MEMORANDUM OF LAW

DATE: April 21, 1998

TO: Charles G. Abdelnour, City Clerk

FROM: City Attorney

SUBJECT: Election Campaign Control Ordinance Requirements Pertaining to Contributions in Primary and General Elections

BACKGROUND

It has come to our attention that confusion may exist in the political and professional communities regarding the proper manner of raising and using contributions in City campaigns that involve both primary and general elections. In particular, this Office's Memorandum of Law [MOL] to then-Deputy Mayor Bob Filner, dated March 27, 1991, on "Clarification of Campaign Control Ordinance Requirements Placing Limits of $250 on Contributions Per Election" [1991 opinion] (copy attached) may need clarification lest potential misinterpretations of its conclusions result in campaign practices that are prohibited by the San Diego Election Campaign Control Ordinance [ECCO], located at San Diego Municipal Code [SDMC] sections 27.2901 through 27.2975.

The attached 1991 opinion answers five questions, all relating to the permissible raising and spending of campaign contributions under ECCO and the sections of the California Government Code constituting the Political Reform Act [PRA]. While this MOL will not change the City Attorney's previous answers to these questions, it does pose and answer two questions that were not raised in the 1991 opinion.

QUESTIONS

1. If funds are raised during a primary campaign prospectively for a general election campaign, how should these funds be managed *during* the primary campaign?

2. May a candidate who ran in a City primary but who will not stand for election in a general election — either because that candidate was defeated in the primary or because that candidate won the seat outright in

the primary — still solicit and accept campaign contributions *after* the primary is over?

ANSWERS

1. Under local law, funds raised for the primary should be segregated from funds raised for the general election and carefully accounted for throughout that and subsequent campaigns.

2. Usually, no. Unless there is campaign debt to be repaid, no more fundraising is permitted under ECCO, and even in these circumstances, no more money may be accepted from those individuals who have already contributed the maximum allowable amount to that primary campaign.

ANALYSIS

Question One

As was explained in the 1991 opinion, ECCO "nowhere requires that fundraising for general elections begins only after a primary election is over." 1991 opinion, page 3. Although Proposition 208, passed by California voters in the November 1996 election, imposed strict time limits on the commencement of fundraising, enforcement of Proposition 208 in its entirety was enjoined by the federal district court in *California Prolife Council Political Action Committee v. Scully*, No. S-96-1965, __ F. Supp. __, 1998 WL 7173 (E.D. Cal. January 6, 1998), because key provisions of Proposition 208 were found to be constitutionally infirm. The *Scully* decision removes all time-based restrictions on the acceptance of contributions in City elections and largely resurrects the legal landscape that existed when the 1991 opinion was issued.

When SDMC section 27.2941(a) was amended in July 1994, its wording was changed slightly to clarify its message, but it did nothing to change the result of the 1991 opinion:

> It is unlawful for a candidate, committee supporting or opposing a candidate, or person acting on behalf of a candidate or committee to solicit or accept from any person a contribution which will cause the total amount contributed by that person in support of or opposition to a candidate to exceed two hundred and fifty dollars ($250) for any single election.

The definition of "election" in SDMC section 27.2903(g) was also streamlined in July 1994, again with no effect upon the 1991 opinion:

> "Election" means any primary, general or special election held in the City of San Diego, including any initiative, referendum or recall election. Primary,

> general and special elections are separate elections for purposes of this Division.

Taken together, these two sections permit candidates or committees that have filed the requisite organizational statements to accept contributions of up to $250 *per election, per contributor*. These contributions may be accepted either:

(1) prospectively, before a candidate has qualified for a specific race;
(2) during the campaign itself; or
(3) retroactively, to pay legitimate campaign debts from a campaign that has just transpired.

But as the 1991 opinion warned, the practice of soliciting and accepting contributions prospectively, though legal under ECCO, is fraught with peril, requiring bookkeeping precautions unnecessary when contributions are not accepted prospectively. Specifically, under ECCO and the conclusions reached in the 1991 opinion, each committee raising funds in this manner should do each of the following:

(1) collect and maintain written evidence, signed by the contributor, of each contributor's intent that the contribution be divided in the manner reported by the committee (i.e., a specified portion of the contribution attributed to the primary and a specified portion to the general);
(2) establish an accounting mechanism to ensure that money raised for a specific election is spent only on that election campaign for which it was contributed;
(3) ensure that no more than $250 is solicited or accepted per election from any single contributor.

