

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

February 14, 1997

Clair W. Harmony
Councilmember
City of Diamond Bar
P.O. Box 4153
Diamond Bar, California 92101

**Re: Your Request for Advice
Our File No. A-97-018**

Dear Mr. Harmony:

This letter is a response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. May you raise and spend campaign funds to defend a defamation suit brought against you by a political activist in your jurisdiction?
2. If any monetary awards are awarded against you in the defamation action, may campaign funds be used to pay that award?

CONCLUSIONS

1. Campaign funds may be used to defend this action to enjoin defamation. However, timing restrictions and contribution limits apply to when these funds may be raised. Also, special rules apply to loans and volunteer services used for campaign related expenses.
2. Yes, campaign funds to defend an action to enjoin defamation could be used to pay the award.

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18000 - 18995, of the California Code of Regulations.

FACTS

You are a city councilman, up for re-election this November. A lawsuit has been filed against you by a political activist in your community for defamation. The city council has denied you a legal defense, claiming the supposed defamation was a political act and not part of the job of being a city councilman. You deny the contention that it was not part of the job of being city councilman. At the present time, you have no funds or assets to support a legal defense.

ANALYSIS

1. Cash Contributions and Gifts

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.² (Regulation 18215(a).)

Section 82007 defines “candidate,” in 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.

Regulation 18215 expressly excludes (among other payments) from the definition of “contribution” a payment received by or made at the behest of a candidate or officeholder which

² 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.”

is for personal purposes.³ (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 Fair Political Practices Commission (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 [his] 'status as 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 any employee with health insurance and was not based on the fact that the individual was a public official.

You have provided no facts regarding the defamation charges themselves. You have stated that the city council has found that the defamatory actions arose out of "political activity." If that is the case, this situation will be more analogous to the facts of *In re Montoya* than those involved in the *Breitfelder* Advice Letter, supra. As such, (and you will have to make the final factual determination),⁴ the payments would be considered contributions. As a contribution, you will be required to disclose the payments as you would any other contribution received and report the expenditures from your campaign bank account. Moreover, none of these funds may be used for personal use. They may be used as discussed below.

³ 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. Further, Section 89503 establishes gift limits. For 1997, that limit is two hundred-ninety (\$290).

⁴ The Commission does not act as the finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

2. Use of Campaign Funds

The Act imposes restrictions on the use of campaign funds that are held by candidates and candidate committees. The general rule is that an expenditure of campaign funds must be reasonably related to a political, legislative, or governmental purpose. Where an expenditure of campaign funds confers a substantial personal benefit on a candidate or elected officer, the expenditure must be directly related to a political, legislative, or governmental purpose.⁵

However, there is a specific rule regarding the use of campaign funds for attorney's fees.

Section 89514 provides:

“Expenditures of campaign funds for attorney’s fees and other costs in connection with administrative, civil, or criminal litigation are not directly related to a political, legislative or governmental purpose except where the litigation is directly related to activities of a committee that are consistent with its primary objectives or arises directly out of a committee’s activities or out of a candidate’s or elected officer’s activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action to enjoin defamation, defense of an action brought for a violation of state or local campaign, disclosure, or election laws, and an action arising from an election contest or recount.” [Emphasis added.]

According to Section 89514, you may use campaign funds to defend an action if it arises out of your activities, duties, or status as a candidate or elected officer, including an action to enjoin defamation . Please be aware that any portion of an action to recover damages is solely personal and is not related to a political, legislative, or governmental purpose and therefore, attorney’s fees may not be paid for from campaign funds. (*Lively* Advice Letter, No. A-91-241.)

Should any monetary awards be awarded against you in the defamation action, may campaign funds may be used to pay that award?

Section 89513(c) provides:

“(c) Campaign funds shall not be used to pay or reimburse fines, penalties, judgments, or settlements, except those resulting from either of the following:

⁵ “Substantial personal benefit” means an expenditure of campaign funds which results in a direct personal benefit with a value of more than \$100 to a candidate, elected officer, or any individual or individuals with authority to approve the expenditure of campaign funds held by a committee. (Section 89511(b)(3).)

(1) Parking citations incurred in the performance of an activity which was directly related to a political, legislative, or governmental purpose.

(2) Any other action for which payment of attorney's fees from contributions would be permitted pursuant to this title. [Emphasis added.]

Since Section 89514 allows campaign funds to be used to defend an action to enjoin defamation, Section 89513(c)(2) allows campaign funds to be used to pay any fine, penalty, judgment or settlement resulting from that action. However, you state that you have no existing campaign funds to pay for a legal defense. Therefore, we must address whether you may raise funds for a defense at this time.

