

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. IA04-11

Christopher Ward

Donna Frye for Mayor

5663 Balboa Avenue #412

San Diego, Ca 92111

Re: Request for Advice Regarding Legal Fees Associated with Election-Related Litigation

Dear Mr. Ward:

This advice letter has been prepared in response to your letter to the City of San Diego Ethics Commission dated December 4, 2004. You are seeking advice from the Ethics Commission on behalf of the Donna Frye for Mayor controlled committee with regard to the requirements and prohibitions 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 services associated with election-related litigation. Your letter asks general, hypothetical questions, and accordingly we consider your letter to be a request for informal advice.

### QUESTIONS

1. Can Councilmember Frye raise legal defense funds and use them to pay for the legal expenses incurred because of the three lawsuits [filed in November regarding the mayoral election]?
2. Would Councilmember Frye be acting in compliance with ECCO by soliciting and accepting up to \$250 in legal defense funds beginning January 5, 2005, from the same contributors who donated to her 2004 Mayoral campaign?

## **SHORT ANSWERS**

1. Yes. Councilmember Frye may solicit and accept contributions in connection with her mayoral candidacy and use those contributions to pay expenses associated with legal proceedings in which she is defending her interests as a candidate. At the present time, she may solicit and accept contributions of up to \$250 per individual for this purpose, but such contributions are aggregated with any prior contributions made to support Councilmember Frye in the November 2, 2004, mayoral election, and may not, in aggregate, exceed \$250. This aggregation rule will change on January 5, 2005.
  
2. Yes. Beginning on January 5, 2005, Councilmember Frye may establish a legal defense fund within her existing campaign committee checking account, and use this fund to accept legal defense contributions in amounts of up to \$250 per year, per legal proceeding, from individual contributors, including those contributors who have already contributed the maximum amount to her mayoral campaign.

## **BACKGROUND**

Councilmember Frye was a candidate in the November 2, 2004, mayoral contest. You indicated that she was required to defend against two lawsuits filed post-election challenging her candidacy, and was named as a real party in interest in a third lawsuit. Your letter states that she has incurred legal fees in connection with these three lawsuits.

## **ANALYSIS AND CONCLUSIONS**

Under the current provisions of ECCO, which will remain in place until substantive revisions go into effect on January 5, 2005, campaign contributions may be used for election-related litigation in which a candidate is involved SDMC § 27.2940; Cal. Gov't Code § 89514. In accordance with these provisions, a candidate may solicit and accept campaign contributions to pay for legal services rendered in connection with election-related litigation. It is important to keep in mind, however, that these contributions are subject to the \$250 per person limit set forth in SDMC section 27.2941. For this reason, a person who has already contributed \$250 to support Councilmember Frye in the November 2, 2004, mayoral election may not, at this time, make any additional contributions to help defray legal fees that Councilmember Frye has incurred in connection with that election.

The prohibition stated in the above paragraph will change when the substantive revisions to ECCO go into effect. On January 5, 2005, committees will be allowed to create a legal defense fund for the acceptance of contributions specifically earmarked to pay for legal expenses incurred by a candidate to defend against civil, criminal, or administrative proceedings arising from an election campaign, the electoral process, or the performance of official duties. SDMC § 27.2965 (effective January 5, 2005). For a more detailed analysis of legal defense funds, you may wish to read the discussion contained in Ethics Commission advice letter IA04-10, dated December 13, 2004.

Legal defense fund contributions are subject to limits, but because they are not aggregated with regular campaign contributions, they may be accepted from individuals who have already given the maximum amount of contributions to your campaign. Because the legal defense fund provisions do not go into

effect until January 5, 2005, Councilmember Frye is precluded from accepting contributions for such a fund until that time. However, on and after January 5, 2005, Councilmember Frye may accept legal defense contributions in amounts of up to \$250 per calendar year, for each legal proceeding, even from individuals who have already contributed the maximum amount to support Councilmember Frye's November 2004 mayoral bid. SDMC § 27.2965 (effective January 5, 2005).

You have not provided any specific information regarding Councilmember Frye's involvement in the election-related litigation, but you did indicate that she is involved in three separate legal proceedings related to the November 2004 mayoral election, and that her involvement in these proceedings is as a defendant or as a real party in interest defending her interests in the litigation. As long as these legal proceedings are separate, and are not combined or consolidated in some manner, and as long as Councilmember Frye's role in each of these proceedings is to "defend" her rights or interests, then she will be entitled to solicit and accept up to \$250 per person, per calendar year for each of the proceedings, starting on January 5, 2005. In other words, Councilmember Frye's controlled 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.

It should be noted that once the legal defense fund provisions take effect, they become the exclusive authority under which a candidate may solicit and accept contributions for litigation expenses relating to the defense of a legal proceeding. SDMC § 27.2965(g). In other words, after January 5, 2005, a candidate will not longer be able to use "regular" campaign contributions to pay for his or her election-related legal defense.

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