

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)

December 13, 2004

SDEC Informal Advice Letter No. IA04-10

Mayor Dick Murphy

Friends of Mayor Dick Murphy

7007 Mission Gorge Road, Suite 200

San Diego, Ca 92120

Re: Request for Advice Regarding Legal Fees Associated with Post-Election Legal Challenges and Payment of “Win Bonuses” in Light of Pending Legal Challenges

Dear Mayor Murphy:

This advice letter has been prepared in response to your letter to the City of San Diego Ethics Commission dated December 2, 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 inquiry pertains to guidelines and restrictions associated with the acceptance of contributions to pay for legal fees associated with post-election legal challenges and “win bonuses” in light of pending legal challenges. Your letter asks general, hypothetical questions, and accordingly we consider your letter to be a request for informal advice.

QUESTIONS

1. Prior to January 5, 2005, may the Friends of Dick Murphy Committee [the Committee] raise money to pay for legal fees associated with post-election legal challenges? If so, from whom and in what amounts?
2. After January 5, 2005, may the Committee establish a legal defense fund and raise money to pay legal fees incurred prior to January 5, 2005? If so, from whom and in what amounts? Does the current 90-day vendor debt time limit apply or the new 180-day limit?

3. Can you personally loan money to the legal defense fund to pay these legal fees and be reimbursed with campaign contributions?
4. When does the vendor debt time limit begin to run on a “win bonus” that is still contingent because of pending legal challenges?
5. If a “win bonus” is still contingent because of pending legal challenges, may the Committee currently accept campaign contributions and hold the funds in its campaign checking account and then either pay the vendors if you ultimately win the election, or refund the contributions to contributors if you ultimately lose?
6. After January 5, 2005, are contributions to pay a “win bonus” limited to \$250 or \$300?

SHORT ANSWERS

1. Yes. Prior to January 5, 2005, the Committee may accept contributions for general election expenses from individuals provided that the total amount contributed by an individual does not exceed \$250 per election.
2. Yes. The Committee may establish a legal defense fund after January 5, 2005, and may use contributions to the legal defense fund to pay for legal expenses incurred prior to January 5, 2005. The Committee may accept contributions for a legal defense fund from individuals up to \$250 per calendar year per legal proceeding. Such contributions are not aggregated with “regular” general election contributions. The vendor debt time limit does not apply to legal fees associated with post-election legal challenges because such debts were not incurred for the political purpose of influencing the action of the voters.
3. Yes. You may make a personal loan to the Committee to pay legal fees for your defense in election-related litigation, and be reimbursed with contributions earmarked for a legal defense fund after January 5, 2005.
4. The time limit associated with the payment of vendor debts begins to run upon receipt of a bill or invoice, or on the last calendar day of the month in which the debt becomes due. In other words, the ninety-day period begins to run on the earlier of two dates: when you receive an invoice from the vendor, or the last calendar day of the month in which the debt becomes due in accordance with the contract you have with the vendor.

5. If the Committee has outstanding debts associated with “win bonuses” for the general election on the basis of the City Council’s declaration that you prevailed in the mayoral election, then you may accept contributions to pay these campaign debts. In the event that pending or future legal challenges result in the de-certification of election results and another candidate is declared the winner of the 2004 mayoral election, any dispute between the Committee and a vendor concerning a “win bonus” would be considered a private contract dispute between the parties. Under such circumstances, if a “win bonus” is returned to the Committee, the funds would become “surplus funds” at the end of the post-election reporting period and the Committee would be required to dispose of such “surplus funds” pursuant to the guidelines established by local and state law.

6. The amendments to ECCO that go into effect on January 5, 2005, include an increase in contribution limits from \$250 to \$300 for citywide elections. In other words, on or after January 5, 2005, the Committee may accept contributions from individuals up to \$300 for the purpose of paying debts associated with any citywide election, including the November 2004 mayoral election.

BACKGROUND

You were a candidate in the mayoral election on November 2, 2004. Subsequent to the election, three legal proceedings were initiated by individuals concerning the election process:

- *McKinney v. City of San Diego*, San Diego Superior Court Case No. 838427
- *McDonald v. County of San Diego*, United States District Court Case No. 04-CV2265
- *League of Women Voters v. McPherson*, San Diego Superior Court Case No. 838890

According to the information you provided, you are a real party in interest in each of these post-election legal proceedings and, as a result, the Committee began incurring legal fees in connection with these proceedings in November of 2004. Although you have prevailed at the trial court level in each of these cases, the possibility for reversal at an appellate level currently remains in each case.

You indicated that the Committee is obligated to pay one or more “win bonuses” if you ultimately prevail in all of the legal challenges. You believe that the Committee has “net debts” on the basis that the value of these “win bonuses” exceeds the Committee’s current cash on hand.

