State of California

82028

Memorandum

To : Ted

Date : August 27, 1979

M-79-152

From : FAIR POLITICAL PRACTICES COMMISSION
Dwight Dickerson

Subject: Gift Disclosure

The Political Reform Act requires that public officials designated in conflict of interest codes, or who are subject to the disclosure provisions of 87200 et seq., disclose gifts received while serving in office. The term gift is generally defined in Government Code Section 82028. This section provides,

> "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.
>
> (b) The term "gift" does not include:
>
> (1) Informational material such as books, reports, pamphlets, calendars or periodicals. No payment for travel or reimbursement for any expenses shall be deemed "informational material";
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> (2) Gifts which are not used and which, within 30 days after receipt, are returned to the donor or delivered to a charitable organization without being claimed as a charitable contribution for tax purposes;
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> (3) Gifts from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin or the spouse of any such person; provided that a gift from any such person shall be considered a gift if the donor is acting as an agent or intermediary for any

person not covered by this paragraph;

(4) Campaign contributions required to be reported under Chapter 4 of this title;

(5) Any devise or inheritance.

Due to this expansive definition, many questions have arisen regarding the reportability of specific transactions. These questions have been addressed by the Commission in the form of informal advice by its staff, formal opinions, regulations, and on occasion by legislative amendment to the Act.

It is my intention to review the previous advice given by the Commission staff in the various areas of gift disclosure. In addition, I will examine the regulations and leading formal opinions of the Commission in this area as well. The purpose of this review is to summarize what type of advice has been given, both past and present, interpreting the Act's gift provisions. Hopefully, this summarization will help us to determine what changes need to be made, if any at all, in the Commission's approach toward gift disclosure.

Requests for advice regarding gift disclosure, usually arise in the context of what may be "excluded" from the definition of gifts for reporting and sometimes disqualification purposes. Therefore, I will first review what types of exclusions are provided for by the Act, Commission regulation, and Commission policy. After a discussion of the exclusionary rules, I will then analyze the state of the law pertaining to the valuation of gifts that are reportable.

I. EXCLUSIONS FROM THE ACT'S DEFINITION OF GIFTS

Informational Materials

Section 82028(b)(1) of the Act provides,

The term "gift" does not include:

Informational material such as books, reports, pamphlets, calendars or periodicals. No payment for travel or reimbursement for any expenses shall be deemed "informational materials";

Although the Section is quite specific that books, reports, periodicals, etc. are deemed informational materials and need not be reported, a condition has been imposed that those materials be of a "trade or professional nature" providing information to the public

official. If the book or periodical is pleasure oriented only, it must be listed as a gift if it exceeds $25 in value. (See memo from Dawn Wiser to the File dated January 3, 1977.) This approach was again taken by Commission with respect to the furnishing of maps to a public official. In the NIDA opinion, 3 FPPC Opinions 1 (No. 75-075-B, Jan. 4, 1977) it was stated by the Commission that if the donor knows or has reason to know that maps will be used for decorative purposes, then the maps must be disclosed as gifts. Therefore, it must be concluded that although books, reports, pamphlets, etc. are listed as informational materials, they may not be considered as such if they are used for non-professional purposes.

The informational material exclusion specifically lists certain tangible items that are to be considered informational material. The Commission has expanded the exclusion to include not only tangible items, but intangible items as well. (See Spellman opinion, 1 FPPC 16 (No. 75-026, May 1, 1975).) The Spellman Opinion stated on pages 16-17 that informational materials may also include "intangible" items such as tours. This rationale was based on a determination that tours supply information in a useful form and does not lend itself to any accompanying gratuities or special favors.

Although tours are considered by the Commission to be excluded under the informational material exception, transportation to and from the site of the tour is not. For it is provided in Section 82028(b)(1) that no payment for travel or reimbursement for any expenses shall be deemed informational material. The Commission confirmed this rule in a letter dated April 15, 1977 to Karl Schnetz of Assemblyman Chappie's office. The letter stated that although a free tour of Auburn Dam by a public official need not be reported as a gift because of the informational material exclusion, the transportation and food provided by lobbyists employers had to be reported as a gift if the value of the transportation and food exceeded $25.

The Commission has carved out an exception to the rule regarding transportation related to tours. Transportation "incident" to the plant tours need not be reported. In a letter dated May 23, 1977 to John Bury the rule was stated that transportation in the general area of a plant tour is considered part of the tour and therefore included in the informational material exclusion. The example cited in the advice letter was if the PUC flies an official from San Francisco to Los Angeles to tour a private facility in Riverside, the transportation provided by the facility from the airport to the facility for the purposes of the tour did not constitute a gift.

Finally, with respect to tours and the information material exclusion, when reimbursement for expenses including transportation, food and lodging are provided to the official by another public agency, those reimbursements need not be reported. If the public official is making the tour in the context of his official duties, reimbursements for food, lodging and transportation are considered excluded by Section 82030(b)(2). This advice was given with respect to tours of water facilities that were sponsored by the Metropolitan Water District. (See letter to William R. Attwater dated Dec. 6, 1977.)

