



FAIR POLITICAL PRACTICES COMMISSION

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March 4, 1998

Michael Karger and Stephanie Scher
Kane, Ballmer & Berkman
515 Figueroa Street, Suite 1850
Los Angeles, California 90071

**Re: Your Request for Advice
Our File No. A-97-253**

Dear Mr. Karger and Ms. Scher:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹ Please bear in mind that nothing in this letter should be construed as evaluation of any conduct which may already have taken place. Further, this letter is based on the facts as they have been presented to us. The Commission does not act as the finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) We realize that several members of the Rose/CCA Group have requested advice from this office with respect to their possible "consultant" status. Please be advised that this letter is an evaluation only of your status and is not applicable to any other person.

QUESTION

As members of the Rose/CCA Group, are you "consultants" for purposes of the Act?

CONCLUSION

Under the facts presented by this matter, and consistent with your agency's determination, neither of you is a consultant under the Act. Accordingly, you need not complete a statement of economic interests.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

FACTS

Both of you are members of the Rose/CCA Group, a collection of five individuals and entities who have extensive experience with aspects of legal gaming in the United States and California. In December 1996, the Rose/CCA Group was awarded a contract with the Milton Marks Commission on California State Government (a.k.a. "the Little Hoover Commission" hereinafter referred to as the "LHC") to provide LHC with assistance in a study being conducted on gaming in California.²

The LHC was created by the California Legislature in 1961 and is responsible for promoting economy, efficiency and effectiveness in state government. Not long ago, the LHC decided gambling was an important issue with many implications for the State's economy and social environment. Based on that decision, the LHC decided to proceed with a multi-faceted study on gaming and gambling to provide information and recommendations to policy makers. Due to a potential conflict of interest, the LHC staff was not given the responsibility of performing the study and, instead, assistance for the preparation of the study was solicited from the public through a request for proposal process. The request for proposal issued by the LHC stated, "[t]he selected consultant will work directly under the supervision of the Commission's subcommittee, chaired by Commission Stanley Zax, and will perform all of the functions normally carried out by staff. This includes creating and coordinating advisory committee meetings, creating a public hearing and producing an in-depth report about the Commission's findings and recommendations."

On December 5, 1996, Mr. Nelson Rose of the Rose/CCA Group submitted to the LHC a document entitled "Proposal to Conduct: A Study on Regulatory Structures for Gaming Oversight." This document appears to be the response submitted by the Rose/CCA Group to the LHC's request for proposal. Contained in that document is the statement, "[w]orking under the Commission's subcommittee, the Rose/CCA Group will assume the functions normally carried out by the Commission's staff." In the document submitted by Mr. Rose, the two of you are identified as principles with the law firm of Kane, Ballmer & Berkman and as having expertise in the area of municipal law. Specifically, your law firm is represented in Mr. Rose's document to the LHC as the entity that will provide the legal and administrative support services for the gaming study project.

In your letter to this office requesting advice, you state the following:

"Our duties with the Little Hoover Commission consist solely of gathering information and assisting the Commission in conducting advisory committee and Commission meetings relating to gambling in California. We have no decision-making power whatsoever. We do not provide advice or make recommendations

² The actual contract is dated December 20, 1996.

to the Commission regarding policy, and if a report is required to be made, it will consist of a recitation of the comments made at Commission hearings or at meetings of the Gaming subcommittee's advisory board. Recommendations as to policy, if any, will be drafted and adopted by the Commission itself."

Your letter also indicates that the Rose/CCA's contract with the LHC terminated on June 30, 1997, and you are not engaged in any further work for the LHC. You have never been asked by the LHC to prepare and file statements of economic interests.

The LHC has a conflict of interest code which includes consultants. However, the code contains an exemption for consultants hired to perform a range of duties that are limited in scope; these consultants are not required to comply with disclosure requirements.

To date, the Rose/CCA Group has conducted a study but has not prepared a report and has not made recommendations to the LHC. It is not expected that a report or recommendations will be requested by the LHC.³

ANALYSIS

Section 87100 provides:

"No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

The Commission has promulgated regulations to interpret various sections of the Act. Regulation 18700(a) provides a definition of the term "public official," as used in Section 87100 to mean "a member, officer, employee, or **consultant** of a state or local government agency." (Emphasis added.) Subdivision (a)(2) of this regulation defines a consultant as,

"[A]n individual who, pursuant to a contract with a state or local government agency:
(A) Makes a governmental decision whether to:
1. Approve a rate, rule, or regulation;
2. Adopt or enforce a law;
3. Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
4. Authorize the agency to enter into, modify, or renew a contract

³ Mr. Rose has submitted a request for advice to this office seeking a determination as to whether he is a consultant under the Act with respect to the LHC work. You have asked us to review the letter dated May 11, 1997, from Mr. Rose to Ms. Stecher of this office in conjunction with our response to your letter. We have done so, but our analysis here is premised on the facts you have provided with respect to your request.

