



## FAIR POLITICAL PRACTICES COMMISSION

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October 21, 2009

Brad Thomas  
P.O. Box 2509  
Truckee, CA 96160

Re: Your Request for Advice  
**Our File No. A-09-216**

Dear Mr. Thomas:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

Please note 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.) In addition, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, 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, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090. We urge you to consult with your agency's attorney regarding these issues.

### QUESTION

May you participate in Tahoe Forest Hospital District's (the "District Hospital") decision to invest in a surgery center where you provide anesthesiologist services to patients?

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<sup>1</sup> 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.

## CONCLUSION

Because the surgery center, a source of income to you, is directly involved in investment decisions before the Hospital District, the effect of the governmental decision is presumed material. Therefore, you may *not* make, participate in making, or influence any decision involving the surgery center if the decision will have any financial effect on the center.

## FACTS

You are the president of the board of directors at the District Hospital in Truckee, California. The District Hospital's board consists of five elected members. You are an MD anesthesiologist and work in the operating room of the District Hospital about 80 percent of the time and spend about 20 percent of your time in an independent surgery center across the street from the District Hospital.

The surgery center is owned by five orthopedists who are also active members of the medical staff at the hospital. The orthopedists have invited the District Hospital to invest in the surgery center. During our telephone call of September 16, 2009, you stated that if the District Hospital decides to invest in the surgery center, it would become a shareholder or an investor of a "significant amount"—50 percent or more—of the center.

The District Hospital board has held meetings with the orthopedists and has retained a consulting firm to establish a fair market value for the surgery center prior to making an offer. You have refrained from participating in any decisions and discussions while awaiting a response for your request for advice.

You are a member of the five-person anesthesia department at the District Hospital. You work as an independent contractor to provide anesthesia services for the District Hospital, the surgery center, and occasionally, for a satellite operating room operated by the district in Incline Village, Nevada.

You do not currently have a contract with the surgery center,<sup>2</sup> but have an informal agreement or understanding to provide anesthesia services to its patients. The surgery center has a non-exclusive agreement<sup>3</sup> with five anesthesiologists (including yourself) to provide anesthesia services four days a week. Each month, a schedule is drawn up to make one anesthesiologist available to the surgery center each day from Monday through Thursday.

You are not a director, officer, partner, trustee, investor or employee of the surgery center, nor do you hold a management position there. You have a non-exclusive agreement

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<sup>2</sup> During our telephone conversation of September 16, 2009, you stated that you had a contract with the surgery center dated April 2003, and that the contract covered a period of three years. It expired in April of 2006.

<sup>3</sup> During our telephone conversation of September 16, 2009 you stated that the surgery center retains the right to bring in other anesthesia providers.

(along with four other anesthesiologists) to provide anesthesia services to the surgery center. However, you do not receive a salary, stipend, benefits or any other compensation from the surgery center. You bill patients and their insurance providers directly for any services you perform at the surgery center.

You state that you expect to continue providing anesthesia services to the surgery center in the foreseeable future, regardless of its ownership status. You have the same arrangement with the District Hospital with the exception that you receive an "on-call" stipend from the hospital when you provide after hours and weekend anesthesia coverage.

You believe that your inside knowledge of the operations of the surgery center and your personal relationships with the orthopedists there are of value to the hospital district in understanding and negotiating with the current owners of the surgery center.

You wish to know whether you may participate in decisions involving the hospital district's possibly investing in the surgery center.

### **ANALYSIS**

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision, which we apply to your question. (Regulation 18700(b)(1)-(8).)

#### **Step One: Are you a "public official?"**

The Act's conflict of interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency (Section 82048.) As a member of the Board of Directors at the Tahoe Forest Hospital District in Truckee, you are a public official within the meaning of the Act.

#### **Step Two: Are you making, participating in making, or influencing a governmental decision?**

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.)

A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.)

A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

As a member of the board of directors at Tahoe Forest Hospital District, you will be making, participating in making, or influencing a governmental decision when acting in your role as board member.

### **Step Three: What are your “economic interests?”**

A public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests, including:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); Regulation 18703.2);
- An economic interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- An economic interest in his or her personal finances, including those of his or her immediate family—this is the “personal financial effects” rule (Section 87103; Regulation 18703.5).

