of Fine Amount*

You have asked whether or not the fundraising staff for Supervisor Roberts’ campaign committee’s may reimburse him for all or a portion of the fine he agreed to pay in his stipulation with the Ethics Commission. In general, any payments a person makes to assist a candidate in defraying fines imposed on that candidate in connection with a campaign violation would be considered a “contribution.” See e.g., *In re Bagatelos*, FPPC Adv. Ltr. A-93-104; *In re Taylor*, FPPC Adv. Ltr. I-90-143.

Contributions in City of San Diego elections are subject to a variety of restrictions, including limitations on the source and amount of contributions and the time frame in which contributions may be accepted. The time restriction is of particular concern with regard to your question because a substantial amount of time has passed since the November 2, 2004, election in which your client participated. San Diego Municipal Code section 27.2938(b) states that “it is unlawful for any candidate or controlled committee for City office to accept contributions more than 180 days after the withdrawal, defeat, or election to office.” Because more than 180 days have elapsed since the November 2004 election, the Roberts Committee may not accept any further contributions. Although contributions to a legal defense fund fall within an exception to the 180-day rule (SDMC § 27.2938(d)), legal defense funds may not be used to pay a fine. SDMC § 27.2968(a). For this reason, the Roberts Committee may not accept any contributions in any amount or from any source, including legal defense fund contributions, to pay the Ethics Commission fine.

Your letter indicates, however, that persons performing fundraising duties for the Roberts Committee have some degree of responsibility for the actions that lead to the fine. In particular, you stated that these persons were responsible for the obtaining contributors’ occupation and employer information. The inaccuracy of that information was the basis of the violations for which the Ethics Commission fine was imposed. *See* Ethics Commission Stipulation (Case No. 2005-07). These particular circumstances raise the question of whether or not payments by the fundraising staff to your client to resolve a dispute over the staff members’ performance could fall outside the definition of “contribution.”

The term “contribution” is defined in ECCO to generally have the same meaning as that set forth in California Government Code section 82015 and FPPC Regulation 18215. According to Government Code section 82015(a), “‘contribution’ means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment *except to the extent that full and adequate consideration is received*, unless it is clear from the surrounding circumstances that it is not made for political purposes.” (emphasis added) This definition also provides that “a payment made at the behest of a candidate is a contribution to the candidate unless the criteria in either subparagraph (A) or (B) are satisfied: (A) *Full and adequate consideration is received from the candidate.* (B) 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)(2) (emphasis added).

FPPC Regulation 18215 defines “political purpose” in the context of a “contribution.” A payment is made for “political purposes” if it is received by a candidate or the candidate’s controlled committee. FPPC Regulation 18215(a). Thus, any payment made to the Roberts Committee would be considered to be made for a “political purpose,” and would therefore be a “contribution” unless it can be clearly established that the payment is made for “full and adequate consideration.” In other words, under the express provisions of both Government Code section 82015 and FPPC Regulation 18215, a payment to the Roberts Committee, even if related to Roberts’ campaign activities, would not be considered a “contribution” to the Committee so long as the Committee gives the payor something of equal value in exchange for the payment.

Although this letter will not presume to advise Supervisor Roberts on any legal recourse he or his committee may have against fundraising staff members for the ECCO violation, we believe that if the Roberts Committee has a bona fide legal dispute with such persons over the performance of their duties, and if the resolution of that dispute results in the Roberts Committee's receipt of a payment in exchange for an agreement to forego legal action against the persons making the payment, then that payment would not be considered a "contribution." A settlement agreement to resolve a contractual dispute between the Roberts Committee and the fundraising staff would be considered a separate contract. See, e.g., *Roe v. State of California*, 94 Cal. App. 4th 64, 69-70 (2001). California statutory law requires that every contract have a "sufficient cause or consideration." Cal. Civil Code § 1550. It is generally accepted by California courts that forbearance (the decision not to exercise a right or power) is sufficient consideration to support a contract. *Small v. Fritz Companies, Inc.*, 30 Cal. 4th 167, 174 (2003). Accordingly, if the Roberts Committee has a good faith right to claim damages against members of the fundraising staff, we believe that the Committee may exchange that right for a monetary payment under the terms of a settlement agreement. Under such circumstances, the Committee would be receiving a payment in exchange for "full and adequate consideration" and would not, therefore, be receiving a "contribution."<sup>1</sup>

Such a scenario is not substantively dissimilar to a situation in which a vendor's performance fails to meet the terms of a contract and sums paid by the candidate's committee to the vendor are returned. In both instances, the candidate committee has a contractual relationship with a party, pays the party to perform under the contract, and the payment is returned when the party fails to adequately perform the terms of the contract. In such situations, where the payment cannot reasonably be considered a means of helping a candidate win an election, but instead is clearly a good faith means of resolving a bona fide dispute, any characterization of the payment as a "contribution" would in no way further the purposes for which ECCO was created.

