



California Fair Political Practices Commission

December 16, 1991

Stephen M. Eckis
McDougal, Love, Eckis,
Grandle & O'Connor
460 North Magnolia
P. O. Box 1466
El Cajon, CA 92022-1466

Frederick K. Lowell
Pillsbury, Madison & Sutro
P. O. Box 7880
San Francisco, CA 94120-7880

Re: Government Code Section 83116.5
Our File No. I-91-537

Dear Mr. Eckis and Mr. Lowell:

This letter is in response to the concerns you raised in the discussions we have had with you and your colleagues concerning the Commission's interpretation and application of Section 83116.5 of the Political Reform Act (the "Act").¹

For the record, Commission Chairman Ben Davidian, Commission Acting General Counsel Scott Hallabrin and I met with Mr. Eckis, who is President of the City Attorneys Department of the League of California Cities (the "League"); Betsy Strauss, First Vice President of the City Attorneys Department; and Joanne Speers, General Counsel to the League of California Cities, on November 15, 1991. On November 20, 1991 Chairman Davidian, Mr. Hallabrin and I met with Mr. Lowell, President of the California Political Attorneys Association, and Association members Charles Bell and Robert Leidigh. Both of your organizations have expressed a concern as to whether Section 83116.5 can be invoked to fine an attorney who incorrectly advises a client on the application of the Political Reform Act to any given set of facts or circumstances.

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated.

Section 83116.5 reads as follows:

Any person who violates any provision of this title, who purposely or negligently causes any other person to violate any provision of this title, or who aids and abets any other person in the violation of any provision of this title, shall be liable under the provisions of this chapter. Provided, however, that this section shall apply only to persons who have filing or reporting obligations under this title, or who are compensated for services involving the planning, organizing, or directing any activity regulated or required by this title, and that a violation of this section shall not constitute an additional violation under Chapter 11.

(Emphasis added.)

Both of your organizations take the position that the Legislature, in adding Section 83116.5 to the Act, never intended that it apply to an attorney who gives advice about application of the Act. Furthermore, both organizations invoke the last sentence of Section 83116.5 (underlined in pertinent part above) as support for the proposition that the section in fact does not apply to attorneys giving advice under the Act.

We recognize that the advice rendered to public officials on the Political Reform Act by both government and non-government attorneys contributes significantly to continuing compliance with the Act in election campaigns and at all levels of state and local government and we do not desire to disrupt this outstanding service to the public.

However, we are bound by law to interpret and enforce the Act according to its clear language and stated purposes. Having analyzed Section 83116.5 and its legislative history, we find no clear intent that the Legislature meant to totally exempt attorneys from liability under that section. Rather, we believe that Section 83116.5 was meant to impose a level of responsibility upon persons either who have knowledge of the Act, as evidenced by their duty to file or report, or who, for compensation, actively participate (by "planning, organizing, or directing") in an activity regulated by the Act.

Consequently, attorneys who do not have filing or reporting obligations under the Act are only liable under Section 83116.5 when, for compensation, they are involved in the planning, organizing or directing of an activity otherwise regulated by the Act. We do not believe that an attorney who merely renders advice

which interprets a provision of the Act is involved in the "planning, organizing, or directing" of an activity regulated or required by the Act. However, involvement by the attorney beyond mere interpretation of the Act may constitute "planning, organizing, or directing" and may result in the application of Section 83116.5.

Section 83116.5's application to attorneys who have filing or reporting obligations under the Act is more problematic. Because they are often involved in high-level government decisions, a large number of government attorneys in California, both at the state and local level, have reporting obligations under the Act.

As we understand it, the League's position is that city attorneys have no legal obligation to provide Political Reform Act advice in order to keep city officials from individually violating the Act. Rather, they render the advice as a service to the city generally, presumably to help preserve the legal integrity of city decisions.² According to Mr. Eckis, some city attorneys, such as himself, often notify city officials in writing prior to responding to Political Reform Act questions that a city attorney has no legal duty to provide advice to city officials under the Act, that the officials may not rely on the advice and that, if circumstances indicate that disqualification is warranted, the city attorney will notify the city of that fact.

Given the dilemma created for government attorneys in that they best serve their agencies by providing agency officials with Political Reform Act advice, but risk liability under Section 83116.5 in doing so, we believe a balance must be struck. On one hand, we do not desire to "chill" the giving of advice on the Act. On the other, we do not believe Section 83116.5 should be interpreted to exempt a government attorney totally from liability for his or her advice-giving activities.

Therefore, pending consideration of this issue by the Commission, the Chairman has directed staff to pursue the following policy in enforcement of Section 83116.5 against attorneys who give incorrect advice under the Political Reform Act:

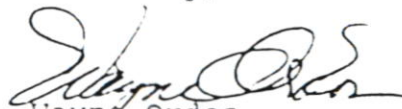
1. Section 83116.5 will not be applied against attorneys who do not have filing or reporting obligations under the Act when, in good faith, they have given incorrect advice on application of the Act. However, activities by an attorney that include more than mere advice-giving on the Act may be subject to Commission enforcement action.

² For example, under Section 91003(b), if a city official participates in a city decision when he or she has a conflict of interest under Section 87100, the city's decision may be voided by a court.

2. Section 83116.5 will be applied against attorneys who have filing or reporting obligations under the Act where the attorneys have given incorrect advice on application of the Act and their conduct in giving the advice is grossly negligent or worse. Conduct which constitutes mere negligence on behalf of these attorneys will not be subject to Commission enforcement action.

We hope that this information satisfies your concerns about Section 83116.5. However, should you have any questions, please contact Scott Hallabrin at (916) 322-5901.

Sincerely,



Wayne Ordos
Executive Director

WO:SH:aa