

October 10, 2012

M. Eli Underwood
Law Offices
Redwine and Sherrill
1950 Market Street
Riverside, CA 92501-1720

Re: Your Request for Advice
Our File No. A-12-142

Dear Mr. Underwood:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based solely on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, nothing in this letter may be construed to evaluate any conduct that has already taken place.

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application of any other laws that may apply.

QUESTION

Do the Act's conflict-of-interest provisions prohibit you from seeking attorney fees from the State of California, for legal work performed on behalf of a client, involving a lawsuit to compel the state to open a hiking trail in Southern California?

CONCLUSION

So long as any appearance before the courts is not an appearance before your own agency, seeking attorneys' fees from the State of California before the courts will implicate the Act's conflict-of-interest provisions only if you act or purport to act on behalf of your own agency as a member, officer, employee or consultant of the agency.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You are an attorney currently representing an individual in a lawsuit against the State of California to open a hiking trail in Southern California. While this type of work is not a part your regular practice, you became involved in this issue because friends and family members regularly hike this specific trail and because you are an avid hiker.

Two assemblymen introduced a bill into the legislature to open this trail. Without receiving any compensation, you traveled to Sacramento and spoke with several Senate staff members about supporting this bill. Your client did, however, pay for your expenses including your hotel, food, and airfare. Recently, the bill passed the State Assembly and State Senate, and is currently on the Governor's desk for his approval or veto. Neither you, nor your client, have promised any campaign contributions or donations of any kind to receive support for this bill.

At this time, you have not billed your client (or anyone else) for the time spent with legislative staff. You have however, billed your client hourly for the legal work performed on the lawsuit currently pending in Superior Court. While you state that this case is not a “contingency fee” case, under your fee agreement, you will not hold your client responsible for the legal fees you have billed and will only recover fees if you are successfully awarded fees from the State through a settlement agreement or court order.

In the event that the bill becomes law, you believe your client will be considered the “successful party” under the Private Attorney General Doctrine (Code of Civil Procedure Section 1021.5). As you have explained this doctrine, the “successful party” is entitled to their attorneys’ fees if a lawsuit is a substantial factor in causing the adverse party to change their position. Should the bill become law, you will seek attorneys’ fees from the State for the legal work actually performed in the lawsuit.

ANALYSIS

The Act’s conflict-of-interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Specifically, Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. An official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the official’s economic interests. (Section 87103; Regulation 18700(a).)

The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).) Assuming for the purposes of this analysis that you are a “public official,” only the second step of the analysis is pertinent to your specific question.²

Step Two: Are you making, participating in making, or influencing a governmental decision?

The Act’s conflict-of-interest provisions apply only when a public official “make[s], participate[s] in making, or in any way attempts to use his [or her] official position to influence a governmental decision in which he [or she] knows or has reason to know he [or she] has a financial interest.” (Section 87100; Regulation 18700(b)(2).) In other words, an official is not prohibited from contacting an agency under the Act’s conflict-of-interest provisions if the official is not making, participating in making, or influencing a governmental decision. The Commission has adopted a series of regulations defining “making,” “participating in making,” and “influencing” a governmental decision. (Regulations 18702-18702.3.)

Making a Governmental Decision: A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Section 87100; Regulation 18702.1(a).)

Participating in Making a Governmental Decision: A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decision-maker regarding the governmental decision. (Section 87100; Regulation 18702.2.)

Influencing a Governmental Decision: There are two rules that address whether a public official is using or attempting to use his or her official position to influence a governmental decision. The first rule applies when the governmental decision is within or before the public official’s own agency or an agency appointed by or subject to the budgetary control of the public official’s agency. (Regulation 18702.3(a).) In these cases, if “the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency” then he or she is attempting to influence a governmental decision. This includes, but is not limited to, “appearances or contacts by the official on behalf of a business entity, client, or customer.”

² The Act’s conflict-of-interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) A “public official” is “every member, officer, employee or consultant of a state or local government agency . . .” (Section 82048.) We assume your question is premised on the fact that you are a public official performing services for a state agency and are not a member, officer, employee or consultant of the courts.

The second rule applies when the governmental decision is within or before an agency other than the public official's own agency, or an agency appointed by or subject to the budgetary control of the public official's agency. (Regulation 18702.3(b).) Under this rule, the official cannot act or purport "to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency" to influence a decision that will have a material financial effect on his or her economic interests.

Based upon the facts you have provided, we must determine whether an appearance before the courts seeking attorney fees from the State of California is an attempt to use your position to influence a governmental decision. However, assuming you are not a member, officer, employee or consultant of the courts, an appearance before the courts is not an appearance before your own agency. Thus, an appearance before the courts will implicate the Act's conflict-of-interest rules only if you act or purport to act on behalf of your own agency as a member, officer, employee or consultant of the agency. (See Regulation 18702.3(b).)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl