



FAIR POLITICAL PRACTICES COMMISSION

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August 17, 2009

Jason Kaune
Nielsen Merksamer Parrinello
Mueller & Naylor, LLP
2350 Kerner Blvd, Suite 250
San Rafael, CA 94901

Re: Your Request for Advice
Our file No. A-09-186

Dear Mr. Kaune:

This letter responds to your request for advice regarding the gift and lobbyist provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. Does legal representation provided by PG&E for a former-employee constitute a gift, where the representation is limited to providing counsel for a deposition where the former-employee is not a party?
2. Even if the payments for legal representation are not a gift, would PG&E disclose the fair market value of the legal services on its lobbyist employer report as an "activity expense" of PG&E?

CONCLUSIONS

1. Incidental legal representation of a former employee at a deposition for a case to which the employee is not a party does not constitute a gift under the Act.
2. The payments for the legal representation are not a reportable "Activity Expense" under the Act.

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.

FACTS

You represent Pacific Gas & Electric Company ("PG&E"). PG&E and other utility companies have brought an action in Los Angeles Superior Court against certain municipalities regarding electric power sales in 2000-2001. During the discovery phase of litigation, a former PG&E employee ("the witness"), who is currently a designated employee of the California Public Utilities Commission ("CPUC") will be deposed. The witness may have relevant knowledge based on her employment with PG&E.

It is customary for PG&E to provide legal representation for former employees, without regard to their current employment, when the action involves PG&E's business interest and presents no conflict under professional codes of conduct.

PG&E will send an attorney to the deposition to represent its interests. The witness would like this attorney to represent her for purposes of the deposition. The CPUC, current employer of the deponent, has determined that the deposition does not relate to the employee's official duties, though plans to send an attorney to raise objections should defendants seek privileged or irrelevant information about the witness's current employment.

While there is no legal mandate that a deponent have separate legal counsel, preserving the attorney-client privilege by having PG&E's attorney represent the witness would be in the interest of both PG&E and the employee. The value of the representation would be greater than \$420.

The witness is not a party to the lawsuit, and has no liabilities or benefits related thereto. PG&E would not provide reimbursements for her costs associated with attending the deposition; the legal representation is the extent of the arrangement.

Additionally, PG&E is a lobbyist employer and files FPPC Form 635.

ANALYSIS

Gift

The Act establishes a statutory and regulatory scheme to reduce influences on public officials² from the receipt of gifts. First, it prohibits certain public officials from accepting large gifts (currently defined as more than \$ 420) from identified sources. (Section 89503, Regulation 18940.2.) Second, it requires certain public officials to disclose their receipt of any gift of \$50 or more from identified sources, so that the public is made aware of such gifts. (Sections 87207 and 87302.) Finally, it prohibits a public official from making, participating in making, or using his or her position to influence the outcome of a decision involving the donor of a gift valued at \$420 or more. (Sections 87100, 87103(e), Regulation 18940.2.)

² Section 82048 defines "public official" as every member, officer, employee, or consultant of a state or local government agency.

The Act defines the term "gift" as:

"Any payment that confers a personal benefit on the recipient, 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." (Section 82028(a).)

Whether a payment is a "gift" under the Act depends on whether the payments confer a personal benefit on the official. As the Commission has previously explained, when a payment does not confer a benefit on a public official, the payment is not a gift. (See *Smith* Advice Letter, A-99-146.) While there were other factors in the *Smith* Advice Letter that the Commission considered (the mayor in that scenario did not want representation, did not know of the representation, and did not need representation), those factors served to support the premise that there is no gift because there is no personal benefit.

PG&E will represent its own interests by sending an attorney to the deposition. The legal services that PG&E would provide the witness would be incidental and secondary to that representation and would not confer a personal benefit on her. She is not a named party to the lawsuit. She has no liabilities attached, nor will she benefit from the outcome. As such, the payments for services are not a gift under the Act.

Lobbyist Activities

The Act requires that Lobbyist Employers, such as PG&E, report certain payments and expenditures. Among these are Activity Expenses as reported on FPPC Form 465. An Activity Expense, as defined by the Act is:

". . . any expense incurred or payment made by a lobbyist, lobbying firm, lobbyist employer or a person described in subdivision (b) of Section 86115, or arranged by a lobbyist or lobbying firm, which benefits in whole or in part any elective state official, legislative official, agency official, state candidate, or a member of the immediate family of one of these individuals. Activity expenses include gifts, honoraria, consulting fees, salaries, and any other form of compensation but do not include campaign contributions."

(Section 86111(a).)

As discussed above, the payments for legal services incurred by PG&E to represent the witness in a deposition are not gifts under the Act. The payments are not compensation as PG&E is not providing any payment or other compensation to the witness (nor do they fit under any other category of "Activity Expenses"). For this reason, the payments are not Activity Expenses and not reportable on the Form 465. Furthermore, neither the witness nor her agency will receive a benefit from the legal representation at the deposition. If anything, PG&E would represent the witness to protect its own interests foremost and the witness as a by-product of that representation.

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 that reads "Heather M. Rowan". The signature is written in a cursive style with a long, sweeping tail on the letter 'n'.

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl