

MEMORANDUM OF LAW

DATE: April 12, 1996

TO: Charles G. Abdelnour, City Clerk

FROM: City Attorney

SUBJECT: Disgorgement of Tainted Campaign Contributions

You have asked the City Attorney for advice in responding to a letter from San Diego County Supervisor Ron Roberts in which he asks whether he or his campaign committees have an obligation to pay to the City Treasurer the equivalent of monies that the H.G. Fenton Material Company ("Fenton") was recently found to have improperly paid to his campaign committees for City Councilmember and for Mayor. By telephone, the City Clerk's Deputy Director for Elections and Legislative Services

Joyce Lane has stated that you would like the answer provided to the same question as it pertains to monies Mr. Roberts' campaign committees received from Cox Communications San Diego, Inc. ("Cox"), which was found recently by the Fair Political Practices Commission ("FPPC") to have wrongfully paid money to Mr. Roberts' campaigns for City office.

Since the answers to the questions you raise about Supervisor

Roberts' former City campaign committees will apply to other City candidates whose campaign committees also received "tainted" campaign contributions from either the Fenton or Cox companies, or both, we will take this opportunity to provide you guidance as to those candidates and committees also.

BACKGROUND FACTS

In *People of the State of California and The City of San Diego v. H.G. Fenton Material Company* (S.D. Sup. Ct. No. 697153, filed February 13, 1996), the Fenton Company agreed to a permanent injunction pursuant to stipulation. By terms of the injunction, Fenton agreed to:

- (a) refrain from making contributions for political purposes in violation of California Government Code sections 84300(c) or 84301; and,
- (b) refrain from making contributions for political purposes in violation of San Diego Municipal Code ("SDMC") sections 27.2941, 27.2947 or 27.2950.

In the stipulation upon which the injunction was based, Fenton spelled out the particulars of some sixty instances of contributions it had wrongfully reimbursed to several of its officers and employees in violation of these state and local laws from 1989 through 1993.

In another enforcement matter, *In the Matter of Cox Communication San Diego, Inc.* (Enforcement Order of the FPPC, approved December 6, 1995), the Cox Corporation stipulated to having violated California Government Code sections 84300(c) and 84301, portions of the state's campaign finance laws, with respect to elections for San Diego City offices.F

In this FPPC enforcement order, Cox also stipulated to having violated the same state laws with respect to campaigns for state elective offices. This memorandum, however, deals only with recipients of monies who have been or are candidates for San Diego City elective offices.

In neither the Fenton nor the Cox matter was there any allegation or evidence that any of the recipient candidates or candidate committees knew of the wrongdoing by Fenton or Cox. This memorandum is not

intended to, nor does it in fact, imply any wrongdoing on the part of recipient candidates or their committees in receiving the "tainted" contributions.

QUESTIONS PRESENTED

1. Is there a legal obligation on the part of former candidates for an elective City office who received tainted contributions from Fenton or Cox, or both, to disgorge those contributions, or their equivalent?

2. What sources of money may lawfully be used to pay the City Treasurer the equivalent of monies received in "tainted" contributions?

SHORT ANSWERS

1. Yes, if the candidate whose campaign account received the tainted contribution still has the campaign account open and if the account has funds in it.

2. According to private advice letters issued by the FPPC, as a general rule the payment to the City Treasurer must be made with existing campaign funds, if any. If no campaign funds exist, candidates may make the payment out of their own pockets.

ANALYSIS

I. State Law Requirement to Disclose True Campaign Donor

Both Fenton and Cox admitted to violations of two state laws: Government Code sections 84300(c) and 84301.

Government Code section 84300(c) reads as follows: "No contribution of one hundred dollars (\$100) or more other than an in-kind contribution shall be made unless by written instrument containing the name of the donor and the name of the payee."

Government Code section 84301, entitled "Contributions Made Under Legal Name" reads in full as follows: "No contribution shall be made, directly or indirectly, by any person in a name other than the name by which such person is identified for legal purposes."

II. Local Prohibition Against Businesses Contributing to Campaigns and Prohibition against Assumed Name Contributions

Fenton stipulated that it violated three sections of the SDMC: Sections 27.2941, 27.2947 and 27.2950. These three sections are part of the City's San Diego Municipal Election Campaign Control Ordinance ("Campaign Control Ordinance"). In the FPPC action, Cox made no express admissions as to violations of the City's Campaign Control Ordinance.

