

THRU: J. PRITCHARD

FROM: Madden

RE: Code §§ and Regulations Referenced:

18620 (a)(4)

86108 (b)

82045 (d)

July 2, 1976

76-281

Palmer Brown Madden  
Morrison & Foerster  
One Post Street  
San Francisco, California 94104

Dear Mr. Madden:

The staff has discussed the questions and comments in your letter of June 10, 1976 and reached the following conclusions.

Attorneys do not qualify for the 10 percent time exemption in 2 Cal. Adm. Code Section 18620(a)(4). Aside from the fact, as you point out, that an attorney is not considered an "employee" of a client, Government Code Section 82045(d) does not specify that a payment in connection with direct communication with elective state officials, legislative officials or agency officials must be to an employee; rather it states "payment, including ... payment ... of an employee, for or in connection with direct communication ...." The purpose of establishing a de minimis threshold in Section 18260 (a)(4) was to minimize burdensome recordkeeping by filers, under Government Code Section 86108, that employ many people. Since attorneys, on the other hand, customarily bill clients based on the amount of time spent in rendering services, they have standard procedures to record their activity. Attorneys must, therefore, include all time spent attempting to influence legislative or administrative action in computing their fee reportable by their client.

A client of a law firm may report payments to the firm for the purpose of influencing legislative or administrative action on either the accrual or cash basis. Therefore, filers under Section 86108 may report payments to influence legislative or administrative action in either the month in which the services are performed or the month in which payment for the services is made.

If you would like to discuss these questions further, you may contact our staff.

Sincerely,

Nan Hambleton  
Special Compliance Representative

NH:bw bcc. Jeanne P.

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June 10, 1976

Ms. Nan Hambleton  
Fair Political  
Practices Commission  
P. O. Box 807  
1100 Street Building  
Sacramento, California 95814

Dear Nan:

I would like to have the staff views on two issues.

I. Do Attorneys Qualify for the 10% Time Exemption?

Must a client of a law firm report as an expense to influence legislative or administrative activity time spent by an attorney that falls within this area but, which activity is less than 10% of such attorney's time? You have previously advised me orally that, in the situation I have just described, the law firm does not have a reporting requirement, while the client does. It seems to me that, under the above reasoning, the client should be entitled to the 10% de minimis threshold.

For your consideration, I note the following. The reporting obligation stems from § 86109, which requires reports by persons who fall into the class of persons described in § 86108(a) or (b). In the instant matter, we are concerned with the "\$250 filing" requirement of § 86108(b). This threshold of § 86108(b), in turn, depends upon the definition of the phrase "payment to influence legislative or administrative action" as defined in § 82045. Section 82045 contains subsections (a) - (e) but only subsection (d) comes close to reaching this fact pattern. Subsection (d) of § 82045 refers to:

"Payment, including compensation, payment or reimbursement for the services, time or expenses of an employee, for or in connection with direct communication with any elective state official, legislative official or agency official."  
(Emphasis added.)

Now, in common parlance, an attorney in the fact pattern I have described is not an "employee" of the client.

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Assuming, for the sake of argument, that this problem is overcome and the Act can properly be interpreted to embrace an attorney within the word "employee", one must then turn to the FPPC Regulation § 18621(a)(3), which provides that one need not count the time of any "employee" if such person devotes less than 10% of its time to this activity. If the statute reaches the attorney by including him or her under the genus "employee", it seems that when this same word "employee" is used in Regulation 18621(a)(3), it seems that this Regulation would permit the use by the attorney of the 10% exemption.

## II. When Must a Client Report its Activity?

The second question is less a matter of fine analysis than one of practicality. Assume that a client of a law firm will meet the "\$250 filer" requirement and is ready, willing, and able to file. Assume further, that the client is making, inter alia, payments to an attorney for reportable activities. The statute speaks of the obligation to report "payments" to influence. Section 86108(b). Assume that the law firm, in the regular courses of its billing cycle, will perform its services in January, aggregate this time, send it to its service bureau for computer processing, review the computer printout, and then bill the client six weeks later in the middle of March.

Note that I want to make clear in this example that this is the firm's regular business practice with all of its clients. As I am sure you can appreciate, it is in the interest of any business (law firm or otherwise) to bill matters as quickly as possible and the time schedule I set out above is as quickly as possible.

In the above fact pattern, I believe that the client should report these activities when it makes its payment.

I want to call to your attention that in the area of campaign contributions, the statute specifically calls for an accrual method of reporting and a report must be filed for services either when payment is made or when the service is rendered, whichever comes first. Section 84210(h) (requiring the reporting of "expenditures") and § 82025 (defining "expenditure" to include date of payment or date service rendered, whichever is earlier). Similarly, within the Conflicts of Interest provision, that statute specifically requires that an official must consider income received or income promised to such official when deciding if there is a

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conflict. Section 87103(c).

It is striking that there is no similar requirement within the provisions pertinent to a "\$250 filer" for such accrual accounting. The statute requires reporting of "payments". It seems to me that so long as there is no artifice or attempt to delay the billing or payment cycles, that the statute requires reporting upon payment and not after the services were rendered. As a practical matter, any other remedy would be quite burdensome to many filers.

I would appreciate your views on the above.

Very truly yours,

  
Palmer Brown Madden  
for  
MORRISON & FOERSTER

PBM:jck