ANALYSIS AND CONCLUSIONS

A. Contributions for Legal Fees

According to ECCO, the use of campaign funds is governed by California Government Code section 81000 et seq. SDMC § 27.2940. California Government Code section 89514 specifically permits the use of campaign funds for attorney’s fees and costs associated with an administrative, civil, or criminal

action provided that the action is directly related to the activities of a committee that are consistent with its primary objectives. Cal. Gov't Code § 89514. Accordingly, the use of campaign funds to pay the legal fees you have incurred in connection with the post-election legal proceedings discussed above is clearly permitted by local and state law. Current ECCO limits contributions from individuals to \$250 per election. This limit applies to campaign contributions accepted by the Committee prior to January 5, 2005, to pay the subject legal expenses.

B. Legal Defense Fund

As you know, extensive amendments to ECCO were recently approved by the City Council. The majority of the amendments will go into effect on January 5, 2005. Some of the substantive changes concern the establishment of a legal defense fund. These new provisions fundamentally alter the manner in which candidates and committees may raise money to pay for legal expenses. In this regard, you may wish to read Ethics Commission advice letter IA04-11, dated December 13, 2004, which contains a related analysis concerning the use of contributions to pay for election-related legal expenses. Although the Committee may accept campaign contributions prior to January 5, 2005, to pay for legal expenses, the Committee is required to establish a legal defense fund after January 5, 2005, in order to pay legal expenses associated with defending your interests in a civil, criminal, or administrative proceeding. Specific details of this recently adopted provision are as follows:

- (a) Every elected City Official and every candidate for elective City office shall be permitted to establish and maintain one legal defense fund.
- (b) In addition to contributions received in connection with seeking an elective City office, any elected City Official or candidate for elective City office may receive contributions from individuals for a legal defense fund, and may use such contributions solely for the following purposes:
 - (1) to defray professional fees and costs incurred in the City Official's or candidate's response to an audit of his or her campaign activity conducted by the City of San Diego Ethics Commission or the California Fair Political Practices Commission; or
 - (2) to defray attorney's fees and other legal costs incurred in the City Official's or candidate's legal defense to one or more civil, criminal, or administrative proceedings arising directly out of the conduct of an election campaign, the electoral process, or the performance of the City Official's governmental activities and duties.
- (c) It is unlawful for any individual to make, or any City Official or candidate to solicit or accept from any individual, contributions totaling more than \$250 during a single calendar year to a legal defense fund in connection with an audit or a civil, criminal, or administrative proceeding identified in a Statement of Purpose filed with the City Clerk pursuant to section 27.2966.
- (d) An individual's contributions to a legal defense fund are not subject to the campaign contribution limits set forth in sections 27.2935 and 27.2938.

(e) It is unlawful for any individual to make a contribution to a legal defense fund without accompanying the contribution with 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. When filing the quarterly campaign statements required by section 29.2967, the City Official or candidate maintaining the legal defense fund shall attach to such statement a copy of each disclosure form received pursuant to this subsection.

(f) Any legal defense fund established in accordance with sections 27.2965-27.2969 must be maintained through a controlled committee the City Official or candidate has organized to seek the office held or sought that is the subject of the civil, criminal, or administrative proceeding.

(1) It is unlawful for a controlled committee to accept a contribution for a legal defense fund unless it is accompanied by a written designation from the contributor indicating that the contribution is a contribution for the legal defense fund.

(2) Contributions collected for a legal defense fund must be deposited in the controlled committee's campaign contribution checking account.

(3) Expenditures from a legal defense fund must be made from the controlled committee's campaign contribution checking account.

(g) Except as set forth in subsection 27.2924(c)(6), sections 27.2965-27.2969 shall constitute the sole authority for soliciting or accepting contributions for the costs of responding to an audit or for the defense of an action relating to an election campaign, electoral process, or a City Official's conduct in office.

SDMC § 27.2965 (effective January 5, 2005).

Accordingly, after January 5, 2005, the Committee will be required to establish a legal defense fund in order to accept contributions to pay legal fees associated with your defense of any post-election legal challenges. In other words, the Committee will no longer be permitted to use "regular" campaign contributions for the purpose of paying for your election-related legal defense.

Pursuant to the provisions cited above, the Committee will be permitted to establish one legal defense fund, and to accept contributions for the legal defense fund up to \$250 per individual per calendar year in connection with each legal proceeding provided that the Committee maintains a separate ledger for each proceeding. If the Committee incurs legal expenses associated with the defense of three separate and distinct civil proceedings, the Committee would be permitted to solicit and accept \$250 per individual for each proceeding. Please refer to the provisions of amended SDMC sections 27.2966 and 27.2967 (effective January 5, 2005) for guidelines concerning the establishment and maintenance of a legal defense fund, as well as the disclosure of legal defense fund activity.

The legal defense fund provisions cited above do not require that a fund be established before any legal fees are incurred. In fact, from a practical perspective, it may be unlikely for an officeholder or candidate to need a legal defense fund and solicit contributions before he or she begins to incur legal fees. The legal defense fund provisions permit the Committee to create a legal defense fund after

January 5, 2005, to pay for legal expenses incurred prior to January 5, 2005.