However, having admitted to violations of California Government Code sections 84300(c) and 84301, Cox essentially admitted facts that constitute violations of SDMC sections 27.2941, 27.2947 and 27.2950.

SDMC section 27.2941 entitled "Contribution Limits" and Section 27.2947 entitled "Prohibitions and Limitations on Contributions From Organizations" are lengthy; therefore, they are not quoted here. Instead, photocopies of the sections are attached to this memorandum.

Section 27.2950 "Assumed Name Contributions" reads in full, as follows:

No contribution shall be made, directly or indirectly, by any person or combination of persons acting jointly in a name other than the name by which they are identified for legal purposes, not in the name of another person or combination of persons. No person shall make a contribution

in his or its name of anything belonging to another person or received from another person on the condition that it be used as a contribution. When it is discovered by the campaign treasurer that a contribution has been received in violation of this section, the campaign treasurer shall pay promptly, from available campaign funds, if any, the amount received in violation of this section to the City Treasurer for deposit in the General Fund of the City.

SDMC Section 27.2950 (emphasis added).

The first part of Section 27.2950 contains the substantive prohibition against making assumed name campaign contributions. It is the local equivalent of Government Code section 84301. The second (emphasized) portion of Section 27.2950 deals with the remedy in the event a campaign receives monies that were made in violation of this section. The second portion raises the crux issue of this memorandum, which is treated in the following paragraphs.

III. Is there a Legal Obligation under Local Law for Recipients of Tainted Campaign Contributions to Disgorge those Monies, or their Equivalent?

The portion of SDMC section 27.2950 emphasized above requires certain persons who received "assumed name" contributions made in violation of this SDMC section to disgorge those monies, or their equivalent, to the City Treasurer. This language brings to the forefront the main question you raise, namely, whether and under what

circumstances persons have a legal obligation to disgorge monies that were wrongfully paid to them by either Fenton or Cox.

The issue is complicated by the fact that there is another "disgorgement" provision in the City's Campaign Control Ordinance, namely, SDMC section 27.2948(d). Section 27.2948 entitled "Obligation to Return Contributions," reads in relevant part: "(d) The candidate or committee treasurer shall promptly deliver an amount equal to any

monetary contribution constituting a violation of this Division that is deposited into the campaign contribution checking account to the City Treasurer. . . ."

Both Sections 27.2948 and 27.2950 require disgorgement of "tainted" campaign funds. However, Section 27.2948 is clearly the broader of the two. First, it requires disgorgement in the event of violation of any part of the SDMC division that comprises the Campaign Control Ordinance. In contrast, Section 27.2950 deals only with violations of the prohibition against making "assumed name" contributions. Secondly, Section 27.2948 is broader than Section 27.2950 because it does not limit by any means the source of money from which a person pays the City Treasurer. In contrast, Section 27.2950 requires payment (disgorgement) only if there are available campaign funds to do so. What both sections have in common is that they are strict liability laws. That is, they require even "innocent" recipients of tainted campaign funds to disgorge those monies, or their equivalent, to the City Treasurer. Both of them also serve to further the legitimate governmental purpose of preventing a benefit from accruing for an illegal campaign contribution.

A. Application of Statutory Rules of Construction to Determine Appropriate Disgorgement Provision

The question becomes: which SDMC "disgorgement" provision, Section 27.2948(d) or Section 27.2950, applies to the present facts? The answer to this question involves analyzing several rules of statutory construction as they relate to these two SDMC sections.

These two code sections are apparently conflicting. Under the general rule of statutory construction, apparently conflicting provisions should be reconciled in order to carry out the legislative purpose as gathered from the whole legislation. 58 Cal. Jur. 3d Statutes Section 106. Therefore, the next question is: are they reconcilable? The answer is: "potentially, yes". However, to reconcile them requires reading language into Section 27.2948 to the effect that disgorgement is required only if there are campaign funds from which to pay the tainted contributions (or their equivalent) to the City Treasurer. In the City Attorney's opinion, a court would not go to such lengths to reconcile these two SDMC provisions. The better approach, we think, is to view them as irreconcilable provisions, and then to determine which of the two controls over the other. Our analysis under this approach follows.

