



FAIR POLITICAL PRACTICES COMMISSION

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October 12, 2007

David Zito
Treasurer, Save Old Solano
603 Seabright Lane
Solana Beach, CA 90275

Re: Your Request for Advice
Our File No. A-07-145

Dear Mr. Zito:

This letter is in response to your request for advice on behalf of Save Old Solana ("SOS"), yourself as treasurer for SOS, and Ms. Gerri Retman¹ regarding the campaign provisions of the Political Reform Act (the "Act").²

QUESTIONS

1. Is there any requirement or assumption in the Act regarding the proportioning of litigation costs paid for by SOS versus the ten individuals also making payments in support of the litigation?
2. Now that the election is over, must payments for litigation costs made by the other ten individuals be paid to SOS directly or may the payments be made to the attorney representing SOS in the litigation? Must SOS's self-imposed contribution limits be ignored?
3. As a result of their payments related to the litigation, are the ten individuals required to form a committee and make their payments through that committee?

¹ In a telephone conversation on September 5, 2007, you stated that you are authorized by Ms. Retman to ask for advice on her behalf.

² The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

1. The Act has no requirements regarding the portioning of the litigation costs between SOS and the other individuals.

2. There is no requirement that payments made by the ten individuals must be paid directly to SOS. Accordingly, the individuals may pay the attorney representing SOS directly. However, all payments for the costs of the litigation, whether paid to SOS or paid directly to the attorney representing SOS in the litigation, are contributions to SOS and must be reported by SOS regardless of SOS's self-imposed contribution limits.

3. We do not have enough information to determine whether the other ten individuals have qualified as a committee. However, even if the ten individuals form a separate committee, payments made by this separate committee to SOS or the attorney representing SOS in the litigation are contributions to SOS and must be reported by SOS.

FACTS

You are treasurer for the recipient committee, SOS. SOS was approached by ten private individuals, including Ms. Retman, regarding litigation to challenge the validity of ballot measure statements for a measure in a special election held on March 6, 2007. In response, SOS agreed to challenge the ballot measure statements under state election law seeking to modify or remove the statements from the ballot.

Ultimately, the complaint was filed in your name, as the treasurer of SOS, and in the committee's name. While SOS was the listed plaintiff, the contract for the attorney to represent SOS in the litigation was executed by SOS as well as the ten private individuals. In a telephone conversation, on October 2, 2007, you clarified that that the contractual agreement did not attempt to divide the litigation costs between the parties.

In terms of the litigation costs incurred through the date of the election, you have stated that the expenses were reported by SOS. However, the litigation has extended beyond the date of the election. In addition to the expenses already incurred, SOS may be responsible for the attorneys' fees of the opposing party.

ANALYSIS

Section 82015 defines "contribution" as the following in pertinent part:

"(a) 'Contribution' means a payment, a 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.

“(b)(1) A payment made at the behest of a committee as defined in subdivision (a) of Section 82013 is a contribution to the committee unless full and adequate consideration is received from the committee for making the payment.”³

Additionally, a “payment” is defined in Section 82044 as a “payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible.”

Under the facts you have provided, the litigation was filed in the name of SOS. While the contract with the attorney representing SOS in the litigation was signed by SOS and the ten individuals who approached SOS, you have stated that the contract does not reach an agreement as to the division of the litigation costs between the respective parties. Because SOS is the listed plaintiff in the litigation and the parties have not previously determined the amount of the litigation costs to be paid by each party, any payment made by the other ten individuals will effectively reduce SOS’s obligation to pay the legal fees associated with the litigation.

Accordingly, monetary amounts paid by the ten individuals to cover litigation costs including but not limited to amounts paid as an advance of litigation expenses, for incurred litigation expenses, or to satisfy a judgment against SOS are a rendering of value to SOS and are, therefore, “payments” to SOS under Section 82044. Moreover, payments made by the ten individuals to cover litigation costs are payments made at the behest of SOS under Regulation 18225.7(a). These payments, whether made directly to SOS or to the attorney representing SOS in litigation, are contributions to SOS if the payments are made for a political purpose. (See *In re Montoya* (1989) 12 FPPC Ops. 7; *Sutton* Advice Letter, No. A-00-226; and *Roberti* Advice Letter, No. I-91-292.)

