

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of)	
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Opinion requested by)	No O-00-274
LeeAnn Pelham)	May 7, 2001
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BY THE COMMISSION LeeAnn Pelham, Executive Director of the Los Angeles City Ethics Commission, has requested an opinion of the Fair Political Practices Commission on the following questions

I. ISSUES PRESENTED

- 1 *Does Section 85700¹, which requires a candidate to return a contribution of \$100 or more within 60 days if the donor information is not on file, interfere with Los Angeles City's ("City") enforcement of a provision of its campaign finance law (LAMC § 49 7 11 B) that prohibits a candidate from depositing a contribution if the donor has not provided the donor information?*
- 2 *Does Section 85304(b) interfere with the City's enforcement of a provision of its campaign finance law (LAMC 49 7 12 B) that limits contributions to a legal defense fund to \$1,000 per fiscal year?*
- 3 *Under Section 85308(b), must contributions by children under the age of 18 always be attributed to the parent or guardian? May a minor ever be a contributor in his or her own right?*
- 4 *Does Section 85701's requirement that laundered contributions be paid to the state General Fund preempt LAMC section 470(k), which requires such contributions be paid instead to the city's general fund?*

II. SUMMARY OF CONCLUSIONS

- 1 Because the local ordinance does not impede compliance with the Political Reform Act ("Act"), the Los Angeles ordinance prohibiting deposit of a contribution until all donor information is obtained does not conflict with Section 85700 Recipients of contributions in city elections, as in state elections, must return the contribution within 60 days if the donor information has not been obtained

¹ All statutory references are to the Government Code, unless specified otherwise

- 2 An elected state officer or candidate for elective state office may establish a legal defense fund under Section 85304 regardless of the individual's status as a local candidate or officeholder. If the individual, however, establishes a legal defense fund created pursuant to the Los Angeles ordinance, that particular legal defense fund will be subject to the rules of that ordinance.
- 3 Section 85308 establishes a rebuttable presumption that a contribution from a minor is actually from the child's parent(s). That presumption may be overcome under certain circumstances. Accordingly, under Section 85308 a minor may be a contributor in his or her own right under certain circumstances.
- 4 Section 85701 does not preempt the local provision that governs violations of the local charter. Section 85701 applies when there is a violation of the state statute, Section 84301. This does not preclude the City in most circumstances from bringing its own action under its local campaign finance law and depositing laundered contributions into the City's general fund.

III. BACKGROUND

In the November 2000 statewide general election, California's voters approved Proposition 34, which amended the Act. The statutory changes made by the proposition significantly impact the duties and responsibilities of statewide and local officials, candidates, filing officers and others. For the sake of orderly implementation of the statutory changes relating to local jurisdictions, the Commission at its January 2001 meeting adopted Emergency Regulation 18573. This regulation identifies each provision of Proposition 34 that is applicable to local candidates, committees and jurisdictions.

Among the changes made by Proposition 34 are several provisions that reach areas addressed by local laws. LeeAnn Pelham, Executive Director of the Los Angeles City Ethics Commission ("LAEC"), submitted to the Commission a request for advice concerning various provisions of the Los Angeles City Municipal Code and Charter and their continued vitality in light of the new law. Each is discussed below.

IV. Analysis

A. Section 85700 - Disclosure of Occupation and Employer - Return of Contributions:

"Does Section 85700, which requires a candidate to return a contribution of \$100 or more within 60 days 'for which the donor information is not on file,' [sic] interfere with the City's enforcement of a provision of its campaign finance law (LAMC § 49 7 11 B) that prohibits a candidate from depositing a contribution if the donor has not provided the donor information?" - Ethics Commission Question #1

Section 85700 provides that

"A candidate or committee shall return within 60 days any contribution of one hundred dollars (\$100) or more for which the candidate or committee does not have on file in the records of the candidate or committee the name, address, occupation, and employer of the contributor "