The last piece of written advice yet to be reviewed which pertains to informational material regards the receipt of a free course of instruction. An official was provided with books and a free real estate course. In advice to Assemblyman Larry Chimbole dated February 1, 1978, it was provided that the books fell within the exception for informational material, however, the course and ensuing lectures did not, and had to be reported. It is puzzling to me why the course could not be considered informational material if, the course can be justified as relevant to the official's duties. For example, if the official was a legislator, and the "free" course was a course giving instruction in bill drafting techniques, it could be argued that the course should be deemed informational materials. This rationale is based on the purposes behind excluding informational material. There is a value in providing officials with tours, data books, calendars, periodicals in order that they can become more knowledgeable and more effective in their work. The same could be said for classroom instruction.

Return of Gifts

Section 82028(b)(2) provides,

The term "gift" does not include:

> Gifts which are not used and which, within 30 days after receipt, are returned to the donor or delivered to a charitable organization without being claimed as a charitable contribution for tax purposes.

Little written advice has been provided in this area. Only two advice letters could be found in the file. In the first situation provided to the staff for consideration, it was asked if free passes to athletic events had to be reported even though they were never used by the official. It was concluded by staff that the tickets were reportable gifts. The letter stated that it was the acceptance of the gift that mattered and not its ultimate use or in this case non-use. (See letter to Senator Dennis Carpenter dated October 20, 1975 by Michael Bennett (Ted Prim).)

In the second situation an official received a gift then after 30 days paid the donor the gift's fair market value. The question presented for consideration was whether or not the official had received a gift. It was concluded by staff that the gift had to be reported. The advice letter stated that the law allows the official 30 days to return a gift, in addition it is also required that the gift had not been used by the official during that 30 day period. The facts provided to the staff for consideration indicated not only had the 30 day period lapsed for return, but the official had used the gift during the six week period in which he had retained it. (See letter from Edgar Kerry to George R. Corey, dated October 25, 1976.)

Gifts from Relatives

Section 82028(b)(3) provides,

> Gifts from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first coursin or the spouse of any such person; provided that a gift from any such person shall be considered a gift if the donor is acting as an agent or intermediary or any person not covered by this paragraph;

I could not find any advice letters or opinions pertaining to this subject.

Chapter 4 versus Chapter 7 Reporting

Section 82028(b)(4) provides,

The term "gift" does not include:

> Campaign contributions required to be reported under Chapter 4 of this title;

In light of Commission advice in this area over the years this provision should be restated as follows: The term gifts does not include for the purposes of Chapter 7 any payments which are related to Chapters 4 and 6 of the Act. It has been the Commission's intention to separate as much as possible Chapter 4 and Chapter 7 activity and reporting requirements.

A staff letter to Assemblyman Richard Robinson dated October 5, 1977 typifies the Commission's views regarding exclusions under Section 82028(b)(4). The letter provides that when a campaign committee reimburses an office holder for staff, constituent entertainment, and political travel the payments need not be reported as gifts from the campaign committee on the official's statement of economic interests. However, if the payments provide a purely personal benefit to the office holder, then the payments must be

reported as gifts from the committee on his statement of economic interests. This advice follows closely the Commission's Brown opinion, 1 FPPC Opinions 67 (No. 75-055, July 2, 1975). The opinion provides that activities carried out primarily as part of an Assemblyman's responsibilities as an elected office holder and a candidate are properly treated as campaign expenditures by the Committee and not as personal income. However, if the campaign funds are deferred to personal use by an official, then they would no longer be within the exemption for campaign contributions and would be considered personal and reportable income under Section 87207.

The Brown opinion was later affirmed by the Hayes Opinion, 1 FPPC Opinions 210 (No. 75-145, Dec. 4, 1975). Hayes stated that proceeds from fund raisers remained campaign contributions so long as they are used to support those activities related to the official's responsibilities as an elected official or as a future candidate for office. Again, it was stated that if expenses incurred by the official are incurred to support personal costs and needs, then the official has received a gift from the campaign committee. (See Hayes opinion, 1 FPPC Opinions 210, 211-212 (No. 75-145, Dec. 4, 1975.)

If the activities of the official are political then any gifts that relate to that activity need not be reported as gifts. The staff has developed overtime, standards for determining what constitutes political activity instead of personal use. In a memo to an opinion request meeting dated March 10, 1977 it was provided once a person becomes a candidate, items given to the official tend to be political rather than personal and thus contributions rather than gifts. However, this presumption may be overcome if factors such as proximity to the election and the nature of the event suggest that the items received are personal rather than political.[1/]

This rule seems to overrule previous advice given by the staff to supervisor Joseph Sheedy in a letter dated June 14, 1976. It was provided there that funds received by him to defray the costs of attending the democratic convention had to be reported as a gift. (Frankly, I do not see how this activity would be reported in light of the Brown and Hayes standards which were developed previous to

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1/ These criteria were later published in an opinion (see Gutierrez Opinion, 3 FPPC Opinions 44 (No. 76-081, June 6, 1977).

this advice letter. Those opinions made it clear that any funds collected and expended for political activity should be excluded under Chapter 7, apparently this was not done in the case of Mr. Sheedy.)

Legal fees paid by the campaign committee on behalf of a public official are also treated as non-disclosable contributions if the payments are primarily political. When a public official was sued by an opposing candidate for defamation of character, it was determined by staff that the legal fees raised on behalf of the official were political contributions and need not be treated as gifts. (See letter to Ken Cory from Michael Bennett (Mike Baker) dated September 15, 1977.)

