

August 25, 2005

SDEC Informal Advice Letter No. IA05-05

Marco A. Gonzales, Esq.
Coast Law Group LLP
169 Saxony Road Suite 201
Encinitas, CA 92024

Re: Request for Advice Regarding Fee Rebates for Legal Services

Dear Mr. Gonzalez:

This advice letter has been prepared in response to your letter to the City of San Diego Ethics Commission dated August 4, 2005. You are seeking advice from the Ethics Commission regarding the requirements and prohibitions of the City's Ethics Ordinance which is contained in the San Diego Municipal Code [SDMC]. Your inquiry pertains to discounted rates for legal services offered to elected officials. Your letter asks general, hypothetical questions, and accordingly we consider your letter to be a request for informal advice.

QUESTIONS

1. Because in the regular course of its business Coast Law Group LLP has a practice of extending legal advice to clients free of charge on matters that you consider "quick", are elected officials entitled to also occasionally receive such services without either compensating Coast Law Group LLP or reporting the value of such services as a gift pursuant to Municipal Code section 27.3510?
2. Coast Law Group LLP has clients on retainer who pay a fixed sum each month for representation, regardless of the number of hours you spend on their matters. Are you constrained by the aforementioned Municipal Code section from creating a similar monthly arrangement with an elected official? For instance, you occasionally perform up to 100 hours of work for a client who is on retainer for only \$1,000.00 per month, and the fair market value of your work is much more than \$10 per hour. Nonetheless, could you provide the same terms to an elected official?

SHORT ANSWERS

1. Unless the "quick" legal services you or your law firm provide to the public official are solely an informational item, you or the law firm would be a source of a reportable gift to the official. This gift of services would not only be subject to the disclosure requirements of SDMC section 27.3510, but may also be subject to the gift limits in SDMC section 27.3561 and may trigger the official's disqualification obligations in SDMC section 27.3561, depending on the fair market value of the services.
2. Unless your firm offers to all members of the public the opportunity for retainer fees that result in your firm's lawyers working for \$10.00 per hour, which you acknowledge is substantially less than the fair market rate for your firm's services, then the proposed retainer fee arrangement with public officials would result in a gift to the public official, subject to the gift limits and disclosure requirements. It may also trigger disqualification obligations for the official pursuant to San Diego Municipal Code section 27.3561.

BACKGROUND

By way of background, you state that the work you propose to perform for elected officials is not campaign related. We understand your statement to mean that the work would not be performed for political purposes, as that term is defined in the Municipal Code (SDMC § 27.2903), and would therefore not be considered a campaign contribution. We caution you that this informal advice could differ if this background information changes.

ANALYSIS AND CONCLUSIONS

Having assumed that the legal services proposed to be rendered would not be considered campaign contributions, you are correct to assert that the proposed services generally would be treated as some form of gift, subject to the City's gift limits and disclosure requirements.

The definition of "gift" set forth in the City's Ethics Ordinance includes the following:

Gift means any *payment* that confers a benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public. . . .

SDMC § 27.3503.

The term "payment" is also defined in Municipal Code section 27.3503. It specifically includes rendering services, such as providing legal advice.

Municipal Code section 27.3520 sets limits on the amount of gifts from a single source in a calendar year. Currently that amount is \$360. Municipal Code section 27.3525 itemizes several exceptions to the restrictions set forth in section 27.3520. SDMC section 27.3525(j) specifically excludes "a rebate or discount in the price of anything of value which is made in the regular course of business to members of the public." SDMC section 27.3525(l) also specifically excludes informational material that is provided to assist a city official in the performance of his or her duties. However, if the fair market value of the informational material exceeds the gift limit amount in section 27.3520, the city official has the burden of demonstrating that the item is informational. SDMC § 27.3525(l)(1).

The facts in your letter raise a preliminary issue about who is the true recipient of these legal services: the elected official or the governmental entity that the elected official represents. This issue arises because of the description of the types of services you contemplate providing to the elected official, namely, reviewing a contract or environmental document. If in fact the contract or environmental document pertains to a governmental project and the usual legal review is also being, or should be, provided to the governmental entity and its elected officials by the governmental entity's attorney, the legal services provided by your law firm could be considered a gift to the public entity. If so, procedures and requirements of the Fair Political Practices Commission [FPPC] Regulation 18944.2 should be strictly followed.

If not a gift to the entity, discounted legal services provided to an elected official are potential gifts to that official unless one of the relevant exceptions applies, that is, unless the legal services are in the form of informational material or "unless the rebate or discount is made in the regular course of business to members of the public." The questions you present have not been the subject of previously issued Ethics Commission advice letters. Therefore, we turn to FPPC advice letters interpreting substantially similar state laws for guidance.