3. The Raising of Campaign Funds

Proposition 208 passed by the voters in November became effective January 1, 1997. Among other things, Proposition 208 established contribution limits. In local races in districts with less than 100,000 people, the candidate who does not agree to spending limits may not accept contributions over one hundred dollars (\$100). Those candidates who agree to spending limits may not accept contributions over two hundred-fifty dollars (\$250). (Sections 85301 and 85402.) Voluntary spending limits for statewide offices were established by Proposition 208. However, local jurisdictions were left the option, whether to establish voluntary expenditure ceilings. (Section 85400.)

Proposition 208 also established restrictions on the timing of fundraising. Sections 85305 states:

“(a) In districts of fewer than 1,000,000 residents, no candidate or the candidate's controlled committee shall accept contributions more than six months before any primary or special primary election or, in the event there is no primary or special primary election, any regular election or special election in which the candidate is attempting to be on the ballot or is a write-in candidate

(c) No candidate or the controlled committee of such a candidate shall accept contributions more than 90 days after the date of withdrawal, defeat, or election to office. Contributions accepted immediately following such an election or withdrawal and up to 90 days after that date shall be used only to pay outstanding bills or debts owed by the candidate or controlled committee.” [Emphasis added.]

Section 85305(d) provides an exception for raising funds to pay for attorney's fees to the timing restrictions in Section 85305(a) and (c).

Section 85305(d) states:

“(d) Notwithstanding subdivision (c), funds may be collected at any time to pay for attorney’s fees for litigation or administrative action which arises directly out of a candidate’s or elected officer’s alleged violation of state or local campaign, disclosure, or election laws or for a fine or assessment imposed by any governmental agency for violations of this act or the Political Reform Act of 1974, or for a recount or contest of the validity of an election, or for any expense directly associated with an external audit or unresolved tax liability of the campaign by the candidate or the candidate’s controlled committee; provided such funds are collected pursuant to the contributions limits of this act.”
[Emphasis added.]

This exception does not apply to you because it does not appear that the charges alleged against you arose directly out of a violation of state or local campaign, disclosure, or election law.

In summary, you may raise campaign funds starting six months before your election and up to 90 days after the date of withdrawal, defeat, or election to office. Contributions accepted during the 90 day period may only be used to pay outstanding bills or debts owed. Also, any contributions collected are subject to the contribution limits.

4. Free Legal Services

The term “gift” as provided in Section 82028(a) means:

“[A]ny 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.”

However, the term “gift” does not include campaign contributions required to be reported under the provisions of the Act. (Section 82028(b)(4).)

As discussed above, the definition of “contribution” in Section 82015 includes any

payment⁶ for which full and adequate consideration is not made to the donor which is received by or made at the behest of an elected officeholder unless it is clear that the payment was made for personal purposes unrelated to his or her candidacy or status as an officeholder. Therefore, any legal services provided for the defense of an action to enjoin defamation would also be a contribution rather than a gift.

However, Section 82015 further states in pertinent part:

“Notwithstanding the foregoing definition of “contribution,” the term does not include volunteer personal services or payments made by any individual for his or her own travel expenses if such payments are made voluntarily without any understanding or agreement that they shall be, directly or indirectly, repaid to him or her.”

But be aware that the exemption for “volunteer personal services” does not strictly apply if Regulation 18423 applies. Regulation 18423 states in pertinent part:

The payment of salary, reimbursement for personal expenses, or other compensation by an employer to an employee who spends more than 10% of his compensated time in any one month rendering services for political purposes is a contribution . . . by the employer if:

- (1) The employee renders services at the request or direction of the employer; or
- (2) The employee, with consent of the employer, is relieved of any normal working responsibilities related to his employment in order to render the personal services, unless the employee engages in political activity on bona fide, although compensable, vacation time or pursuant to a uniform policy allowing employees to engage in political activity.” [Emphasis added.]

Further, Regulation 18423(b)(1) states that personal services are rendered for political purposes if the “personal services are received by or made at the behest of a candidate or committee by an employee.”

In summary, unless Regulation 18423 applies, no reportable contribution would result

⁶ Section 82044 defines “payment” to mean a “payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible.” [Emphasis added.]

from any free legal services given to you to defend an action to enjoin defamation.

5. Loans

Proposition 208 added Section 85307 which states:

“(a) A loan shall be considered a contribution from the maker and the guarantor of the loan and shall be subject to all contribution limitations.

(b) Extensions of credit for a period of more than 30 days, other than loans from financial institutions given in the normal course of business, are subject to all contribution limitations.

(c) No candidate shall personally make outstanding loans to his or her campaign or campaign committee that total at any one point in time more than twenty thousand dollars (\$20,000) in the case of any candidate, except for candidates for governor Nothing in this chapter shall prohibit a candidate from making unlimited contributions to his or her own campaign.”

According to Section 85307, all loans or extensions of credit for more than 30 days to a candidate by other persons are treated as contributions and subject to the Proposition 208 limits discussed above. However, a loan from a bank or financial institution made in the normal course of business is not considered a contribution.

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

Sincerely,

Steven G. Churchwell
General Counsel



By: Marte Castaños
Staff Counsel, Legal Division

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