MEMORANDUM OF LAW

DATE: July 27, 1990

TO: Mayor Maureen O'Connor and Members of the City Council

FROM: City Attorney

SUBJECT: Reportability of Pro Bono Legal Services

BACKGROUND

Perez, et al v. City of San Diego, et al, United States District Court No. 88-0103-R, involves allegations by the plaintiffs of violations of federal voting rights and civil rights arising from the configuration of San Diego City Council districts. In September of 1989 a settlement agreement was approved which established a Redistricting Advisory Board (RAB) for purposes of recommending to the Council a redistricting plan. A controversy has now arisen over fulfillment of the settlement agreement stemming from the Council's action on July 9, 1990 in considering a substitute recommendation.

In our letter of July 18, 1990 (attached), the procedural history is further reviewed and because of the facts, we conclude that the City Attorney's Office cannot represent the four (4) members opposing the substitute recommendation. After receiving this letter, both Mayor O'Connor and Councilmember Henderson have utilized pro bono legal services and have inquired how the receipt of these services should be treated under existing municipal and state restrictions on campaign contributions and gifts. Similarly in a letter of July 19, 1990 we have received an inquiry from the law firm of Lorenz Alhadeff Lundin & Oggel on the same issue of contribution of pro bono services.

After a review of the municipal and state restrictions and consultation with the staff of the Fair Political Practices Commission, we believe the receipt of pro bono legal services is not restricted by the San Diego Municipal Election Campaign Control Ordinance (San Diego Municipal Code section 27.2901 et seq.) but such a receipt may pose reporting problems under the Political Reform Act, California Government Code section 81000 et seq. depending on who is the recipient of the gift.

ANALYSIS

A. San Diego Municipal Election Campaign Control Ordinance

In City Attorney Memorandum of Law of October 2, 1985 we analyzed whether the receipt of pro bono services by then Councilmember Uvaldo Martinez was restricted by the campaign

limitations posed by the Campaign Control Ordinance. In concluding he was not, we relied on Section 27.2903(e) which specifically excludes "volunteer services" from the definition of contributions. Since this express exclusion still exists, the same conclusion follows.

B. The Political Reform Act

The Political Reform Act (California Government Code section 81000 et seq.) is premised on eliminating financial influences on public officials:

> (c) Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided.

California Government Code section 81002(c). Accord, In re Cory, 1 FPPC Ops. 153 (1975)

In fulfilling this purpose, the Fair Political Practices Commission, which is charged with enforcing the Act, has consistently treated funds contributed to candidates to defend lawsuits challenging election issues as contributions. In re Buchanan, 5 FPPC Ops. 14 (1979); In re Johnson, 12 FPPC Ops. 1 (1989). Accord, Thirteen Committee v. Weinreb, 168 Cal. App. 3d 528 (1985). Indeed, relying on Buchanan and before Weinreb, this office found that funds contributed to then Mayor Hedgecock for his legal defense of criminal charges were contributions and hence restricted. 1985 San Diego City Atty. Ops. 687.

However, the regulation of monies contributed by others and the provision of pro bono services must be distinguished. In fact California Government Code section 82015 in defining "contributions" appears to make an express distinction between payment and "volunteer personal services":

> . . . Notwithstanding the foregoing definition of "contribution," the term does not include volunteer personal services or payments made by any individual for his own travel expenses if such payments are made voluntarily without any understanding or agreement that they shall be, directly or indirectly, repaid to him or her emphasis added.

California Government Code section 82015.

Hence it appears that "volunteer personal service" such as pro bono services are expressly excluded from the term "con-tribution" and hence are not restricted or reportable as such. While we understand this conclusion is contrary to Borenstein Advice Letter No. A-89-085, we are persuaded that the factual context giving rise to Borenstein differs from the present

situation and we are mindful that these advice letters are only binding on the recipients and are of no precedental value. California Government Code section 83114(b). Further, the Borenstein letter has been suspended by the Commission, and the Commission has been asked to consider a specific regulation on pro bono services.

While we conclude pro bono services are excluded from the definition of "contribution," such services may be reportable as "gifts" depending on who is the recipient of the gift. California Government Code section 82028 defines gifts as follows:

(a) "Gift" means, except as provided in subdivision (b), any payment 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 without regard to official status. Any person, other than a defendant in a criminal action, who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value.