The general rule that has now been developed in this area may be stated as follows: if legal services are paid by the official with personal funds the expenditures are usually deemed personal rather than political in nature. If funds are raised on behalf of an official, then the standards set forth in the Hongisto letter are applicable (I couldn't find the letter): Were the funds raised unrelated to the filer's statuts as a candidate or office holder and used solely for personal purposes. If so, funds then must be reported by the official as a gift.

Under the doctrine of excluding Chapter 4 related items from the Chapter 7 reporting requirements, the Commission has developed a policy that tickets received to attend political fund raisers need not be reported. (See Cory opinion, 1 FPPC Opinions 137 (No. 75-094-C, Oct. 1, 1975.) The rationale for not requiring officials to report free tickets to political fund raisers has its basis on the fact that fund raiser activities fall under Chapter 4. However it should be noted that the transaction regarding the gift of free tickets to a public official under Chapter 4 would not be considered a reportable item. This conclusion was reached by the Commission because it believes the official has not received a contribution under Chapter 4 because the official's attendance at the event is full and adequate consideration for the tickets. Therefore, the transaction goes completely unreported both under Chapter 4 and Chapter 7. The Commission may wish to reconsider its approach regarding free tickets in this area.

There have been several events honoring public officials that have given rise to a personal reporting obligation under Chapter 7. In a letter to Assemblywoman Pauline Davis dated August 19, 1976, it was concluded that proceeds for a trip to Europe collected at a

testimonial dinner in her honor had to be reported as a gift.

In the Gutierrez opinion, 3 FPPC Opinions 44 (No. 76-081, June 7, 1977) it was determined that donations made to have a testimonial to honor the appointment of a judge to the Court of Appeals were not contributions but should be considered as gifts. The conclusions were based on the following criteria: At the time of the reception the judge was : 1) not a candidate, and 2) the payments were not for political purposes. (Why these payments were not for political purposes was not explained in the opinion.)

It is curious that the activities in Guiterrez, though deemed reportable under Chapter 7, did not meet the test established earlier by the Commission in the Hayes and Brown opinions as political activity. If an official was provided food, lodging and travel to speak at a public event and the campaign committee paid for those items then the following criteria is considered in determining whether or not the official has received a gift. Is the public official a candidate for office. If so, then a presumption is created that items given to the official tend to be political rather than personal and thus contributions rather than gifts. The presumption is overcome according to Gutierrez if factors such as proximity to the election and the nature of the event suggest that the items were personal rather than political. It seems that a party or dinner celebrating a political victory could be considered Chapter 4 activity. There is little question those activities are related to the official's activity as a political office holder or candidate.

Perhaps one way to solve the problem of determining whether or not a benefit or a gift is related to the official's campaign activities and thus a Chapter 4 related item, is to determine if the official has become a candidate for office. If there is no determination, any item received by the official should be considered reportable under Chapter 7 as a gift. On the other hand, the Commission may want to clarify its advice in this area by adopting the standard in the personal use bill which essentially provides that an official has received a gift only if the use of the gift is personal and there is only a negligible campaign or office holder related benefit.

Exclusions of any Devise of Inheritance

82028(b)(5) provides that,

> Any devise or inheritance.

No written advice of opinions have been rendered regarding this section.

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Exclusions by Commission Regulation and Policy

The Commission has developed exclusions to the definitions of gifts both by regulation and opinion. Set forth below is a discussion of written advice that has been generated interpreting these regulations and policies developed by the Commission.

Commission Regulation 18727 -- Exclusion of Exchanges and Home Hospitality

Commission Regulation 18727 provides,

> For the purposes of Government Code Section 87207(a), the term "gift" does not include the value of gifts:
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> (a) of hospitality involving food, beverages or lodging provided by an individual in his or her home to any public official filing a statement of economic interests;
>
> (b) exchanged between a public official filing a statement of economic interests and an individual other than a lobbyist on holidays, birthdays, or similar occasions. This provision does not apply to the extent that the gifts received by the public official exceed in value the gifts that he or she has given.

It is questionable in my mind that the Commission can adopt a regulation of this type for several reasons. The regulation provides additional items to be excluded from the definition of gifts. Section 82028(b) provides specifically what items are excluded from the definition of gifts. If the statutes provides for specific exclusions it should be assumed that those items not included in the listing are reportable as gifts. By regulation, the Commission on its own initiative and without any support from the Act has expanded the list of items not disclosable as gifts.

Prior to the enactment of the regulation full consideration had to be provided before an item would not be considered a gift. In one situation presented to the staff, a judge stayed in a friend's hotel suite in Las Vegas for several days. In return the judge bought dinner one night and provided a cartoon caricature of himself to his friend. It was concluded by the staff in a memorandum from Ken Finney to the file dated April 7, 1977 that sufficient consideration had not been provided, and the judge received a gift. After passage of the regulation, it could be concluded that such "hospitality" might be excluded for several reasons.

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First, in a letter by Mike Baker to William O'Malley dated June 22, 1977 it was stated that sufficient consideration had been provided in exchange for a weekend stay at a cabin as guest of a friend when the official brought $48 worth of food for four. In the letter Mike Baker stated that the exchange need not be equal exactly, it was reasonable to assume that $48 spent on food and beverage is roughly equivalent to the value of the benefit received by staying in the cabin for a weekend. The judge could try his adequate consideration argument relying on the O'Malley letter. Second, with respect to other exchanges, the staff has developed the view at a recent opinion request meeting that if there is a history of exchanges between individuals on holidays, birthdays and other similar occasions, gifts that are provided in a one way exchange for example a baby shower gift need not be reported by an official. If the judge could show there was a special occasion for the gift it need not be reported. Third, if the judge's friend also stayed in the suite, it could be argued home hospitality was provided and the issue of adequate consideration need not be considered. Cabin lodging provided to an official is considered home hospitality, and not a reportable gift, if the donor stays overnight as well. It is irrelevant that the cabin is not the donor's principal residence. If the provider of the hospitality does not stay overnight, the hospitality will then be considered a gift. The value of the gift will be the fair market value for use of the cabin. In addition, the gift is considered to be made directly to the official and can not be apportioned among other friends who may have stayed overnight at the cabin as well.

It is my opinion that regulation 18727 makes gifts received from friends unreportable. There is no justification for this in the Act as it is presently written. I believe the Act must be amended in order to make 18727 a valid regulation.

Commission Regulation 18728 -- Honoraria Exclusion of Food, Transportation and Necessary Accomodations

Commission Regulation 18728(a) provides,

> (a) As used in this section, "honorarium" means a payment for speaking at any event, participating in a panel or seminar or engaging in any similar activity. For purposes of this section, free admission, food, beverages and similar nominal benefits provided to a filer at an event at which he or she speaks, participates in a panel or seminar or performs a similar

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> service, and reimbursement or advance for actual intrastate travel and for necessary accomodations provided directly in connection with the event are not payments and need not be reported by the filer. . .

The exclusion of those items set forth in regulation 18728(a) from the gift requirements will be allowed only if the public official is a speaker, panelist or any organizer at a speaking event, seminar or conference. The regulation does not apply to those officials who participate in the event only by attending. In such cases a gift has been provided unless full and adequate consideration has been provided. (See letter to Thomas McBride, Jr. by Kenneth Finney dated January 27, 1977.)

In the MacBride letter the Commission staff reviewed the issue of adequate consideration. Members of the PUC were invited to attend a conference sponsored by the California Truckers Association (C.T.A.). The $100 registration fee for the PUC members were paid by CTA. The staff concluded in the advice letter that the PUC members had not received a gift because full and adequate consideration had been given. It was believed by staff that because the boardmembers would be participating in informal discussions and consultations at the conference adequate consideration was provided for the registration fee. However, the staff was also of the view that this activity would not consitute adequate consideration for food, beverage, transportation and lodging. Those items, if received, would have to be reported because the boardmembers were not speakers or panelists for the purposes of regulation 18728(a). It is unclear to me how the result regarding food and beverage could be reached in light of the staff's conclusions regarding the reimbursement of the registration fee for the same event. These distinctions are not explained.

With respect to reimbursements in an earlier advice letter to Senator Russell dated June 2, 1976 by Nan Hamberton, the staff concluded that reimbursements by the Senate Republican Caucus for out of pocket expenses incurred by attending a cocktail fund raiser party were not reportable. Because the Senator attended the event on behalf of the Republican party adequate consideration had been provided by merely attending the event.2/

2/ This letter was in the honoraria file. I suspect the conclusions were based more on the desire to keep separated Chapter 4 and Chapter 7 activity. It should also be noted that this advice is inconsistent with the advice given to Supervisor Sheedy who received reportable reimbursements for attending the Democratic convention.

Regulation 18728(a) excludes from disclosure most reimbursements for expenses connected with speaking at an event. However, the reimbursements must be made by the party sponsoring the event and not a third party. In a memorandum to Tony Alperin by Barbara Campbell dated February 1, 1979 we gave such advice.

It is also required that the public official participate in a structured event in order to gain the benefits of the honoraria exclusion of food, transportation and lodging. Section 18728(a) was not intended to apply to reimbursements made for impromptu speeches. This was the advice given to Betty Jo Smith (Lt. Gov. Dymally) in a letter by Ted Prim dated January 13, 1977. The Lieutenant Governor went on a foreign trade mission on behalf of the state. While abroad the Lt. Gov. was given free entertainment, food, transportation and accomodations by the host countries. The staff concluded that the receipt of these items were reportable gifts because no consideration had been provided to the foreign governments because the Lt. Gov. was there on the state's behalf. The payments were not excluded by the honoraria regulation because the Lt. Gov. was not engaged in any structured or formal speaking role. Trade negotiations on behalf of the state was not sufficient to bring the activity under the regulation. Similar advice was rendered to Senator Ayala who visited Mexico.

I found the staff's approach troubling. If the Governor attends a state banquet in Mexico would the meal be reportable? It would appear that no consideration was provided to Mexico because the Governor is there on the state's behalf. Therefore, the Governor has received a gift. I do not see the purpose of disclosure or disqualification with respect to this kind of activity. It is doubtful that a public official would become "beholden" to a foreign government because he was enterained while on an official governmental mission. I believe that the Commission should develop a policy that entertainment, food, and lodging provided by a foreign government to an official on official visits need not be construed as gifts. It could be argued that gifts in this context are being made to the state and not personally to the official.