Los Angeles Municipal Code Section 49 7 11 B prohibits a candidate for elective city office from depositing the contributor's check if donor information is not in the campaign's records (L A Mun Code § 49 7 11, subd (B)) Under this section, a local candidate cannot deposit a check without providing the donor information (Op Req , at p 2) In contrast, Section 85700 is silent as to depositing a contribution within 60 days of receipt while the recipient obtains the required information Rather, the statute requires only the return of contributions lacking the required donor information after 60 days following the deposit

1. **Resolving Conflicting Statutes and Ordinances**

State law governing campaign finances provides some deference to local governments to regulate within the subject matter of the Act Section 81013 of the Act provides

"Nothing in this title prevents the Legislature or any other state or local agency from imposing additional requirements on any person if the requirements do not prevent the person from complying with this title If any act of the Legislature conflicts with the provisions of this title, this title shall prevail "

Proposition 34 itself speaks to the propriety of local regulation of subject matter within the purview of the Act, declaring.

"Nothing in this act shall nullify contribution limitations or prohibitions of any local jurisdiction that apply to elections for local

elective office, except that these limitations and prohibitions may not conflict with the provisions of Section 85312 " (§ 85703)²

Interpreting the preemptive significance of Section 81013, the Commission stated in 1979

"Section 81013 makes clear that the Political Reform Act is not intended to so occupy the field it regulates that state and local government agencies are powerless to enact additional regulations " (In re Alperin Opinion, 3 FPPC Ops 77, 76-084, at p 3)

2. Interpreting Section 85700

Turning to Section 85700, we see that to comply with the statute, a recipient of a contribution must

- 1) return within 60 days,
- 2) contributions of \$100 or more,
- 3) for which specified donor information is not in the recipient's files

The Los Angeles ordinance adds an additional requirement to recipients who are candidates in city elections, that prohibits deposit of the contribution until the donor information is obtained Using the standard established by Section 81013, and in light of 85703, we conclude that prohibiting deposit of a contribution does not prevent a recipient from fulfilling each element of responsibility under Section 85700 Thus, because compliance with the Act is unimpeded, we find the Los Angeles ordinance does not conflict with Section 85700 Recipients of contributions in city elections, as in state elections, must return the contribution within 60 days if the donor information ultimately is not obtained

B. Section 85304 - Contributions to Legal Defense Funds:

"Does Section 85304(b) interfere with the City's enforcement of a provision of its campaign finance law (LAMC 49 7 12 B) that limits contributions to a 'legal defense fund' to \$1,000 per fiscal year?" - Ethics Commission Question #2

Section 85304 provides

"(a) A candidate for elective state office or an elected state officer may establish a separate account to defray attorney's fees and other related legal costs incurred for the candidate's or officer's legal defense if the candidate or officer is subject to one or more civil or criminal proceedings or administrative proceedings arising directly

² Section 85312, referenced in 85703, references the status of contributions for communications to members of an organization, and is not relevant to the issues posed in this opinion request

out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties. These funds may be used only to defray those attorney fees and other related legal costs.

"(b) A candidate may receive contributions to this account that are not subject to the contribution limits set forth in this article. However, all contributions shall be reported in a manner prescribed by the commission."

Section 85304 is situated in Article 3 of Chapter 5, limitations on contributions. The three preceding statutes, 85301, 85302 and 85303, limit contributions from persons, small contributor committees and contributions to committees and parties, respectively. Each section speaks to "candidates for elective state office" or "statewide elective office" and none of these provisions apply to local jurisdictions. (Emergency Regulation 18573 excludes these provisions from application to local jurisdictions.) In context, it is clear that Section 85304 is intended to apply to actions arising from campaigns for state elective office and performance of state officeholders' duties, as opposed to actions pertaining to local officeholders and local elections. In light of the statute's plain meaning and context, a candidate for elective state office or an elected state officer may establish a separate account, not subject to the contribution limits established by Proposition 34, to raise funds to pay legal costs associated with the conduct of a state office election campaign or legal costs associated with these official duties.