Although not expressly set forth in your letter, we presume that it was the Roberts Committee that entered into a contractual agreement with one or more persons to provide fundraising services to the Committee, and that such services were paid for with contributions received by the Committee. Accordingly, it follows that any payments made by a member of the fundraising staff to resolve a bona fide legal dispute would need to be made to the Roberts Committee, and not to Supervisor Roberts personally. As in the analogous situation described above involving a refund from a campaign vendor resulting from the failure to meet the terms of a contract, the refund must be made to the committee that originally paid for the services. It would be inappropriate for a candidate to personally benefit from a refund when the payment for the original services was made from contributions to the candidate's committee.

The above advice is consistent with that given by the FPPC in *In re Davis*, FPPC Adv. Ltr. I-93-119, wherein it advised that a payment made by a hotel in settlement of a lawsuit filed against it by a candidate's controlled committee was not a contribution under the Act. Even though the candidate's committee received the payment, the FPPC determined that the payment was not a "contribution"

---

<sup>1</sup> Note that this conclusion extends only to members of the fundraising staff against whom the Roberts Committee has a legitimate cause of action, e.g. a breach of contract. In other words, this conclusion would not permit a payment by a low-level member of the fundraising staff unless the Roberts Committee has a reasonable legal basis for pursuing damages from that person.

because the settlement was the type of transaction that would be made by the hotel to resolve any lawsuit brought against the hotel by any hotel customer. Similarly, if the Roberts Committee has a good faith contractual dispute with a member of its fundraising staff, any financial settlement of that dispute would not be considered a “contribution” so long as the terms of the settlement were of the type normally associated with the resolution of similar disputes outside the political arena.

Keep in mind that the scope of our assistance on this issue is limited to our interpretation of the provisions of ECCO. As indicated above, we do not provide advice on state law. Because there do not appear to be any FPPC advice letters or opinions addressing this particular factual scenario, we do not know if the FPPC would agree with our conclusions. In this regard, you may wish to consult with the FPPC directly for further guidance on this question.

#### *6. Transfers from County Committee*

Your final question pertains to whether or not Supervisor Roberts may transfer funds from a committee he formed for a County of San Diego election to his City campaign committee in order to pay the Ethics Commission fine. ECCO does permit the transfer of campaign funds from one committee to another committee under some circumstances. SDMC § 27.2920. Such transfers, however, must be treated as “contributions” to the City committee. *Id.*

As indicated above, a candidate who is defeated at a City election may accept post-election contributions only for 180 days following that election. SDMC § 27.2938(b). Because the 180-day period has passed, the Roberts Committee may not accept any additional contributions (except for legal defense fund contributions explicitly earmarked for such purposes by the contributor, which would not be the case with any County contributions). Transferring funds from his County committee to his City committee would constitute the acceptance of contributions, and would therefore be prohibited under ECCO because more than 180 days have elapsed since the November 2004 election.

### **CONCLUSIONS**

Because of ECCO’s 180-day time limit on post-election contributions, the Roberts Committee may not accept any contributions at this time except for those that are specifically earmarked for one or more legal defense funds. Contributors to your client’s legal defense funds must disclose any matters pending before Supervisor Roberts when the contribution is made. An individual may use a single check to make a contribution to multiple legal defense funds, so long as that individual expresses his or her intentions in writing and does not exceed the applicable contribution limits. Legal defense funds may not be used to pay an Ethics Commission fine. In addition, funds from your client’s County committee may not be used to pay the fine because of the 180-day rule discussed above. Payments to the Roberts Committee from other persons, including members of the Committee’s fundraising staff, would not be considered “contributions” if the payments are received in exchange for full and adequate consideration. The term “full and adequate consideration” includes the Committee’s agreement not to pursue legal action to resolve a bona fide dispute against persons making payments to the Committee.

James R. Sutton, Esq.

April 4, 2006

Page 8

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 C. McGuire

General Counsel

By: Stephen Ross

Program Manager-Technical Assistance