In the event a court were to find that these two SDMC sections are not reconcilable, under another commonly accepted rule of statutory construction, a provision adopted later in time normally controls over one adopted earlier in time. *Western Mobilehome Assn. v. County of San Diego*, 16 Cal. App. 3d 941, 948 (1971).

Applying this rule to the present set of facts, we note that in 1994 the City Council adopted several amendments to the City's Campaign Control Ordinance (Ordinance No. 0-18086 N.S., adopted on July 11, 1994). Section 27.2950 was renumbered by those amendments but was not otherwise amended. Section 27.2948 was a new section adopted in 1994. But, as the legislative recitals on the face of the ordinance and the accompanying City Attorney report attest, this and other rewritten sections merely clarified existing law. Specifically, new Section 27.2948 restated and replaced former Sections 27.2941(d) and 27.2942(d). City Attorney Report to the Honorable Mayor and City Council, dated April 22, 1994, at page 3. Therefore, even though Section 27.2948 ostensibly was "newly adopted" in 1994, in fact it merely restated portions of existing law.F

Both SDMC sections 27.2941 and 27.2947 as well as SDMC section 27.2950 have been on the books since the City's Campaign Finance Ordinance was first adopted in 1973 (See Ordinance 0-11034, adopted April 10, 1973).

It seems, therefore, that we cannot rely on the "later-in-time" rule of statutory construction to determine which of the two apparently conflicting disgorgement sections apply to the current facts.

We therefore turn to another commonly accepted rule of statutory construction to resolve the issue. This rule avers that where a statute contains both general and special provisions, effect should be given to both if possible. But, in the event of irreconcilable conflict, a general provision is ordinarily controlled by a special provision. *Diamond International Corp. v. Boas*, 92 Cal. App. 3d 1015, 1031 (1979).

Section 27.2950 is clearly more specific than 27.2948. It requires disgorgement if someone has made an "assumed name" contribution. In contrast, Section 27.2948 requires disgorgement for any violation of the division (referring to the Campaign Control Ordinance). Section 27.2950 is also specific in that it requires disgorgement only from existing

campaign funds, if any exist. In contrast, Section 27.2948 does not specify the source of money from which payment to the City Treasurer must or may be made.

Applying the rule of statutory construction that the more specific provision controls over the general, since both Fenton and Cox

essentially involve "assumed name" contributions^F

These are not the only kinds of violations of local law that Fenton and Cox made. By virtue of the fact that they are companies, not individuals, their contributions to candidate campaigns were violations of SDMC sections 27.2941 and 27.2947, in addition to the "assumed name" contributions made in violation of SDMC section 27.2950.

we conclude that the

disgorgement provisions of Section 27.2950 should prevail over Section 27.2948.

B. Application of Disgorgement Provision to Present Facts

At our request, Bonnie Stone of the Clerk's office made a written report dated March 15 of the status of each "candidate" or "recipient committee" who received tainted contributions from either Cox or Fenton, or both. By telephone on Friday, March 22, she further informed me as to which of those persons continue to have City candidate committees (even though the original recipient committees may have been terminated); and which ones do not. Her report is attached.

Significantly, she reports that all incumbent City officeholders have paid the City Treasurer the amount their campaigns received either from Fenton or Cox, or both. Therefore, we are required to determine only whether former City officeholders or candidates are required to disgorge tainted campaign monies to the City Treasurer.

As pointed out above, Section 27.2950 requires disgorgement only from campaign accounts and only if monies exist in those accounts. According to Ms. Stone, the following campaign accounts of former officeholders who received "assumed name" contributions from Fenton are still open accounts:

San Diegans for Bob Filner '91 (\$1,350 in contributions)
Ron Roberts for Mayor (\$750 in contributions)
Neighbors for Linda Bernhardt (\$1,000 in contributions)

Also according to Ms. Stone, the following campaign accounts of former officeholders who received "assumed name" contributions from Cox are still open accounts:

San Diegans for Bob Filner '91 (\$150 in contributions)
Ron Roberts for Mayor (\$875 in contributions)

We conclude that if those campaign accounts have any money in them, the campaign treasurer or candidate who controls the committee may be required to disgorge the monies to the City Treasurer pursuant to SDMC section 27.2950. Nothing in this SDMC section or any other law requires the former candidates, even if their campaign accounts are still open,

to hold fundraisers to replenish the account so that the committees can "disgorge" the equivalent of the tainted contributions to the City Treasurer.