The next step in our analysis relies on the LAEC's interpretation of Los Angeles Municipal Code 49 7 12 B, which establishes a fiscal year limit on any contribution to a legal defense fund established by a city officeholder to no more than \$1,000 per person, per matter, per year.³ If the ordinance is not applied in the context of an election for state office or the duties of an elected state officeholder, then no potential conflict with Section 85304 arises. In a letter to the Commission sent prior to the hearing on this matter and in testimony during the hearing, however, the LAEC contended that its limits would apply in the context of a legal action arising from a state election campaign. The LAEC posited this scenario:

"A city official happens to be a candidate for state office and is under investigation by the City Ethics Commission concerning allegations that he violated both state and City laws in connection with his state election campaign. He wishes to establish a legal defense fund to defray attorneys' fees for the Ethics Commission investigation." (Pelham ltr. to Chairman Getman, March 5, 2001.)

The LAEC contends that, notwithstanding Section 85304, a city official running for statewide office is subject to the local contribution limit. In essence, in answering which

³ The provisions of the municipal code and charter of the City of Los Angeles discussed herein apply to municipal elections in the City. (L.A. City Charter, § 400, 101, LAMC § 49 7 1.)

law governs a defense fund arising from an election campaign, the LAEC looks to the status of the official as opposed to the election

While this Commission respects the LAEC's interpretation of the city ordinance, we disagree with its interpretation of the applicability of Section 85304 in the example above. The LAEC interpretation would result in a situation where two candidates in a state election who were faced with the need for a legal defense fund would be treated differently - the state office incumbent would get the benefit of Section 85304 but the city officeholder-opponent would be limited by the local ordinance. We think such a result is untenable.⁴ The language of Section 85304 unambiguously applies in elections for state office, regardless of the status of a candidate, and applies to state officeholder duties, regardless of whether that officeholder happens to be involved in a local campaign elsewhere.

In another letter, the LAEC asks us to "further consider and conclude" that their local limit on legal defense funds applies to an incumbent elected City officer seeking an elected state office.⁵ (Pelham ltr to Chairman Getman, April 25, 2001.) We address each of the arguments as set forth in that letter.

1 Government Code § 81013

The LAEC argues that because allowing the City to apply its limit on legal defense funds would not "prevent [a] person from complying with this title," Section 81013 allows them, as a local agency, to impose additional requirements. (*Id.*, at p 2.)

Section 81013, however, must be harmonized with other pertinent provisions of the Act. A more specific provision enacted by Proposition 34, Section 85703, provides that local agencies may essentially make contrary provisions for contribution and expenditure limits *with respect to local elections* only. Read together, Sections 81013 and 85703 allow a local agency to impose additional obligations or, in the context of local elections, completely different expenditure and contribution limits. It does not follow, however, that these statutes allow a local entity to enact laws that contradict express provisions in the Act that apply to state elections. In short, we do not find authority for the notion that Section 81013 may be used by local agencies to rewrite express limiting provisions of the Act. Accordingly, we conclude Section 81013 provides no authority to rewrite Section 85304.

⁴ We also believe such an interpretation would leave the statute vulnerable to attack on Equal Protection grounds. We are prohibited from taking any action that would abridge constitutional guarantees (§83111.5).

⁵ The April 25, 2001, letter also requests the Commission conclude that local legal defense fund limitations apply to "any person seeking elective City office, including an incumbent state officer." Because our opinion already reaches that conclusion with respect to actions arising from local campaign activities, we do not address those arguments further.

