

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance • • Administration • • Executive/Legal • • Enforcement
(916) 322-5662 322-5660 322-5901 322-6441

May 31, 1985

Zoe Lofgren, Supervisor
Board of Supervisors
County of Santa Clara
County Government Center, East Wing
70 West Hedding Street
San Jose, CA 95110

Re: Your Request for Advice
Our No. A-85-103

Dear Ms. Lofgren:

You have written requesting our advice regarding your reporting obligations in two situations involving your husband's private law practice and legal fees which he may receive this year.

FACTS AND QUESTIONS

A public official's spouse, a lawyer, is retained on a contingent fee basis to represent multiple plaintiffs or a class. The Public Official learns the identity of the defendant and so, presumably, with some effort can learn the identity of the plaintiffs. The case is either won or settled and the Public Official's community property interest in the spouse's share of the fee is \$10,000 or more.

Please answer the following:

- o Should a public official in this situation divide the total fee by the number of plaintiffs to determine whether the threshold has been met? And, if so, how does one do that when there is a certified class of an unknown number?
- o If the fee is to be divided by the number of plaintiffs, would one use the named plaintiffs in the case of a class action?

- o I am also interested in the reporting requirements when a lawyer is awarded fees under the so-called private attorney general theory. In such a situation, is the source of the fee considered to be the defendant (who is not represented by the public official or spouse of the public official), or is the reportable source the plaintiff, even though the fee was not awarded on a contingent fee basis but on the private attorney general theory?

CONCLUSION

In the first situation, for reporting purposes you should disclose the case, by caption and number, as the source of the fees on Schedule H, income to business entities, and should indicate "Class Action" and list the names of the "named plaintiffs." For disqualification purposes, you should divide your community property share by the number of named plaintiffs and attribute an equal amount to each. If that amount equals or exceeds \$250, disqualification may be required as to any of the named plaintiffs during the applicable 12-month period.

In the second situation, involving court-awarded fees, it is the plaintiff(s) in the action who would be the source of the income (fees). Disclosure would be required as per the preceding paragraph, as would disqualification. Provided, however, that where there is no contractual obligation on the part of the plaintiff to ever pay any fees, there is no "promise" of income pending the outcome of the case until the fees are awarded by the court, or until there is a substantial expectation that fees will be awarded by the court.

ANALYSIS

The Political Reform Act (the "Act")^{1/} requires public officials such as yourself to disclose sources of income (Sections 87200 and 87207) and, in certain circumstances to disqualify from making or participating in decisions which will have a financial effect upon a source of income. (Sections 87100 and 87103). However, the Act does not provide a specific definition with respect to the "source" of income when there may be more than one possible source.^{2/}

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise noted.

^{2/} The Act does indicate that sources of income to a business entity in which an official owns a 10% or greater interest will be treated as sources of income to the official.

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On several occasions in the past the Commission has resolved the question of the source of income in a particular circumstance. In the Lewis advice letter, No. A-77-087 (12/27/77), we considered the question where a doctor served a patient but received payment for his services entirely from the patient's insurer. There we said:

In this case, most decisions to enter into an economic relationship with the doctor would be made by the patient, not the insurance carrier. Since the decision to enter into the relationship is made by the patient and not the insurance company, it is not likely that the payment by the insurance company on behalf of the patient will influence the doctor's government decisions which may affect the insurance company.

Accordingly, Dr. Black should report the names of those patients otherwise reportable under the Code who, along with their insurance companies, paid Dr. Black fees in excess of \$10,000 during the reporting period.

In another 1977 advice letter to Ronald Kaldor, No. A-77-244 (5/16/77), we had occasion to also consider the duality of sources of income to a physician. In that letter we said:

While it is true, under the recited facts, that the physician's income is received from patients served by the physician and not from the hospital itself, it is also quite clear that the patients are hospital patients, that the facilities used to provide the services are hospital facilities, and that absent the physician's contractual relationship with the hospital, the physician would have other or no facilities to use, other or no patients to serve and would receive income via other sources. Thus, the physician clearly is dependent for his or her income on the operation of the hospital. Under these circumstances, it is our view that both the hospital and the patients are a source of income to the physician.

Recently, the Commission adopted a regulation specifying who is to be considered the source of income received from commissions in certain professions. 2 Cal. Adm. Code Section 18704.3 (copy enclosed). While it does not cover the situation of attorneys fees, the regulation and the above-cited letters certainly guide our analysis of your questions.

