

**CITY OF SAN DIEGO  
ETHICS COMMISSION**

**Office of the Executive Director**

**MEMORANDUM**

**DATE:** July 1, 2008

**TO:** Chair and Members of the San Diego Ethics Commission

**FROM:** Stacey Fulhorst, Executive Director

**SUBJECT:** Election Campaign Control Ordinance [ECCO]  
Docketed for Discussion at Commission Meeting on July 10, 2008

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Beginning in late 2007, the Commission began discussing proposed amendments to the City's campaign laws. These discussions focused primarily on the City's contribution limits and related issues. The Commission ultimately agreed to propose a series of amendments, which were presented to the City Council Rules Committee on June 11, 2008. Since that time, however, several additional issues have arisen concerning various provisions in ECCO that the Commission might want to consider. A summary of these issues is set forth below.

*Additional Filing Requirement*

In accordance with the filing schedule outlined in state law, local candidates must file several "pre-election statements" in the months leading up to a City election. Specifically, for this year's June 3rd election, candidates had to file a statement by March 24, covering the period ending March 17, and another statement by May 22, covering the period ending 17 days before the election. Their next campaign statements are not due until July 31, and will cover the period from the last statement through June 30. In other words, information regarding contributions received and expenditures made during the last 16 days before the election is not disclosed to the public until approximately two months after the election. State law includes a similar time table for filings required in advance of a November election.

During the course of the Commission's previous discussions concerning contribution limits, the Commission heard several suggestions concerning twenty-four hour disclosure of all campaign activities. Twenty-four hour filings could be extremely burdensome for candidates and their treasurers. In the heat of a campaign, it can be difficult for candidates and treasurers to gather information regarding the contributions that have been accepted by agents of the committee on a given day. To require them to do this every day would be especially onerous. Moreover, because ECCO requires candidates to obtain contributor information before depositing a

contribution, and because a contribution must be disclosed as received even if it has not yet been deposited, a twenty-four hour filing requirement would likely necessitate frequent amendments of their campaign statements.

In light of the difficulties that would accompany twenty-four hour reporting, the Commission may want to consider recommending one more pre-election filing in order to provide the public with additional information before election day. Put another way, requiring one additional campaign statement could strike the appropriate balance between a desire for extra transparency and the interest in minimizing the burdens placed on campaign committees.

Specifically, the Commission could consider recommending amendments to ECCO that would require City candidates to file a third pre-election campaign statement on the Friday before a Tuesday election, covering the period through the Thursday before the election. It is relevant to note that the City of Los Angeles currently imposes a similar additional filing requirement on its City candidates, and the Los Angeles Ethics Commission staff reports that there do not appear to be any associated difficulties in terms of compliance.

Attached for your review is a strike-out version of the relevant provision in ECCO that includes the proposed additional filing at section 27.2930(e).

### *Legal Defense Funds*

During the 2007 state legislative season, the City of San Diego sponsored Assembly Bill 1441. This bill was ultimately approved and signed by the Governor in October of 2007. It amended state law to provide that local candidates may establish and maintain separate committees and bank accounts for legal defense fund purposes. Prior to the passage of this law, local candidates were required to maintain legal defense funds within an existing campaign committee, which effectively required them to co-mingle legal defense and campaign funds.

After the law was approved, the FPPC proposed a corresponding regulation delineating the various rules associated with local legal defense funds. Because the initial proposed regulation conflicted with the current legal defense fund rules in ECCO in several respects, the Commission staff worked with the FPPC staff on amendments to the proposed regulation. These efforts were successful and on June 12, 2008, the FPPC approved the regulation for final adoption at its August 14, 2008, meeting. Because there is no opposition to this regulation, it appears likely that final approval will take place in August. Accordingly, the staff has drafted corresponding changes to ECCO for your review that are reflected in the attached strike-out.

The FPPC Regulation requires our local legal defense fund laws to be at least as strict as the state's laws in three specific areas: the establishment of a legal defense committee, recordkeeping requirements, and reporting obligations. The proposed changes to ECCO meet these standards, and in fact closely follow the state's guidelines. In all other areas, the FPPC Regulation expressly permits the City to tailor its legal defense fund provisions in the manner it

deems most appropriate, regardless of whether such laws are more or less restrictive than state law. Thus, the proposed amendments to the City's legal defense fund laws largely keep intact most of the framework that currently exists in ECCO. Many of the proposed changes simply reflect the fact that legal defense funds no longer must be subsumed within an existing campaign committee. In other words, the proposed draft recognizes the ability of a candidate or elected official to create a new and distinct legal defense committee that can collect and spend contributions through its own separate and distinct legal defense checking account.