The Good Neighbor Doctrine and Bona Fide Dating Relationship Exclusion

The Commission by opinion has ruled that some free services, though gifts under a literal interpretation of the Act, are excluded from the Act because it was not the intention of the framers to make the services or activities reportable. This concept was first developed in the Cory opinion 1 FPPC 153 (No. 75-094-B, Oct. 23, 1975) which held that public officials need not report voluntary assistance received repairing a fence from a neighbor.

This neighborliness doctrine was affirmed and expanded by the Commission in the Stone opinion 3 FPPC Opinions 52 (No. 77-003, June 9, 1977). In the Stone opinion, the city attorney received a free plane trip at his request from a friend in order that he might attend a hearing on city-related matters. The Commission concluded that because the pilot did not deduct the cost of the flight on his tax return as a business expense; had no business pending before the city, and the service of providing an occasional ride to "work" was not normally the subject of an economic transaction; the city attorney received the benefit of a neighborly act and need not report the free plane ride.

Also included under the non-intention of the framers concept are gifts received in the context of a bona fide dating relationship unless the donor is intending to influence the official in his or her official duties, a lobbyist, or has official dealings with the official. It should be noted at this point that the Commission is split on the rationale for this policy. Although in agreement that bona fide dating relationship gifts are excludable, some Commissioners justify the exclusion under the exchange doctrine of Regulation 18727 while others rely on the general non-intent of the framers as a rationale. The legal basis for either approach is weak. Regulation 18727 regards exchanges and special occasions. Neither condition need occur under current interpretations of the bona fide dating relationship doctrine in order to have a gift excluded. With respect to the non-intent of the framers rationale, the framers specifically listed those items to be excluded from the definition of gifts.

The policy reasons for excluding these kinds of gifts are probably similar to the exclusion of gifts from relatives (Section 82028(b)(3)). The policy rests on the belief that the official will not be as biased or influenced on the basis of a financial interest than by the personal relationship that exists. In addition, privacy concerns may be a factor. Given the broad impact of the doctrine, I believe that the Commission should codify its policy by amending the Act, passing a regulation or opinion.

Community versus Separate Property

Chapter 7 of the Act requires disclosure of income sources by public officials, and disqualification if those sources are materially affected. With respect to income received by the spouse, the official's interest is limited to a community property share. Income is defined in Section 82028 to include gifts. Therefore, with respect to gifts received by the spouse, the official's interest is also limited to a community property share. Gifts which

are separate property of the official's spouse are excluded from the disclosure and disqualification provisions of Chapter 7.

The Commission's definitive opinion in this area is the Cory opinion 2 FPPC Opinions 48 (No. 75-094-A, April 22, 1976). The test Cory provides,

> Gifts received by the spouse of an elected state officer are the separate property of the spouse and do not have to be disclosed under Chapter 7. Sections 87100, et. seq. . . However, a gift ostensibly made to the spouse . . . of an elected state officer shall be considered a gift to the official if:
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> 1. The nature of the gift is such that the official is likely to enjoy direct benefit or use of the gift to at lease the same extent at the ostensible donee; and
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> 2. The official in fact enjoys such direct benefit or use; and
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> 3. There are no additional circumstances negating an intent to make an indirect gift to the official.
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> 2 FPPC Opinions 48, 51

Based on the Cory opinion, and the honoraria regulation, the Commission has developed the policy that when an official is attending a seminar, food, transportation and lodging provided to an official's spouse need not be reported as a gift. It was concluded by the Commission that such a gift was separate property when it was considered that the gift would not be reportable if made directly to the official. No public purpose would be served by reporting the reimbursements provided to the official's spouse. (See memo to the Commission by Natalie West dated November 25, 1977.) The staff's advice prior to this policy determination had been quite the opposite. Such benefits received by a spouse had to be disclosed by the official.

It is difficult to understand why these transactions would not be reportable. The gift is being made to influence and benefit the official. It is doubtful that the gift would have been made to the official's spouse, if the official had chosen not to attend the event. The gift is made to encourage the official to attend. In this light, gifts of meals, lodging and transportation to a spouse are made to influence the official and are indirect gifts. If gifts are to be considered separate property and not reportable

the Commission should place the burden on the filer to demonstrate that the gift is in fact the separate property of the spouse (perhaps a prenuptial agreement).

Wedding gifts are considered community property unless the filer can demonstrate that the gift is "peculiarly adaptable only to the personal use of the spouse or it was specifically intended only for the use of the spouse." (See Torres Opinion, 2 FPPC 31,35 (No. 75-163, Feb. 4, 1976). Unless the gift satisfies this criteria, the wedding gift will be treated as community property, even if it was received prior to the wedding.

The advice regarding the reporting standards for community property has been inconsistent. In a memo to the file dated September 1977, and the Torres opinion, the threshold for wedding gift disclosure was $50. However only the community share and not the full value of the gift need be disclosed once the $50 threshold is met. This approach was not taken in a letter to Grover L. McKean dated February 7, 1978. It was stated that once the $50 threshold was exceeded the full value of the gift must be disclosed.

The Act and the Torres opinion are quite specific in its language that the official need only disclose his or her community property share of gifts to the spouse. Therefore, the value to be reported is only half the fair market value of the gift. It is my opinion that the advice given to Grover McKean is in error.