C. Vendor Debt Limit for Legal Fees

You asked whether the current 90-day vendor debt time limit, or the 180-day limit that will go into effect on January 5, 2005, will apply to the legal expenses incurred by the Committee. Although the current and amended provisions in ECCO require candidates and committees to pay vendors for goods or services within the specified time period, both the current and amended provisions specifically state that the time limit only applies to debts incurred for “political purposes.” SDMC § 27.2945; SDMC § 27.2960 (effective January 5, 2005). Both the current and amended provisions state that “political purpose” means the purpose of influencing or attempting to influence the action of the voters with respect to a City candidate or ballot measure. SDMC § 27.2903. Because any legal fees incurred by the Committee in connection with post-election legal challenges are not made for the purpose of influencing the action of the voters, the vendor debt time limits do not apply.

D. Loans for Legal Defense

Finally, you have asked whether you can personally loan money to the legal defense fund to pay legal fees, and whether you can be reimbursed with campaign contributions. As explained above, the amendments to ECCO require a committee to maintain a legal defense fund through a controlled committee organized to seek the office held or sought that is the subject of the legal proceeding. State law does not allow candidates for municipal offices to open more than one committee or bank account for each office sought. For this reason, a “legal defense fund” is more of a concept than an actual account. It exists as a separate “fund” only through the requirement that a committee maintain a separate ledger for all of the fund’s contributions and expenditures. Because the “legal defense fund” exists only within an existing committee’s campaign checking account, any loan that you make for legal defense purposes is actually a loan to your campaign committee. Nevertheless, in order to show the transparency of the financial activity, it would be wise for your legal defense fund’s ledgers to show the loan as a contribution from you for the purpose of defending a particular legal action. Otherwise, you may have difficulty showing that an individual’s contribution to the legal defense fund is an appropriate source of reimbursement monies.

Although it is not specifically addressed in current or amended ECCO, it is customary for committees to accept contributions to repay both personal and institutional loans. The only restrictions concerning the repayment of loans exist in amended ECCO. According to SDMC section 27.2938 (effective January 5, 2005), candidates and committees may only accept contributions for 180 days after withdrawal, defeat, or election to office. However, subsection (d) specifically states that the post-election fundraising time period does not apply to legal defense funds. Accordingly, after January 5, 2005, you may solicit and accept legal defense fund contributions to repay any personal loans you make to the Committee for the purpose of paying expenses related to your legal defense.

E. Win Bonuses

In light of existing post-election legal challenges and the possibility of appellate review, you have asked several questions concerning the Committee’s ability to raise funds to pay “win bonuses.” The current version of ECCO sets forth contribution limits of \$250 per election. SDMC § 27.2941. Therefore, if the Committee accepts contributions after the November 2004 election, it must have existing campaign debts from this election, or must have a reasonable expectation that debts exist or will become due. Because the City Council recently declared you the winner in the mayoral election, it is reasonable to conclude that “win bonuses” are now due to those vendors and/or campaign professionals with whom

you have an agreement to pay a bonus should you prevail in the election. The Committee may therefore accept contributions for the purpose of paying these general election campaign debts.

The amendments to ECCO that take effect on January 5, 2005, include an increase in contribution limits from \$250 to \$300 for Citywide elections. SDMC § 27.2935 (effective January 5, 2005). Therefore, on or after January 5, 2005, the Committee may accept contributions from individuals up to \$300 for the purpose of paying debts associated with Citywide elections, which include the November 2004 mayoral election. Obviously, contributions from an individual received on or after January 5, 2005, would be aggregated with any general election contributions already received from that individual for the November 2, 2004, mayoral election.

In the event that future court actions result in the decertification of election results and another candidate is declared the winner of the 2004 mayoral election, any dispute between the Committee and a vendor concerning a “win bonus” would be considered a private contract dispute between the parties. If a vendor returns a “win bonus” to the Committee, the funds would become “surplus” at the end of the post election reporting period. The Committee would then be compelled to dispose of the surplus funds in accordance with the options set forth in local and state law, one of which is the repayment of contributions. Cal. Gov’t Code § 89519; SDMC § 27.2924 (effective January 5, 2005).

You have also asked about the time limits that apply to the payment of “win bonuses.” Current ECCO requires that all campaign debts be paid within ninety days. In particular, the ninety day time limit begins to run upon receipt of a bill or invoice, or on the last calendar day of the month in which the debt becomes due. SDMC § 27.2945. In other words, the ninety-day period associated with “win bonuses” began to run on the earlier of two dates: when the Committee receive an invoice from the vendor, or the last calendar day of the month in which the debt becomes due in accordance with your contract with the vendor.

I hope this letter sufficiently answers your questions. 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.

Sincerely,

Stacey Fulhorst

Executive Director

SF/s