

State of California

Memorandum

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

Date : Feb. 22, 1980

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18215(b)

From : **FAIR POLITICAL PRACTICES COMMISSION**
Ted Prim

Subject: Reporting donations for legal expenses as
contributions or gifts

M-80-138

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

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.

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.

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.

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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