Turning specifically to the issue of fees awarded in a class action lawsuit, it is the named plaintiffs who have made the

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decision to enter into the economic relationship of attorney and client which ultimately gives rise to the fees. Therefore, we will treat the named plaintiffs as the source of this income. The same analysis applies to court-awarded attorneys fees based upon a "private attorney-general" theory. Certainly it is not the defendant who has determined to enter into the relationship. Again, we believe that it is the plaintiff, or plaintiffs, who are the source of such court-awarded fees, even though the fees are paid by another party and even though the plaintiff(s) may be under no legal obligation to pay any fees at all if the court does not award the fees.

In another, related letter, you have raised the issue of the timing of the income from contingency fees and court-awarded fees. In responding to previous questions with regard to contingency fees, where there is a contractual agreement between the client and the attorney, we have advised that once the contract is entered into income has been promised to the attorney by the client since, absent special circumstances, attorneys normally take contingency fee cases with the expectation of ultimately receiving a fee. We have not previously addressed the issue of court-awarded fees, where no contract for fees exists between the client and the attorney.

In the instant case, it is our understanding that an action has been commenced pursuant to the Act to seek injunctive relief (Section 91003(a)). Under that section:

The court may award to a plaintiff or a defendant who prevails his costs of litigation, including attorneys fees.

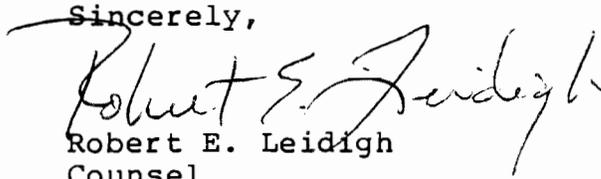
It is our further understanding that your spouse has already succeeded in obtaining a preliminary injunction in the subject litigation. You should consider whether, as a result of that fact, the prospects for ultimately obtaining court-awarded attorneys fees in the subject case are good.^{3/} If that is the case, it is our advice that the named plaintiff in that action would be considered a source of income promised to your husband (and hence to you), within the preceding 12 months. We assume, of course, that any fees will equal or exceed the necessary threshold amount (\$500).

^{3/} See enclosed slip opinion of the Court of Appeal in the case of The Thirteen Committee v. Weinreb, No. AO 19811, May 22, 1985.

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If you have any questions regarding the foregoing advice,
please do not hesitate to call me at (916) 322-5901.

Sincerely,



Robert E. Leidigh
Counsel
Legal Division

REL:nwm
Enclosure
cc: Donald Clark



BOARD OF SUPERVISORS
COUNTY OF SANTA CLARA
COUNTY GOVERNMENT CENTER, EAST WING
70 WEST HEDDING ST. / SAN JOSE, CALIFORNIA 95110 / 299-2323

ZOE LOFGREN
SUPERVISOR SECOND DISTRICT

April 25, 1985

Mr. Robert Leidigh
Legal Division
Fair Political Practices Commission
1100 K Street
Sacramento, California 95814

Dear Mr. Leidigh:

Per our recent conversation, I am interested in the reporting requirements I may have in the future under the following factual situation.

A public official's spouse, a lawyer, is retained on a contingent fee basis to represent multiple plaintiffs or a class. The Public Official learns the identity of the defendant and so, presumably, with some effort can learn the identity of the plaintiffs. The case is either won or settled and the Public Official's community property interest in the spouses share of the fee is \$10,000 or more.

Please answer the following:

- o Should a public official in this situation divide the total fee by the number of plaintiffs to determine whether the threshold has been met? And, if so, how does one do that when there is a certified class of of an unknown number?
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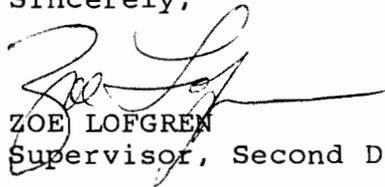
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Mr. Robert Leidigh
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As I mentioned to you on the phone, these situations may face me for next year's report. I think that your comment that this is an interesting legal area is certainly accurate and look forward to hearing your advice on these issues.

With kindest regards.

Sincerely,



ZOE LOFGREN
Supervisor, Second District

ZL/sm