2 Authority of Charter to Regulate Municipal Affairs

Turning to the language of subdivision (b), the LAEC argues that had the drafters wanted to exempt legal defense funds from "all" contribution limits, including those imposed by local agencies, they would not have referenced the contribution limits "set forth in this article" but would have used the word "any " We believe the language of subdivision (b) evinces no such limiting intent. The reference to contribution limits "set forth in this article" does not indicate other limits by local agencies apply because prior to Proposition 34 no contribution limits applied to state elective offices.⁶ If anything, the language of subdivision (b) evinces voter intent that the only contribution limits applicable to state elective office campaigns are those established by the Act.

The LAEC's last argument rests on the California Constitution's grant of "home rule authority" to charter cities which allows cities freedom from contrary state laws with respect to municipal affairs (Cal Const , Art XI, §5(a)) Section 5(b) of that article of the Constitution lists several "core" municipal affairs, including "conduct of city elections " (Cal Const , Art XI, §5(b)) Citing *Johnson v Bradley* (1992) 4 Cal 4th 389, the LAEC argues there is no statewide interest that overrides the City's regulation "of persons who hold or seek to hold City office," and thus Section 85304 impermissibly interferes with a municipal affair (April 25, 2001, ltr , at pp 3-4) This argument, however, misses the point. Insofar as the LAEC seeks to apply its ordinance to candidates for state elective office, the ordinance goes beyond "municipal affairs" and the conduct of city elections and instead crosses over to an area clearly of paramount interest to the state – the governing of state elections. Thus, the *Johnson* case is not relevant, for there the Court construed application of a state prohibition on public financing of local elections. Our case, however, is the exact opposite. Here, the LAEC seeks to impose its ordinance on candidates in a state election. Neither the Constitution nor case law provides authority for the LAEC to do so.

C. Section 85308 - Contributions from Minor Children:

"Under Section 85308(b), are contributions by children under the age of 18 always required to be attributed to the parent or guardian? May a minor ever be a contributor in his or her own right?" - Ethics Commission Question #3

Section 85308 governs family contributions

"(a) Contributions made by a husband and wife may not be aggregated

"(b) A contribution made by a child under 18 years of age is **presumed** to be a contribution from the parent or guardian of the child " (Emphasis added)

⁶ The only exception is contribution limits applicable in special elections for state elective office established by Proposition 73, which limitations were not enjoined by a federal court

As the LAEC observes, the use of the word "presumed" implies the statute establishes a rebuttable presumption that may be overcome under a given set of circumstances. Accordingly, if the presumption can be overcome, the minor may contribute in his or her own name. In contrast, Los Angeles Municipal Code Section 49 7 3 states that contributions by children under eighteen years of age "shall" be treated as contributions by their parents (foreclosing contribution from a minor) and attributed proportionately thereto (but making no provision for a guardian) ⁷

1. Does 85308, subdivision (b), establish a rebuttable presumption?

To answer the question whether contributions to minors are "required" to be attributed to the parent or guardian, we first address whether the use of the word "presumed" indicates an intent to establish a rebuttable presumption or whether it establishes a conclusive presumption requiring attribution to the minor's parents.

Initiative measures are subject to the ordinary rules and canons of statutory construction (*Evangelatos v Superior Court* (1988) 44 Cal 3d 1188, 1212). The goal of statutory construction is to ascertain and effectuate the intent of the Legislature (*Pacific Gas & Electric Co v County of Stanislaus* (1997) 16 Cal 4th 1143, 1152). Generally, the language of a statute is the most reliable indication of legislative intent (*Calvillo-Silva v Home Grocery* (1998) 19 Cal 4th 714, 724). However, when the language of the statute is ambiguous, a court will consider both the legislative history of the statute and the wider historical circumstances of its enactment to determine the legislative intent. (*Watts v Crawford* (1995) 10 Cal 4th 743, 753). A substantial change or a deletion in the language of a statute is assumed to change its meaning (*Clark v Workers' Compensation Appeal Board*, (1991) 230 Cal App 3d 684). A statute should be construed if reasonably possible to preserve its constitutionality, and avoid the constitutional issue inherent in a contrary construction (*Department of Corrections v Workers' Comp Appeals Board* (1979) 23 Cal 3d 197, 207).