Here we must stress that while the burden of proving violations of both ECCO and the PRA remain squarely on the shoulders of the prosecution, failure by a committee to adhere to these guidelines will invite an investigative audit aimed at accounting for the source of each dollar spent during the course of a campaign, unless money that was specifically intended for a *general election* winds up being spent on the *primary* instead.

Adhering to these guidelines along with the accounting procedures detailed in both SDMC section 27.2925, which was expanded in 1994, after the 1991 opinion was issued, and the reporting laws detailed in California Government Code sections 84100 through 84510 should enable candidates and campaign treasurers to comply with ECCO's fundraising requirements in these areas.

Question Two

The 1991 opinion, on pages four through six, includes a general discussion of the permissible uses for contributions that were raised *during* a primary campaign when the candidate who has raised them *either* wins the seat outright in the primary *or* does not receive a sufficient number of votes to qualify for the general election.

But what about *after* the primary? With no new election looming, may the primary victor begin a new round of fundraising? And may the primary losers do the same? The answer here depends on two factors: the presence or absence of campaign debt and the contribution history of the prospective contributor.

A few words about "campaign debt" are necessary here. The term is nowhere defined in either ECCO or the PRA, but it is nonetheless clear how it may arise. That money which has been committed by a candidate or committee for campaign-related goods and services but remains unpaid after the first post-election filing deadline is campaign debt. Some degree of campaign debt may be unavoidable, but candidates and treasurers should keep in mind that it is disfavored in ECCO, one of whose stated purposes is to "limit the use of loans and credit in the financing of municipal campaigns." SDMC 27.2901. So while all committees should try to spend only what they have raised, provisions in ECCO do exist for those who overspend.

If campaign debt exists after a primary, and the debtor candidate does not face a general election, then the candidate may continue to raise money to repay the debt *and for no other purpose*. Statewide, all post-election time limits were discarded in the *Scully* decision. Locally, however, certain post-election restrictions remain. Under ECCO, all vendors must be paid within 90 days from the last day of the month in which their goods were delivered or their services rendered. SDMC 27.2945(d). Money must be either allocated from existing funds or lawfully raised to meet these campaign obligations. If additional funds must be raised, however, they must be raised from individuals eligible to contribute. *No additional contributions may be solicited or accepted from any individual who has already contributed the maximum allowable amount — $250 — to the primary campaign*.

This is so because ECCO specifically limits contributions to $250 per contributor, *per election*. SDMC 27.2941(a). Each election — primary, general, or special — counts as a separate election for ECCO purposes. SDMC 27.2903(g). ECCO specifically regulates conduct only during "election campaigns"; thus, its title. Everything in ECCO relates to "campaigns," "campaign committees," and "candidates." Candidates are of only four types:

> those "listed on the ballot for elective City office";
> those who have begun circulating nominating petitions "for nomination for or election to a City office";
> those who have received contributions or made expenditures "with the intent to bring about . . . nomination for or election to a City office"; and
> those City officeholders who become subject to a recall election.

SDMC 27.2903(b). Note that only *candidates* and *campaign committees* are addressed by ECCO, and that all definitions of candidates relate in some way to "election for City office." Only those individuals running for a specific City office and represented by a campaign committee that has timely filed an organizational statement may properly raise money for City elections. All money raised for City races must be raised according to ECCO's provisions and tied to a specific City election.

It thus follows that if a candidate in a primary is elected outright in that election, that

candidate may not raise money for a general election that will never occur.[1] It also follows that if primary campaign debt exists and more money needs to be raised to repay it, then no one who has already contributed $250 to the campaign may be re-solicited. Nor may a single additional penny be lawfully accepted from that "maxed-out" contributor, even if the contribution were to arrive unsolicited.

It also follows that if there is no campaign debt to be paid off and no election looming, then no campaign contributions may be solicited or accepted. Although Proposition 208 briefly provided guidelines for incumbents to raise money for what was called "officeholder expenses," those guidelines failed to survive the *Scully* decision, and there is no longer any provision under ECCO or the PRA for incumbents to raise funds *for any purpose other than a specific election campaign for which they have organized and declared.*

We hope these guidelines serve to clarify any confusion that exists concerning the proper handling under ECCO of campaign funds in these types of multiple-election situations. We understand that the sudden imposition and removal of many new statewide restrictions on campaign fundraising has created much confusion and stress in the political and professional communities. We will try to clarify the local situation each time specific questions arise that we can properly resolve.

CASEY GWINN, City Attorney

By
Cristie C. McGuire
Deputy City Attorney

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