Gifts to a Public Entity versus Public Official

On occasion a public official will receive the benefits of a gift made to his or her public entity by a private individual. Such benefits are not reportable, provided the test in the Stone opinion has been met. The test provides,

> While no immutable guidelines can be cast for determining when a gift of this nature is a gift to the city only, and not the official, we would require it to satisfy at least the following four criteria:
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> 1. The donor intended to donate the gift to the city and not to the official;
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> 2. The city exercises substantial control over use of the gift;
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> 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

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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.

Stone, 3 FPPC Opinions 52, 57
(No. 77-003, June 9, 1977)

The only written advice I could locate interpreting these provisions required the city official to report the gift. A foreign developer invited a city delegation to meet with business and governmental leaders in his country. The staff concluded that a gift to the officials and not the city had been made. Although the invitation spoke in general terms, the trip was only being offered to high ranking city officials. It was unacceptable to the developer, if only lower ranking officials attended. On this basis, the staff reached the result that a gift had been made to the public official. (See letter to Ralph R. Kuchler by Ted Prim dated October 31, 1978.)

It is also possible for the official to receive reportable gifts from a public entity. Although it is illegal for a public entity to make gifts to its servants, it has been our advice that such gifts are nevertheless reportable. The Thomas opinion, 3 FPPC Opinions 30 (No. 76-085, Feb. 1, 1977) makes it clear that even if there was no donative intent and the official had misused the funds provided, a gift has been made. The approach in the Thomas opinion was upheld by the courts in the Suitt case. FPPC v. Suitt, 90 Cal App 3d 125 (1979).

An Official as an Intermediary

When an official has been placed in the role of an intermediary between two private parties involved in a gift transaction we have usually indicated that the official had not received a gift. The primary consideration in determining whether a gift has been made to the public official is the control or direction the official has over the gift.

In an opinion request meeting memo dated June 24, 1977 the staff concluded that an occasional request by an official that a horse race track make tickets available to a constituent is not a gift to the official unless there is a clear pattern of conduct where the official keeps asking for tickets and the track continues to give them out.

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This advice is rooted in the Commission's Nejedly Opinion, 2 FPPC Opinions 46 (No. 75-190, April 8, 1976). In that opinion the Commission ruled that an appeal for donations on behalf of a non-profit organization by a legislator, was not a gift to the official. I believe the Commission's approach regarding the role of an official as an intermediary should be reviewed. If, the donor makes the gift at the legislator's request, and it is clear from the circumstances that the gift would not have otherwise been made, the legislator has received a gift. The legislator in effect is deciding how the gift should be used when it is given to the third party under these circumstances.

II.

Besides the basic question of whether a gift is reportable the next most often asked question is how the gift should be reported. More specifically, how is the value of the gift to be determined for reporting purposes. This question usually centers around testimonial dinners and other group gifts; free entertainment, food and lodging by foreign governments; and free tickets and passes.

Section 87207(b)(4) requires that the specific value of a gift be reported. However, the section does not provide sufficient guidance regarding what type of value should be attached to the gift. This question has often been addressed by the Commission in its advice letters and opinions. Generally, the fair market value of a reportable gift should be disclosed.1/

Section 81004 of the Act requires that the filer use reasonable diligence in order to determine the value of the gift. (Also see Torres, 2 FPPC Opinions 31, f.n. 6 (No. 75-163, Feb. 4, 1976). If the donor fails to indicate the value of the gift, the official may make a good faith estimate of the gift's fair market value. (Cory, 1 FPPC Opinions 153,154 (No. 75-094-B, Oct. 23, 1975))

The filer may also seek the opinion of a third party regarding the value of the gift. In a letter to Senator Allan Robbins by Lee Rosenthal dated August 7, 1978, it was stated that reasonable diligence is met if the filer in good faith uses a value computed by a third party that has the expertise or resources to make an objective judgement. However, if the filer knows the determination is incorrect he may not rely on the opinion. (Presumably, this analysis also applies to incorrect value quotations given by the donor.)

1/ Also see Government Code Section 81003, it provides,

> This title should be liberally construed to accomplish its purposes.

Testimonial Dinners and Group Gifts

Before addressing the question of how to report the value of a testimonial dinner, it should be kept in mind that most testimonials honoring public officials are not reportable under Chapter 7 because they are for political reasons.

If the money raised by the testimonial, or the event itself, is not for political purposes then the official has received a gift. (See letter to Assemblyman Knox by Barbara Campbell dated May 19, 1978, and the Gutierrez opinion.) Under these conditions the public official, if he or she is aware of the upcoming event, has the duty to make sure he is kept informed by the sponsor of the identity of the contributors. (See letter to Richard McManus by Ken Finney dated March 29, 1977.)

The value of the testimonial to the official for reporting purposes is the per capita cost of his or her meal plus any incidental items. The procedure of reporting may follow the Torres opinion which establishes the standard for group gifts. The source of the gift may be described as the entire group. However, if any individual in the group contributed $25 or more then he or she must be identified separately.

The Commission takes this approach towards disclosure with regard to testimonials because of the intangible quality of the gift. In the Gutierrez opinion the Commission stated that the value of such intangibles are small unless there are unique circumstances present. (For example, office warming celebrating the opening of a law firm. This event may attract potential customers.) In addition, the Commission believes the official's share should be pro rated because everyone who attends the event is also receiving benefits in the form of food and entertainment. Therefore, the official should only have to report his or her share of the benefits. (See Gutierrez)

This approach of pro rating the value of the gift is troubling. Presumably, the event would not have occured but for the official's attendance. The gift to the official is the banquet not just the meal and accompanying incidentals. The gift may be intangible but easily valued. The value of the gift should be whatever it cost to stage the event. This procedure is justified because the sole purpose of having the event is for the official's benefit. If not for the official the event would never take place.

