

RAVI MEHTA  
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

February 7, 1996

Arthur Danner III  
Santa Cruz County District Attorney  
P.O. Box 1159  
701 Ocean Street  
Santa Cruz, CA 95061

Re: Your Request for Advice  
Our File No. A-96-039

Dear Mr. Danner:

This is in response to your letter requesting advice regarding your responsibilities as District Attorney for Santa Cruz County under the provisions of the Political Reform Act (the "Act").<sup>1</sup>

Please note that nothing in this letter should be construed to evaluate any conduct which may have already taken place. In addition, this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.) Moreover, our advice is limited to the provisions of the Political Reform Act and your obligations thereunder. We cannot advise with respect to the application of your local campaign ordinance.

QUESTION

A lawsuit has been filed against you alleging that by authorizing, as district attorney, the payment of regular salary

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<sup>1</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations, Sections 18000-18954. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

to an attorney in the district attorney's office while the attorney was on mandatory home leave pending termination of her employment, this violated the county's rules and the common law prohibition on making gifts of public funds. You have asked if you raise funds to pay for your legal fees, how these payments will be characterized under the Act.

#### CONCLUSION

Funds you raise to pay for your legal fees incurred in defending the lawsuit are considered contributions.

#### FACTS

You are currently a defendant in a lawsuit filed by Ed Frey, an unsuccessful opponent in your 1990 and 1994 elections. The lawsuit alleges that you authorized, as district attorney, the payment of regular salary to an attorney in the Santa Cruz District Attorney's Office who you placed on mandatory home leave pending termination of her employment. The lawsuit alleges this decision was in violation of the county's rules and the common law prohibition on making gifts of public funds. The attorney was ultimately terminated after three months (from April 1994 through July), an act upheld by the County Civil Service Commission. You stated that the delay was intended to allow the employee to resign on her own accord and avoid any damage to her reputation and the possibility of a lawsuit against the county.

The complaint alleges that the lengthy termination process was occasioned by your desire to remove the ultimate firing with its potential for controversy to a date past the June 1994 election. Moreover, it requests that the court order you to reimburse the County for the monies paid to the terminated employee while she was on home leave, a sum of about \$45,000.

You stated that initially the county counsel represented you in this case, but you have since chosen to retain your own attorney. You are now considering methods to pay the legal fees you have incurred as a result of the lawsuit.

#### ANALYSIS

Section 82015 defines "contribution" as any payment, forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received unless it is clear from the surrounding circumstances that it is not made for political purposes. A payment is made for political purposes if it is: (1) for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or

passage of any measure; or (2) received by or made at the behest of a candidate.<sup>2</sup> (Regulation 18215(a).)

Section 82007 defines "candidate," in a pertinent part, as any individual who is listed on the ballot for elective office. An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214. Thus, as an elected official you are considered a candidate under Section 82007. Consequently, any payments you receive are presumed to be for political purposes unless a specific exception applies.

However, Regulation 18215 expressly excludes (among other payments) a payment received by or made at the behest of a candidate or officeholder which is for personal purposes is not considered a "contribution."<sup>3</sup> (Section 82015; Regulation 18215 (c)(14).) Whether a payment is received or made at the behest of a candidate for personal purposes depends on the specific facts and circumstances surrounding the payment. (Regulation 18215.)

In In re Montoya (1989) 12 FPPC Ops. 7, the Commission concluded that payments received to pay for litigation costs resulting from a federal indictment where the senator improperly used his office to obtain payments (including campaign contributions) would be contributions. The Commission stated:

Unlike payments made by a candidate for legal expenses in a personal lawsuit, for example, a divorce case, the funds Senator Montoya seeks to raise and spend in defending against the indictment have more than "some reasonable relationship to

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<sup>2</sup> Regulation 18215 provides: "A payment is made for political purposes if it is: (1) for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure; or (2) received by or made at the behest of the following or any agent thereof: (A) a candidate; (B) a controlled committee; (C) an official committee of a political party, including a state central committee, county central committee, assembly district committee or any subcommittee of such committee; or (D) an organization formed or existing primarily for political purposes, including, but not limited to, a political action committee established by any membership organization, labor union or corporation.

<sup>3</sup> Please note that payments that do not meet the definition of "contribution" may still be gifts. "Gift" is defined in Section 82028 as any payment to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.

[his] 'status as an officeholder.'" (Thirteen Committee v. Weinreb (1985) 168 Cal.App.3d 528.) The funds thus raised and spent will have a direct relationship to his status as an officeholder, since the illegal activities alleged in the indictment all concern Senator Montoya's conduct in his capacity as a member of the Legislature.

In re Montoya, supra, at p. 11.

Conversely, we have advised that where litigation concerned the alleged falsification of a city health insurance document, such an action did not relate to the official's candidacy or governmental office, but was of a personal nature. (Breitfelder Advice Letter, No. A-95-058.) This was because while the actions in question related to employment, the actions related to any employment or employee with health insurance and was not based on the fact that the individual was a public official.

According to your facts, the litigation in question concerns a decision you made in your capacity as district attorney regarding the compensation that an attorney of your office received while on mandatory home leave awaiting the employment termination process. This is distinguishable from the alleged embezzlement of money for personal use discussed in the Breitfelder Advice Letter and more similar to the facts of In re Montoya which involved an accusation that the Senator misused his office.<sup>4</sup>

Thus, we conclude that the payments you receive for this purpose would be considered contributions. As a contribution, you will be required to disclose the payments as you would any other contributions received and report the expenditures from the campaign bank account.<sup>5</sup> Moreover, none of these funds may be used for personal use.

Finally, as we stated earlier, we cannot advise on the application of the county ordinance. We can only advise with

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<sup>4</sup> Of course the determination of whether a payment is a gift or contribution is a factual question which must be determined on a case-by-case basis.

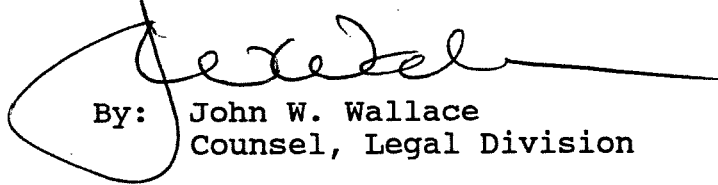
<sup>5</sup> In my telephone conversation with Don Gartner of January 26, 1996, he asked under what circumstances we require the cumulation of contributions from different sources. For your information we have enclosed Regulations 18215.1 and 18533. (See also, Ishihara Advice Letter, No. I-89-508.)

respect to your disclosure and other obligations under the Act.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.<sup>6</sup>

Sincerely,

Steven G. Churchwell  
General Counsel

A handwritten signature in black ink, appearing to read "John W. Wallace", is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

By: John W. Wallace  
Counsel, Legal Division

**ENCLOSURES**

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<sup>6</sup> Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.