To determine the intent of the voters and answer whether the presumption of 85308 is rebuttable or conclusive, it is helpful to examine the statute that Section 85308 rewrote ⁸. Prior to Proposition 34, Section 85308, as enacted by voters with passage of Proposition 208, stated

⁷ Section 49 7 3, subdivision (B), states "Contributions by children under eighteen years of age shall be treated as contributions by their parents and attributed proportionately to each parent (one-half to each parent or the total amount to a single custodial parent)" (Emphasis added)

⁸ The ballot pamphlet materials on Proposition 34 do not discuss the particulars of this section. Proposition 34, however, expressly repealed the Proposition 208 version of Section 85308 (in Section 42 of the initiative)

"85308.

(a) Contributions by a husband and wife shall not be aggregated

(b) Contributions by children under 18 **shall** be treated as contributions attributed equally to each parent or guardian "

(Emphasis added)

As can be seen, Proposition 34 replaced the Proposition 208 command "shall" with the word "presumed "⁹

The word "shall" is defined as follows

"**shall** owes, ought to, must, **2a** - used to express a command or exhortation **b** - used in laws, regulations, or directives to express what is mandatory " (Webster's 3d New Internat Dict (1993) p 2085)

In contrast to the imperative tone of "shall," one dictionary definition of the word "presume" states

"**presume** **1.** To take for granted, assume to be true **until disproved** " (Funk & Wagnalls Std College Dict (1974) p 1068, emphasis added)

Another dictionary defines the word as follows

"**presume** **3:** to accept as true or credible without proof **or before inquiry** " (Webster's 3d New Internat Dict (1993) p 1796, emphasis added)

In light of the background discussed above, we conclude Section 85308 establishes a rebuttable presumption that a contribution from a minor is to be attributed to his or her parent or guardian This interpretation is consistent with canons of statutory construction which require the Commission ascertain and give effect to legislative intent This intent is best evidenced by the amendment of the statute deleting mandatory language ("shall") and inserting permissive language in its place This conclusion gives effect, as well, to the plain meaning of these words as shown by accepted reference materials Finally, this interpretation comports with the principle that a statute should be construed in a manner that avoids constitutional issues in a contrary construction.¹⁰

⁹ The question of whether "shall" is always mandatory was taken up in a dissent by Justice Brown of the California Supreme Court recently in *People v Tindall* (2000) S080078 Also, California's Appellate Rules Project Task Force is reported to have decided that revised rules will be published in 2002 in which the word "shall" will be replaced with the word "must" to alleviate any confusion (J Roemer, "Thou Shalt Use 'Must'", *Daily Journal*, December 22, 2000)

¹⁰ Any restriction on the ability to contribute to political campaigns may be subject to a constitutional attack on First Amendment grounds Section 83111 5 of the Act states in pertinent part,

Regarding the LAEC's second question, we conclude a minor may be a contributor in his or own right where facts rebutting the presumption otherwise are established. Where the presumption stands, the contribution is to be attributed to the child's parent or guardian.

2. Status of the Local Ordinance:

In light of our conclusion that Section 85308 establishes a rebuttable presumption, the LAEC asks how its ordinance is affected by Section 85308. Section 85703 of the Act allows local jurisdictions to establish their own contribution limitations or prohibitions in certain circumstances, all of which are present here. Following the hearing on this request, the LAEC indicated in a letter to the Commission that it has always treated the municipal provision as part of the City's contribution limits. "Section 49 73B prevents individuals from evading our contribution limits by making contributions in the names of their minor children, and therefore is integral to the City's overall system of limiting contributions." (Pelham ltr to Chairman Getman, March 23, 2001.) As applied, the effect of the ordinance is that contributions from minors are attributed to their parents and count against the parents' contribution limits. As a result, the ordinance acts as a contribution limitation in the context of elections for local elective office (§ 85703).