Foreign Travel

The Commission's advice and policy regarding the reportability and valuation of gifts received by foreign governments has been clear and consistent over the years. Food, lodging and transportation as well as other incidentals provided by a foreign government are reportable. However, the filer need not approach the foreign government to determine the value of the gift. It is sufficient to make a good faith estimate of the gift's value when disclosing. (See letters to Betty Jo Smith by Ted Prim dated January 13, 1977, and Senator Ruben Ayala by Robert Stern dated January 31, 1978.)

Tickets

Disclosure of tickets and passes have generated many requests for advice, and a major opinion from the Commission. (See Hopkins, 3 FPPC Opinions 107 (No. 77-022, Dec. 8, 1977.) The reportability of free tickets and passes will depend on the nature of the event.

If the event is a political campaign event the receipt of free tickets or passes need not be reported. (See memo to file by Barbara Campbell dated March 24, 1978.) This policy of the Commission is based on their previous policy of keeping Chapter 4 and Chapter 7 activity separated.

With respect to charitable events it had been the staff's advice in 1976 that an official need not report the receipt of free passes. The staff concluded in a letter to John F. Van De Kamp by Ken Finney dated August 2, 1976, that attendance at such functions is essentially a political activity and comes within Cahpter 4's reporting criteria and not Chapter 7. The Commission has modified this advice by requiring the tickets to be reported. The value of the tickets would be based on the actual benefits received at the event and not the stated price on the ticket (See memo to file by Ken Finney dated March 22, 1977).

The staff argued during the formulation of this policy that tickets to charitable events should be reported at fair market value (i.e., the stated price on the ticket). None of the written advice in the file indicates the Commission's rationale for moving away in this area from the requirement that a gift's fair market value should be reported as required by Government Code Section 81003.

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The Commission may have felt that disclosure should be based on actual use. This is doubtful because the "actual use" approach has been rejected by the Commission as early as 1975 (see letter to Senator Dennis Carpenter dated March 22, 1977) and affirmed later in the Hopkins opinion.

Except for political and charitable events, free tickets are required to be reported at their fair market value. The procedure for determining the fair market value is set forth in the Hopkins opinion.

> The value of complimentary tickets and free passes is the fair market value. Government Code Section 81011. The value can be determined by considering the following factors:
>
> 1. Can such a pass be purchased on the open market?
>
> 2. If not:
>
> (a) what is the maximum use a person might reasonable make of such a pass in a year, taking into account the nature of the event and whether the pass is transferable; and
>
> (b) what is a reasonable percentage that a vendor might discount the price of a pass from the price of multiple individual tickets in order to induce the general public to buy a pass?
>
> Hopkins, 3 FPPC Opinions 107, 109 (No. 77-022, Dec. 8, 1977)

If it is still impossible to determine the value of the tickets after applying these tests, it is permissable for the official to make a good faith estimate of the ticket's value. In advice previous to the Hopkins opinion, it was staff advice that the official should consult the donor. If the donor could not provide adequate information, it was sufficient to place an asterisk on the reporting form in lieu of a value with an explanation of why the value cannot be determined. Otherwise, the official is required to make a good faith estimate of the ticket's value. (See letter to Kludt, City Manager of San Gabriel by Ted Prim

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dated October 15, 1976.)

In light of the reporting procedures provided in Hopkins and current policies regarding gift disclosure, I would argue that the advice given to Mr. Kludt regarding the "asterisk" non-disclosure has been overruled. If the valuation procedures cannot be follwed in Hopkins, then the official at a minimum should make a good faith estimate of the ticket's value. It has been Commission policy with respect to disclosure of gifts in all areas to allow the official to make an estimate of a gift's value when information from the donor pertaining to fair market value has been otherwise unavailable (e.g., see foreign travel letters).

State of California

Memorandum

79152

To : Commissioners Houston, Lapan, McAndrews, Quinn and Metzger

Date : Feb. 22, 1980

From : FAIR POLITICAL PRACTICES COMMISSION
Ted Prim

Subject: Reporting donations for legal expenses as contributions or gifts

Recently, the staff advised Councilman Garza of San Jose that donations to a legal defense fund set up on his behalf should be reported as contributions. In reviewing this letter, the Commission asked for a memo outlining the standards and/or considerations used in determining when such donations should be reported as contributions or gifts.

a. Legal Setting.

Commission regulation 18215(b) provides that contributions include monetary or non-monetary payments, for which full and adequate consideration is not provided, received by:

> a candidate, unless it is clear from surrounding circumstances that the payment was received or made at his behest for personal purposes unrelated to his candidacy or status as an officeholder....

Thus, to classify donations for legal fees as contributions, two threshold tests must be met. First, the official must be a "candidate" as defined in Government Code Section 82007. The key words in Section 82007 are: "candidate means an individual who...gives his consent for any other person to receive a contribution or make an expenditure with a view to bringing about his nomination or election." Utilizing these words, the staff generally finds that an individual is a "candidate" if he has an active campaign committee.