Addressing when a payment is made for a political purpose, Regulation 18215 provides in pertinent part:

“(a) A contribution is any payment made for political purposes for which full and adequate consideration is not made to the donor. 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 measures; or

³ Regulation 18225.7(a) provides “[m]ade at the behest of” means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of.”

“(2) Received by or made at the behest of the following or any agent thereof:

[¶]

“(D) An organization formed or existing primarily for political purposes, included but not limited to, a political action committee established by any membership organization, labor union or corporation.”

The Commission has previously determined that “[a]lthough payments for the costs of litigation are not generally thought of as having any connection with political campaigns ... the litigation costs are just as key to the success of the campaign as traditional costs such as mailings and media advertisements.” (*In re Buchanan* (1979) 5 FPPC Ops. 14.)

On the other hand, the Fourth District Court of Appeals has determined that litigation costs for challenging the *constitutionality* or *legality* of a ballot measure are not for a political purpose, finding the connection between litigation challenging the constitutionality or legality of a measure and the election process as a “coincidental one.” (*Yes on Measure A v. City of Lake Forest* (1997) 60 Cal. App. 4th 620.) By analogy, we have previously determined that payments made for litigation costs challenging an elections director’s determination to place a ballot initiative on an earlier ballot were, similarly, not made for a political purpose. (*Sutton* Advice Letter, *supra*.)

We must now determine whether payments for litigation costs challenging the content of a ballot measure argument constitute payments made for a political purpose. “Whether a payment is made for political purposes is to be determined ‘from the surrounding circumstances.’” (*Sutton* Advice Letter, *supra*; also see Section 82015.) Therefore, the question of whether a payment is made for a political purpose is a question of fact “eluding a rule of universal application and must be decided on a case-by-case basis.” (*Thirteen Committee v. Ilene Weinreb* (1985) 168 Cal. App. 3d 528, 533, citing *In re Buchanan*, *supra*.)

In reviewing your facts, we note a distinction between a legal challenge of the constitutionality or legality of a ballot measure and a legal challenge of the content of a ballot measure argument. Unlike challenging the constitutionality or legality of a ballot measure as a whole, challenging the content of a ballot measure argument is intended to alter the substance of the information that will be presented to the electorate. Accordingly, we conclude that payments made for litigation costs challenging the content of a ballot measure statement are designed to influence voters for or against the measure and, therefore, made for a political purpose. (Regulation 18215.) Thus, the payments by the ten individuals for litigation costs made to either SOS or the attorney representing SOS are considered contributions to SOS.

Turning to your question regarding the reporting requirements of the ten individuals who have agreed to pay a portion of the litigation costs, these individuals will have reporting obligations only if they qualify as a committee. Section 82013 provides the following:

“‘Committee’ means any person or combination of persons who directly or indirectly does any of the following:

“(a) Receives contributions totaling one thousand dollars (\$1,000) or more in a calendar year;

“(b) Makes independent expenditures of totaling one thousand dollars (\$1,000) or more in a calendar year; or

“(c) Makes contributions totaling ten thousand dollars (\$10,000) or more in a calendar year to or at the behest of candidates or committees.”

While you have not provided sufficient information to determine whether any of the ten individuals qualify as a committee, we note that a payment for litigation costs made to either SOS or to the attorney representing SOS is a contribution to SOS. Accordingly, the contribution to SOS must be considered in determining whether any one of the ten individuals qualifies as a major donor committee under Section 82013(c). Should any of the ten individuals have additional questions regarding the thresholds for qualifying as a committee, the individual should seek additional advice providing all relevant information.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Brian G. Lau
Counsel, Legal Division