



FAIR POLITICAL PRACTICES COMMISSION

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March 16, 2009

The Honorable James E. Rogan
Superior Court of California
County of Orange
1275 North Berkeley Avenue
Fullerton, CA 92838-0500

Re: Your Request for Informal Assistance
Our File No. I-09-038

Dear Judge Rogan:

This letter responds to your request for advice regarding the disclosure provisions of the Political Reform Act (the "Act").¹ Because your question seeks general guidance, we are treating your request as one for informal assistance.² Nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions. In addition, this letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Also, please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application of other financial disclosure laws that may apply to you as a judge.

QUESTION

When selling memorabilia under a consignment agreement with an auction house, who must be disclosed on your Statement of Economic Interests (Form 700) as the source of income if the auction house will not disclose the identity of the buyer?

¹ 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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3), copy enclosed.)

CONCLUSION

When reporting the sale of memorabilia under a consignment agreement with an auction house that protects the anonymity of the buyer, you must disclose only the auction house as the source of the income so long as the identity of the buyer has not been determined and cannot be ascertained. In reporting the "business activity" of the auction house under Section 87207(a)(1), you must also disclose that the auction house represented an anonymous buyer.

FACTS

You are a Judge with the Orange County Superior Court and are required to file statements disclosing your economic interests under the Act's disclosure provisions. (Sections 87200-87210.) For over 40 years, you have been a collector of vintage political memorabilia. While you do not consider yourself a dealer, you occasionally sell items, which no longer appeal to you or fit in your collection, to other collectors. For tax purposes, you declare as income anything earned from the sale of the items after deducting the costs of the items sold. Some items are sold for less than the amount you paid for the item.

When selling parts of your collection, you usually do so under consignment agreements with various auction houses. The auction houses act as middlepersons in selling the items. As the consigner, you retain ownership of the items until sold. The auction houses do, however, pay for the auction costs including costs to catalog and photograph the items as well as listing expenses, shipping and handling, and other similar costs. If a customer of an auction house purchases one of your items, the auction house takes a flat fee from the purchase price and then sends you a check for the remainder of the purchase price. You do not receive a check from the buyer of the item. If an item is not sold, the item is returned to you. You are unaware of any auction house, which you have used, that will disclose the names of either the buyer or the seller (consigner).

ANALYSIS

Section 81001, which contains the voter's findings and declarations supporting the Act, declares among other things that public officials "should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) To this end, Section 81002(c) provides that the assets and income of public officials that may be materially affected by their official actions should be disclosed. To implement these provisions, the Act requires certain public officials to file statements of economic interest disclosing their financial interests. (Sections 87200, 87300, and 87302.) Judges and commissioners of courts of the judicial branch of government are required to file under Section 87200. For Section 87200 filers reporting an economic interest in a source of

income, Section 87207 requires the following:

“(a) When income is required to be reported under this article, the statement shall contain, except as provided in subdivision (b):

“(1) The name and address of each source of income aggregating five hundred dollars (\$500) or more in value, or fifty dollars (\$50) or more in value if the income was a gift, and a general description of the business activity, if any, of each source.”

Furthermore, “income” is defined under Section 82030 (a) as:

“[A] payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in the income of a spouse.”

Turning to your particular question, we must now determine who to identify on your Statement of Economic Interests as the source of income under the provisions of Section 87207, in light of the fact that you sell memorabilia under consignment agreements with auction houses to anonymous buyers. In our previous analyses with respect to consignment agreements, we have stated that the question of who is considered the source of income will turn on whether the individuals who are the consignees are the actual buyers of the items, or whether they are selling the items as agents of the seller. (See *Winter Advice Letter*, No. A-97-610.) However, your factual circumstances are distinguishable because the auction houses (the consignees) complete their transactions while protecting the anonymity of both the buyers and the sellers.

Considering this important fact, there is no potential for bias on your part relating to an anonymous buyer of your memorabilia because you could not knowingly affect the buyer when engaging in your duties as a judge. Under these limited circumstances, if you sell memorabilia under a consignment agreement with an auction house that does not disclose the identity of the buyer, only the auction house must be identified under Section 87207 as the source of the income, so long as you have not determined the identity of the ultimate buyer and the buyer’s identity is not ascertainable. Moreover, when reporting an auction house as a source of income, the fact that the auction house completed the transaction in representation of an anonymous buyer must also be disclosed in reporting the “business activity” of the source pursuant to Section 87207(a)(1).³

³ Note that this conclusion is limited to the fact that the buyer of the memorabilia has not been determined and cannot be ascertained. If the identity of a buyer is later determined, your Statement of Economic Interest must be amended to reflect the buyer as the source of income.

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in black ink, appearing to read "B. Lau", with a stylized flourish extending from the end.

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl

Enclosure