### **Investment Interest in a Business Entity:**

We assume you have an investment interest of \$2,000 or more in your medical practice. On that basis, your medical practice is an economic interest. (Section 87103.)

### **Sources of Income:**

#### *Your Medical Practice*

We assume that you have received income of \$500 or more from your medical practice. Therefore, it is a source of income to you.

#### *Patients and Their Insurance Companies*

Your compensation is based on payments from patients and/or their insurance companies for anesthesia services you provide at the District Hospital, the surgery center and a "satellite" medical facility in Incline Village, Nevada.

Based on these facts, you have an economic interest in the patients of the above medical facilities and their insurance companies if you received income from any of them of at least \$500 within the past 12 months.

#### *The Surgery Center*

The Commission has under some circumstances treated multiple persons as sources of income of a single payment. (*Dorsey* Advice Letter, No. A-87-176; *Vagin* Advice Letter, No. I-90-207; and *Epstein* Advice Letter, I-06-166, where the commission found multiple sources of income for sources of real estate commission income from a single transaction.) If, in the aggregate, the payments from the surgery center are for \$500 or more in the past 12 months, this source is a potentially disqualifying financial interest for the purposes of Section 87103.

The Commission has also specified rules with regard to multi-party economic relationships that did not involve commission income such as when a physician contracts with a hospital to provide services to hospital patients.

In the *Kaldor* Advice Letter, No. 77-05-244, the Commission found that both the patients and the hospital were sources of income to a physician who was under contract with the hospital to provide services to its patients.

"... [I]t is clear that the patients are hospital patients, that the facilities used to provide the services are hospital facilities, and that absent the physician's contractual relationship with the hospital, the physician would have other or no facilities to use, other or no patients to serve and would receive income via other sources. Thus, the physician is dependent for his or her income on the operation of the hospital."

Your situation with regard to the surgery center is similar in many respects. While you receive income directly from the patients themselves and/or their insurance companies, it is also clear that these patients are also patients of the surgery center, and that you use the surgery

center's facilities in providing care to these patients, and that your agreement with the surgery center provides you with regular patient referrals.<sup>4</sup>

In addition, we note that "the term 'source of income' was not intended to be limited to a 'direct payor' of money." (*Peninsula Health Care District v. FPPC*, Superior Court of California, County of Sacramento, No. 02CS01765, Superior Court Ruling on Petition for Writ of Mandate.) Looking to the purposes that the Act was intended to serve, the Superior Court stated that "construing the term 'source of income' to apply only to a 'direct payor' would permit officials to defeat the disclosure and disqualification provisions of the Act by the simple expedient of routing otherwise disclosable or disqualifying income to themselves through intermediaries and third parties."

Based on the facts you have presented, it appears that your agreement with the surgery center has significant impact on your medical practice income. Therefore, we conclude that the surgery center is also a source of income to you.

#### *The District Hospital*

You also state that you receive a stipend from the District Hospital for after hours and weekend anesthesia coverage. Thus, the District Hospital is also a source of income to you if you received \$500 in "income" from the hospital. However, the income you receive from the District Hospital falls under an exception to the definition of income under the Act (Section 82030(b)(2)), which provides that when the employer who provides a salary to an official is a government agency, there is typically no economic interest because of the "government salary exception." The Act's definition of "income" expressly excludes "salary and reimbursement for expenses or per diem received from a . . . local . . . government agency . . ." (*Ibid.*) Because the hospital district is a local government agency<sup>5</sup> under Section 82041, the income you receive from the hospital is not considered "income" under Section 82030(b)(2) and therefore could not form the basis for a conflict-of-interest. Therefore, under the "governmental salary" exception, you do not have an economic interest in the hospital district as a source of income.

#### **Personal Finances:**

Every public official has an economic interest in his or her personal finances and those of his or her immediate family. (Section 87103; Regulation 18703.5.) A governmental decision will have an affect on this economic interest if the decision will result in your or your immediate family's personal expenses, income, assets or liabilities, other than the financial affect on your

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<sup>4</sup> Note that we are not stating that every income generating referral would be considered a source of income to an official. However in your situation, there is an agreement that provides regular referrals and generates steady income.