D. 85701 - Disgorgement of Laundered Contributions:

*"Does Section 85701's requirement that contributions received by a candidate or committee from a donor in other than the donor's legal name (i.e., money laundering) be paid to the state General Fund preempt a local law requiring such contributions made to a local candidate or committee to be repaid instead to the city's general fund?" Ethics Commission Question #4*¹¹

Section 85701 states

"Any candidate or committee that receives a contribution in violation of Section 84301 shall pay to the General Fund of the state the amount of the contribution."¹²

This statute, enacted under Proposition 34, restates a nearly identical provision of Proposition 208. Prior to either incarnation of this statute, in the 1980's the City of Los Angeles adopted Charter provision 470(k) (renumbered), which states that laundered contributions in a City election shall be paid to the City Treasurer for deposit in the City's General Fund (LAMC § 470, subd (k))¹³

"[t]he Commission shall take no action to implement this title that would abridge constitutional guarantees of freedom of speech."

¹¹ We caution at the outset of this analysis that we are concerned here only with disgorgement of the laundered contribution received by the third party/recipient. We are not asked nor do we address the separate issue of "fines" which might be assessed against the wrongdoer/money-launderer under different statutes.

¹² "84301. 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."

¹³ LAMC § 470, subdivision (k) states

In both statutory schemes (Section 85701 and the charter), the respective provisions regarding deposit of laundered contributions may be viewed as a remedial corollary to a primary statutory enforcement provision - the ban on laundered contributions. In the Act, Section 85701 provides a means of enforcement specific to a particular statute - Section 84301. Likewise, the provision in the Los Angeles charter for deposit to the city fund is incorporated in its prohibition against money laundering in city elections. Thus, it can be said that the fund deposit provisions in each respective regime pursue the same goal in different regulatory regimes and, therefore, do not conflict.

Section 85701 is vulnerable, on the other hand, to an opposite construction - one which preempts the local charter by virtue of the statute's decree that laundered contributions "shall" be deposited with the state General Fund. One might construe this language to reflect an intent to preempt local provisions, even in the context of local elections. In order to fully effectuate the state and local schemes, it is preferable to avoid a finding of conflict between the Act and the Los Angeles Charter (*California Fed Savings & Loan Assn v City of Los Angeles* (1991) 54 Cal 3d 1, 16-17)¹⁴

We conclude that it is unnecessary to reach that issue. In construing these provisions, we believe the primary goal of the state statute is that the recipient of a laundered contribution must disgorge the funds received. It goes without saying that disgorgement can occur only once, and the law does not impose on a recipient the unreasonable burden to disgorge the contribution to two different entities. While we advise any recipient of a laundered contribution to disgorge the funds pursuant to the terms of Section 85701, we acknowledge that circumstances may arise where a recipient already will have returned funds to a local agency pursuant to a local ordinance. Whether that disgorgement is to a local or state general fund, we believe that once the recipient has returned the funds pursuant to either law, he or she has complied with the Act. We believe this interpretation avoids unnecessary constitutional questions and comports with general notions of fairness and justice.

"Assumed Name Contributions. 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, nor in the name of another person or combination of persons. No person shall make a contribution in his, her or its name of anything belonging to another person or received from another person on the condition that it be used as a contribution. In the event it is discovered by a candidate or committee treasurer that a contribution has been received in violation of this subsection, the candidate or treasurer shall promptly pay the amount received in violation of this subsection to the City Treasurer for deposit in the General Fund of the City."

¹⁴ *California Fed* requires that state legislative enactments and charter city measures be construed wherever possible in a manner that avoids the finding of a conflict between the two. The decision of whether state law overrides a charter city enactment would take courts into "sensitive areas of constitutional law" (*California Fed*, *supra*, 54 Cal 3d at pp 16-17)

Adopted by the Commission on May 7, 2001 Concurring Commissioners
Downey, Knox, Scott and Swanson



Karen A. Getman
Chairman