C. What is the Effect of Termination of Candidacy Status?

As Ms. Stone's report shows, some former City officeholders have terminated their City candidate status and have closed their campaign accounts.F

Under local law, a candidate may terminate his or her City candidate status whenever conditions in SDMC section 27.2904 are met. SDMC section 27.2904, entitled "Candidate and Committee Status; Duration," reads:

"For purposes of this Division, any individual who is a candidate retains the status of candidate, and any person or combination of persons constituting a committee retains the status of committee, until that status is terminated either:

(a) pursuant to Government Code section 84214 and all vendors granting credit for goods or services have been paid in full; or (b) pursuant to section 27.2971(d) of this Municipal Code."

Up until last year, persons who wished to terminate their candidacy status filed only one form (FPPC form 415). As of last year, "Recipient Committees" who wish to terminate their status file a "415 form;" candidates must file a separate "416 form."

What effect does that have on the Section 27.2950 disgorgement provision?

Given the narrow language of Section 27.2950, we think that, if a former candidate has met the conditions required for terminating City candidacy under SDMC section 27.2904 and has filed the proper forms required by state law, then the City cannot require disgorgement of tainted campaign monies from the former candidates.

If, upon notice that his or her former campaign committees received tainted campaign contributions, the former candidate feels a moral obligation to repay those monies, the question becomes what are lawful sources of funds from which to make the disgorgement. That is the second major question you raise in your inquiry and is the next subject treated in this response.

IV. Lawful Sources of Money for Disgorgement

What source of money may lawfully be used to pay the City Treasurer the equivalent of monies received in "tainted" contributions?

This question is answered by examination of state law, in particular the Political Reform Act. The FPPC, the state agency charged

with administering, interpreting and enforcing that act, has opined on this question.

In 1993, as a result of an FPPC settlement in a "laundering" case, several candidates of the City of Los Angeles were found to have been the recipients of "laundered" campaign contributions. Pursuant to a provision virtually identical with this City's SDMC section 27.2950, the Los Angeles City Ethics Commission planned to send letters to the affected candidates and request that the funds be paid to the city. Before doing so, the Ethics Commission requested advice from the FPPC as to how these candidates could appropriately pay this debt under the

Political Reform Act. The FPPC responded in the form of two private advice letters, copies of which are attached (Priv. Adv. Ltr. I-93-346 (Sept. 16, 1993), and Priv. Adv. Ltr. I-93-346a (Jan. 19, 1994)). These two letters should be read carefully in their entirety, because they deal with several different fact patterns and several different options. However, we think it beneficial to point out two general requirements with respect to repayment of these funds:

(1) If the candidate has an existing campaign or officeholder account, the funds must be repaid through one of those accounts;
or

(2) If the candidate no longer has an open campaign or officeholder account, generally the funds may be paid from the candidate's personal account. However, if this same candidate conducts a fundraiser to assist in payment of the debt, then the candidate must reopen his or her campaign account, deposit the moneys collected into that account and pay the debt from that account.

Priv. Adv. Ltr. I-93-346a (Jan. 19, 1994).

CONCLUSION

Two Companies who do business in this City, H.G. Fenton Material Company and Cox Communications San Diego, Inc., recently were found to have violated state and local campaign money laundering laws by having reimbursed their officers and employees for having made campaign contributions to several candidates for San Diego elective offices. There was no allegation or finding that any of the recipient candidates or candidate committees knew of the wrongdoing by either Fenton or Cox. This memorandum analyzes whether those candidates or committees, even

though innocent recipients of the "tainted contributions," are required to disgorge those contributions, or their equivalent. This memorandum analyzes two apparently conflicting disgorgement provisions in the San Diego Municipal Code---sections 27.2948 and 27.2950. Applying rules of statutory construction to interpret the provisions, the City Attorney concludes that SDMC section 27.2950 requires former candidates for elective City offices who have received "tainted" contributions to disgorge them, if their campaign accounts are still open and if there are still funds in the accounts. Relying on advice letters from the FPPC, this memorandum further outlines other lawful sources of funds for disgorgement.

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By
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Deputy City Attorney

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Attachments
ML-96-22