While this is a broad and all-encompassing definition, it is clear that gifts can benefit both the agency as well as the official. For example, In re Stone, 3 FPPC 52 (1977) focused on the use of private air transportation by city officials. The Commission found that receipt of such services would not have to be reported if:

1. The donor intended to donate the gift to the city and not to the official;

2. The city exercises substantial control over use of the gift;

3. The donor has not limited use of the gift to specified or high level employees, but rather has made it generally available to city personnel in connection with city business without regard to official status; and

4. The making and use of the gift was formalized in a resolution of the city council (a written public record will suffice for administrative agencies not possessing the legislative power of adopting resolutions) which embodies the standards set forth above.

In re Stone at 57.

(Note: FPPC staff has suggested formalization of the Stone rule in proposed 2 Cal. Code Regs. 18727.1 which need not be reviewed since it deals only with transportation, meals or accommodations.)

The instant case presents a unique complication in the

receipt of pro bono legal services. Public officials sued for any act or omissions in the scope of their employment are entitled to defense counsel and entitled to have any general damage award paid for them by the public entity. California Government Code section 825; 995. By virtue of these obligations and his responsibility to defend all suits to which the city is a party, the City Attorney provides the defense for all public officials. San Diego City Charter section 40.

However, because of the conflict of interest concerns expressed in the City Attorney letter of July 18, 1990 (attached), this defense obligation cannot be provided to four (4) members of the Council. Hence the defense to which they are entitled by statutes cannot be provided through the existing legal services of the public entity. The public entity, however, retains the obligation to provide a defense. Therefore to the extent pro bono legal services are donated to the public entity and are utilized to fulfill the obligation of the public entity to the individual public official, it can be clearly concluded that the pro bono services are given to and for the benefit of the public entity. As such the use of such services is of no financial benefit to the public official.

As pointed out previously, the premise of the Political Reform Act is to guard against the effects of financial influences. California Government Code section 81000(c). Hence

where the pro bono services in the instant case go to fulfill a City defense obligation and are utilized to defend the official actions of the public official (versus personal or political interest), such services are not within the purview or restrictions imposed by the Political Reform Act.

The receipt of pro bono legal services intended for the benefit of the City should be accepted by the City by acknowledgment. Where this is done it fulfills the intention requirement expressed in Stone by both acknowledging that the legal services are rendered to the City and acknowledging the City requirement of providing these services through alternative means since City services are unable to do so. Conversely where the legal services are donated to a particular councilperson absent a conflict of interest and operate for the advocacy of his or her own particular position, the individual councilmember is the recipient of "value" and must report same as a gift on the appropriate disclosure form (S.E.I. 721).

As to those services that are donated to a particular councilmember absent a conflict of interest and hence are reportable as a gift, Proposition 73, operative January 1, 1989, imposes an additional restriction. It added Section 85400 which

reads as follows:

Sec. 85400. Elected officeholders; speeches, articles, or published works on governmental process

No elected officeholder shall accept any gift or honorarium for any speech, article, or published work on a subject relating to the governmental process from any single source which is in excess of one thousand dollars ($1,000), in any calendar year, except reimbursement for actual travel expenses and reasonable subsistence in connection therewith.

While this complex sentence is subject to numerous con-structions, we believe the better view is that the $1,000 ceiling applies to those gifts connected with speeches, articles and published works. 2 Cal. Code Regs. 18540. Hence where the donated services are reportable as individual gifts, the dollar limitation does not apply. Of course, where reportable the receipt of gifts aggregating $250 or more may trigger disqualification on matters involving the donor. California Government Code sections 87101, 87103.

CONCLUSION

From the above we conclude that the receipt of pro bono legal services is a) not limited by the San Diego Campaign Control Ordinance, b) not a contribution under California Government Code section 82015, and c) not a reportable gift under California Government Code section 82028 so long as the gift is donated to The City of San Diego, acknowledged as such, and utilized to fulfill the City's legal obligation to defend the actions of the public official in his or her official capacity.

JOHN W. WITT, City Attorney
By
Ted Bromfield
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ML-90-85
Attachment