The FPPC has advised that if a person gives a public official a previously prepared legal memorandum or brief from their files, those materials would be considered informational material, not gifts. *In re Kolkey*, FPPC Inf. Adv. Ltr. I-95-134. However, the FPPC in the same advice letter distinguished attorney services used to research and prepare a memorandum for a public official, finding that type of legal service to be a reportable gift that also subjected the public official to potential disqualification. The FPPC said in relevant part in that letter:

[P]rivate attorneys have expressed an interest in providing pro bono legal services to the Governor's Office concerning legal issues which come within the official responsibilities of the office. . . . The services rendered would not serve primarily to convey information from private sources; rather, they would serve primarily to supplement the work of the Governor's legal staff in connection with various governmental projects and litigation. Moreover, the services will involve reaching legal conclusions, rather than merely facilitating the flow of information. Therefore, the "informational material" exception would rarely, if ever, apply to free legal services provided by their parties to the Governor's office.

In re Kolkey, FPPC Inf. Adv. Ltr. I-95-134.

We therefore conclude that unless the "quick" legal service you or your law firm provide to the public official is solely an informational item (such as a pamphlet or legal memorandum that you have previously prepared and that is already in your files), you or the law firm would be a source of a reportable gift to the official. Review of a contract or environmental document to supplement the public attorney's work would not be merely "informational" legal services and therefore would not be eligible for the exception in SDMC section 27.3525(1). These legal services would be treated as a gift to the public official. This gift of services would not only be subject to the disclosure requirements of SDMC section 27.3510, but may also be subject to the gift limits in SDMC section 27.3561 and may trigger the official's disqualification obligations in SDMC section 27.3561, depending on the fair market value of the services.

Lastly, we consider whether the proposed discounted legal services would either be subject to the "discount to the public" exception in SDMC section 27.3525(j) or would simply fall outside the definition of "gift" because the discount is made in the regular course of business to the members of the public. Again, we turn to FPPC advice letters for guidance. The FPPC has construed language similar to the City's that occurs in the Political Reform Act's definition of "gift" [Cal Gov't Code § 82028] and implementing FPPC regulations.

In one instance, the FPPC found that a large national organization whose goal was to assist in securing the civil rights of disabled person who provided legal services to an official's disabled daughter in protracted litigation did not make a gift to the official by virtue of providing those legal services. *In re Connor*, FPPC Adv. Ltr. A-94-247. The organization maintained that its involvement in particular litigation would further its goal of advancing the civil rights of disabled persons. It would become either directly or indirectly involved, regardless of the identity of the particular disabled person it represented. The FPPC found that such services were subject to the "discount" exception in the gift definition because the organization offered its services to members of the public without regard to an official's status.

In contrast with its ruling in the *Connor* advice letter, the FPPC found the offer of pro bono legal services for the purpose of assisting a public official with media and law enforcement inquiries, but where there was no anticipated litigation arising from the matter, would constitute a gift to the public official, subject to the gift limit and disclosure requirements. *In re Baker*, FPPC Adv. Ltr. A-01-187. The public official and the attorney who offered legal services to her asserted that the offer would be made to other members of the public who met the following three criteria:

- (1) The person's inalienable rights provided by Article I, Section I of the California Constitution had been infringed upon;
- (2) The professional and financial status of the client is such that the client would not be able to deal with the costs associated with the legal issues of the case; and,

- (3) The person was forced into his or her position.

Citing these criteria, the attorney and public official unsuccessfully urged the FPPC to take the view that the offer of pro bono legal services was not in fact a gift to the public official. In contrast with the facts in the *Connor* letter, which involved a large national organization, the FPPC noted that under the *Baker* facts the discretion rested with one person to determine whether an individual fit these three criteria. Looking at all of the circumstances in *Baker*, the FPPC found that the facts did not qualify for the "discount" exception to the gift definition and rules.

In light of the rationale set forth in these two FPPC advice letters, we conclude that the "discounted" services exception to the definition of "gift" in the City's laws should be construed narrowly to be in keeping with similar state laws and regulations. Therefore, in answer to your second question, we conclude that unless your firm offers to all members of the public the opportunity for retainer fees that result in your firm's lawyers working for \$10.00 per hour, which you acknowledge is substantially less than the fair market rate for your firm's services, then the proposed retainer fee arrangement with public officials would result in a gift to the public official, subject to the gift limits and disclosure requirements. It may also trigger disqualification obligations for the official pursuant to San Diego Municipal Code section 27.3561.

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