- provided it is the type of contract which requires agency approval;
5. Grant agency approval to a contract which requires agency approval and in which the agency is a party or to the specifications for such a contract;
 6. Grant agency approval to a plan, design, report, study, or similar item;
 7. Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or
(B) Serves in a staff capacity with the agency and in that capacity performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code."

If an individual performs duties that would make him or her a consultant as set forth above, the individual is a public official under Section 87100 subject to the disqualification requirements of the Act. If the public official is also one enumerated under Section 87200 or is covered by a conflict of interest code requiring the filing of a statement of economic interests, a Form 700 must be filed with the agency filing officer.

Initially, a person will not be a consultant (and, hence, a public official) unless he or she has a contract with a state or local government agency. Section 82049 defines a state agency as "every state office, department, division, bureau, board and **commission**, and the Legislature." (Emphasis added.) As a commission created by the State Legislature, the LHC is a "state agency" under Section 82049. Additionally, the Rose/CCA Group entered into a formal contract with the LHC on December 20, 1996; we assume the contract applies to and binds the individuals of the Rose/CCA Group. Therefore, the threshold test is met for qualifying as a consultant under this regulation.

Regulation 18700(a)(2) establishes two criteria for qualification as a consultant; an individual who satisfies *either* criterion is a consultant for purposes of the Act. First, an individual may be a consultant if he or she performs **any** of the actions described in subdivisions (a)(2)(A)(i) - (vii) of the regulation (quoted *infra*). (*Sanchez* Advice Letter, No. A-97-438.) Nothing in the material you have provided indicates that either of you, as members of the Rose/CCA Group, engaged in the kinds of activities listed in subdivisions (a)(2)(A)(i) - (vii). Accordingly, we proceed to the second criterion under Regulation 18700(a)(2): does the consultant serve in a staff capacity with the agency?

Both the LHC's request for proposals document and Mr. Rose's response thereto contain representations that the Rose/CCA Group will "perform all of the functions carried out by staff." (See pg. 3 of the request for proposal and pg. 8 of Mr. Rose's response.) However, it is equally represented in both documents, as well as other information supplied by you, that the Rose/CCA Group engaged in (or was expected to engage in) information gathering and advisory efforts only; there is no indication from the information provided to us on this matter that the Rose/CCA

Group had the ability to make governmental decisions for or on behalf of the LHC or that its recommendations would be accepted without substantial input and review from the LHC.⁴ Additionally, the Rose/CCA Group contracted to perform work for the LHC with respect to only one project -- the gaming study. The Rose/CCA Group had not performed work for the LHC in the past and its contract concerning the gaming study terminated on June 30, 1997. The Rose/CCA Group is not presently performing work for the LHC or obligated by contract to do so in the future. Given that the Rose/CCA Group provided advisory services only and provided those services over a relatively short period of time (e.g., less than one year), we conclude that your agency's determination that the two of you, as members of the Rose/CCA Group, do not qualify as consultants under subdivision (B) of Regulation 18700(a)(2) is correct. (See *Randolph* Advice Letter, No. A-95-945: implicit in the notion of service in a staff capacity is an ongoing relationship between a contractor and an agency.)

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

Sincerely,

Steven G. Churchwell
General Counsel



By: Lisa L. Ditora
Staff Counsel, Legal Division

SGC:LLD;jlw

⁴ Subdivision (B) of Regulation 18700(a)(2) states that a consultant will be deemed to be serving in a staff capacity if the consultant "performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code." Section 87302 of the Act provides that an individual should be included in an agency's conflict of interest code if that person makes or participates in making a governmental decision. Under Regulation 18700(b) and (c), a person makes or participates in making a governmental decision if, among other things, the person obligates his or her agency to any course of action, enters into a contractual agreement on behalf of the agency, or advises or makes recommendations to a decisionmaker without significant substantive review by the agency.