Second, the payment must be related to the candidate's candidacy or status as an officeholder as opposed to his "personal purposes." But, note that Section 18215(b) presumes that a payment to a candidate is a contribution, "unless it is clear" that it is for personal purposes which "are unrelated to his candidacy or status as an

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officeholder." Relying upon this language the staff has generally adjudged litigation which concerns one's position on the ballot, arises out of one's candidacy, or grows out of one's performance of official duties as being "related to candidacy or status as an officeholder." On the other hand, litigation which involves one's personal conduct, particularly during non-duty hours, or private business activities usually would not be viewed as relating to one's status as a candidate or officeholder. There are possible exceptions to this latter rule, however. For example, if it is crystal clear that such litigation would not have occurred "but for" a candidacy, then the litigation may be sufficiently related to the candidacy to convert donations into contributions.

Below are some examples of how these standards have been applied in the past:

1. Garza letter (contribution): Litigation involved allegations of bribery in connection with the performance of official duties.

2. Buchanan opinion (contribution): Litigation involved whether to take a candidate off the ballot.

3. Reed Hundt letter (no contribution): Litigation involved an effort by a defeated candidate to restore his personal reputation in light of accusations of personal misconduct which had been made about him during the previous political campaign. There was no evidence that he was using this suit as part of an attempt to regain office.

4. Hongisto memo (contribution): Litigation involved contempt of court by Hongisto for failure to evict International Hotel residents pursuant to court order.

5. Diedrich letter (contribution): Litigation involved indictment of Orange County supervisor for possible Political Reform Act violations.

6. John Hay letter (contribution): Litigation involved two-thirds tax initiative. The main committee sponsoring the initiative exercised direction and control over the raising of litigation funds by another organization.

The legal lines which the staff has drawn only constitute one judgment on the issue and are not talismanic.

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b. The Effect of Unstated or Implied Assumptions.

In addition to the above legal reasoning, there may be several "unstated" assumptions or considerations which may have affected the staff's and Commission's approach to the overall issue of litigation expenses. This memo provides a good opportunity to lay them on the table.

First, as a practical matter only officeholders (and perhaps a few well-known candidates) can successfully raise substantial legal defense fees from a wide audience. Thus, in a very real sense their ability to raise funds is related directly to their current, past or future status as an officeholder.

Second, if one looks at where donations to the legal defense funds of many candidates or officeholders come from, they are not exclusively from friends giving on a "personal basis" but are from corporations, associations, and political acquaintances as well. It appears then that the "motive" for legal fund donations, at least on the part of many donors, is political rather than personal. Third, when an officeholder or candidate raises money through a committee structure it naturally appears to be part of a campaign effort. If donors were giving gifts because of personal friendship, as opposed to political associations with the donee, a committee would not be essential--gifts would be made directly to the donee and not to an intermediary committee.

In short, when legal funds are (1) raised by an officeholder, (2) through a committee, and (3) from a broad group of donors, the overall effort appears political rather than personal. Thus, when these circumstances are present the staff and the Commission is naturally drawn toward the finding that such donations are political contributions rather than personal gifts. On the other side of the coin, if an officeholder or candidate pays for litigation expenses solely out of personal funds, the staff, in the absence of clear facts to the contrary, normally views such litigation as a personal rather than a political matter. For if it were political, the candidate or officeholder would be likely to solicit funds in a manner and from sources similar to those utilized in a campaign fundraising drive.

All of these assumptions or considerations are hard to put into legalese but nevertheless may have had an impact on the staff's and Commission's deliberations in the past.

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c. Practical Considerations.

Almost all of the questions we have received concerning litigation funds have come from officeholders. As noted above, this is to be expected. And, where officeholders are involved, the choice between whether donations should be reported as contributions is not a choice between reporting and non-reporting; rather, it is a choice between reporting donations as contributions or as gifts.1/ To classify the donations as a contribution means that the donations are "political" and that they must be reported on campaign statements at a $100 threshold. To provide that the donations are gifts means they are "personal" and that they must be reported on statements of economic interests at a $25 threshold. In addition, gifts of $250 or more trigger disqualification.

When the guidelines for reporting donations to officeholders were created, I think the staff felt that the guidelines were reasonably faithful to reality and were generally favorable to elected officials. Once elected officials realize that these donations have to be reported as either contributions or gifts, they have usually favored the contribution route. The negative reaction to the classification of such donations as contributions usually occurs at the stage where the officeholder hopes such donations need not be reported at all.

d. Final Note.

It is possible that we could be successfully challenged for having defined political purposes too broadly (or personal purposes too narrowly) with respect to some of the legal defense funds discussed above. Certainly, it is possible to apply the concept of political purposes to the legal defense fund issue in such a manner as to conclude that donations are contributions only if the litigation relates to matters such as impeachment defenses, maintaining positions on the ballot, etc. Litigation involving other issues, e.g., acts of conscience in the performance of one's official duties or an attempt to avoid criminal prosecution, could be viewed as personal rather than political.

1/ It may well be that if an organization completely independent of the direction and control of the officer is established to receive donations, only the lump sum from the organization to the officer may have to be reported. The individual donations to such an organization under these circumstances may go unreported.

Ultimately, the choice involves a judgment call by the Commission in which you must balance political realities on the one hand against First Amendment and privacy considerations on the other.

TP:cjb