<sup>5</sup> Section 82041 defines a "local government agency" to include "a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing . . ." Under this definition, the hospital district is a local government agency. (See also *Velasquez* Advice Letter, No. A-08-206.)

real property interest or business, increasing or decreasing. (*Ibid.*)

You have not provided any other facts indicating your participation in government decisions would affect your personal finances in any way. Because you do not include information suggesting this economic interest is implicated, we do not discuss it further.

**Step Four: Are your economic interests directly or indirectly involved in the decision?**

**Investment In Your Medical Practice and Sources of Income**

A person, including business entities and sources of income, is directly involved in a decision before an official's agency when that person, either directly or indirectly by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.” (Regulation 18704.1(a).)

If a public official's economic interest is not directly involved in a government decision, it is indirectly involved. (Regulation 18704(a).)

*Indirectly Involved*

Because neither your medical practice nor the patients of the surgery center or their insurance companies appear to be initiating proceedings, nor do they appear to be named parties in, or subjects of the proceedings, they are not directly involved in decisions regarding the District Hospital investing in the surgery center.

*Directly Involved*

Because the surgery center is a named party, or the subject of, the proceeding before the Hospital District, it is deemed directly involved.

**Step Five: What is the applicable materiality standard?**

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).)

*Indirectly Involved Sources of Income: Business Entities – Your Medical Practice & Insurance Companies*

Whether the financial effect of a governmental decision on an indirectly involved business entity is material or not depends upon what type of business entity is involved. (See Regulation 18705.1(c)(1) - (4), copy enclosed.) There are different tests depending upon the size of the business entity and whether the business entity in question is listed in the Fortune 500, on the New York Stock Exchange, NASDAQ, or American Stock Exchange. (*Id.*) Generally, if a business entity does not fit any of the preceding lists, it is sometimes referred to as a “small business entity” and Regulation 18705.1(c)(4) applies.

For instance, assuming that your medical practice is relatively small and not publicly traded, Regulation 18705.1(c)(4) applies. It provides that a financial effect is considered material if:

“(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.”

Because you have not provided us with facts regarding the size of your medical practice, or the insurance companies from which you receive income, you must analyze –using the proper standards described above – whether the financial effect of the described governmental decision would have a material effect on the identified source of income. Please refer to the copy of Regulation 18705.1 that we have enclosed to assist you in this analysis.

*Indirectly Involved Sources of Income: Individuals – Your Patients*

Regulation 18705.3 provides the materiality standards for economic interests in persons, other than business entities, who are sources of income to the public official and are *indirectly* involved in a governmental decision. For an indirectly involved source of income, who is an individual, the effect of a decision is material if any of the following apply:

“(A) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

“(B) The decision will affect the individual’s real property interest in a manner that is considered material under [Regulation] 18705.2(b).”

If the reasonably foreseeable financial effect on any of your economic interests meets any of the above thresholds, the financial effect of a decision is deemed material.

#### *Directly Involved Sources of Income – The Surgery Center*

Where a source of income is *directly involved* in a decision before an official’s agency, any reasonably foreseeable financial effect, even one penny’s worth, is deemed material. (Regulation 18705.3(a).) This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the source of income.

#### **Step Six: Is it reasonably foreseeable that the financial effect of the governmental decisions on your economic interests will meet the applicable materiality standard?**

An effect meets the “reasonably foreseeable” threshold if the effect is “substantially likely.” (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

We do not have sufficient information to determine whether the effect of the governmental decision on your medical practice, the insurance companies, or your patients will meet the applicable materiality standards described above.

However, because the surgery center, which a source of income to you, is directly involved in investment decisions before the Hospital District, the effect of the governmental decision is presumed material. Therefore, you may *not* make, participate in making, or influence any decision involving the surgery center unless you can rebut this presumption.


#### **Steps Seven and Eight: Public Generally and Legally Required Participation Exceptions.**

Even if a material financial effect on a public official’s economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official’s economic interest is indistinguishable from its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707(a)), or if the official is legally required to participate (Section 87103; Regulation 18708). You have not presented any facts indicating that either of these exceptions is applicable to your situation.

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

Sincerely,

Scott Hallabrin  
General Counsel

A handwritten signature in cursive script that reads "Emelyn Rodriguez". The signature is written in black ink and is positioned above the typed name.

By: Emelyn Rodriguez  
Counsel, Legal Division

ER:jgl

Enclosure