In addition to proposing amendments that reflect the ability to create separate legal defense committees, staff has proposed the following policy modifications for the Commission's consideration:

- The City's current legal defense fund provisions allow a contributor to give a candidate or officeholder up to \$250 per year per audit or legal proceeding, over and above what the contributor may give for campaign purposes. The current limit is not tied to the campaign contribution limits that will be raised to \$1,000 if the Commission's recommendations are approved by the City Council. For purposes of making recommendations regarding legal defense funds, the Commission may propose to either: (1) keep the \$250 limit; (2) increase the limit so that it is equal to the campaign contribution limit (i.e., raise it to \$1,000 per year per matter and increase it every two years in accordance with changes to the Consumer Price Index); or (3) establish a different dollar amount, with or without indexing.
- ECCO currently states that the creation of a legal defense fund is the only means by which a candidate or elected official may solicit and accept contributions to pay for the costs of responding to an audit or enforcement action. In other words, under current law, candidates and elected officials are not permitted to solicit or accept new campaign contributions for legal defense purposes without first establishing a "legal defense fund" to accept those contributions. (They are, however, permitted to use existing campaign funds for legal defense purposes in accordance with the guidelines in state law.) The Commission staff has heard from attorneys for various candidates and elected officials that this law, who argue that this provision prevents candidates and officials from collecting new contributions for their legal defense without first publicizing the fact that they are the subject of an Ethics Commission investigation (because they are required to provide a description of the action when they establish the legal defense fund). Thus, if a need for legal defense funds occurs in the midst of an election, it forces the candidate to decide between giving opponents potentially damaging information, or foregoing the ability to collect new legal defense fund contributions to pay legal expenses. These attorneys point out that there is arguably no harm to anyone but the candidates if they are allowed to solicit and use new campaign contributions to pay for legal bills, since they would essentially be using campaign funds that could be used for purposes of campaign advocacy on attorney's fees. For the above reasons, staff recommends deleting the exclusivity provision.

- Shortly after the legal defense fund provisions were adopted by the City Council, the 2004 Mayoral election resulted in a series of lawsuits concerning the validity of votes cast by voters who did not fill in the “bubble” for a write-in candidate. As a result, several candidates established a legal defense fund for each action and, in accordance with ECCO, maintained separate ledgers for contributions and expenditures associated with each action. During this process, the Commission staff advised these candidates and their treasurers that, in the event one lawsuit concluded and there were leftover funds remaining in the corresponding legal defense fund, they could transfer the funds to another legal defense fund ledger provided that they adhered to the \$250 per contributor limit. This proved to be a fairly difficult accounting task for the treasurers involved, without any corresponding benefit to the public. Accordingly, the staff has recommended a simpler provision that expressly permits candidates and elected officials to use leftover legal defense funds to pay for legal costs associated with any other pending audit or legal proceeding without attributing the leftover funds to a particular contributor.
- Both the current and proposed legal defense fund laws state that within six months of the conclusion of all audits and proceedings for which legal defense funds were collected, all leftover funds must be disposed of and the City Clerk notified that the audits or proceedings have concluded. In the proposed amendment, the language refers to the termination of the legal defense committee, and is modeled on the new FPPC Regulation. That Regulation includes a provision permitting a local jurisdiction or the FPPC Executive Director to extend the termination date for good cause. In the event that a candidate or elected official has incurred substantial legal fees and needs additional time to retire the debt, an extension may be appropriate. (Note that any unpaid legal fees could be considered an unlawful gift to a candidate or elected official.) Accordingly, the staff has proposed a corresponding provision in ECCO that would permit the Ethics Commission Executive Director to extend the termination date for good cause.

Attached for your review is a strike-out version of the relevant provisions in ECCO associated with legal defense funds.

#### *Telephone Communications*

The changes already proposed by the Ethics Commission and approved by the Rules Committee include several amendments designed to bring the telephone communications provisions into conformance with recently-adopted state law. State law differs from ECCO in that state law regulates 500 or more advocacy calls “that are similar in nature,” whereas ECCO currently regulates 500 or more advocacy calls made in connection with an election, regardless of whether the content is similar. State law clearly intends to capture only those campaign efforts involving calls of 500 or more that use substantially the same script for the call (either live or recorded). The Commission staff is concerned that incorporating this new rule into ECCO will result in the Commission staff (in an advisory capacity) and the Commissioners (in an enforcement capacity)

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being forced to evaluate the nuances of different scripts to determine if a reasonable person would believe that they are “similar in nature.” Staff believes that it would be more appropriate to adopt a simpler bright-line law that will apply without the need for a case-by-case analysis. Accordingly, the staff recommends amending the definition of “mass telephone communications” to use ECCO’s current standard (500 or more calls made in connection with an election).

The Commission previously recommended that the “mass telephone communications” definition be broadened to include more than just advocacy calls, in order to require disclosure on subtle “push poll” calls. By returning to the current standard discussed in the previous paragraph (500 calls in an election, not 500 similar in nature), the requirement would potentially apply to all of the calls that a committee makes throughout the course of a campaign (e.g., calls to vendors, campaign staff, and the media), even though the requirement is intended only to apply to members of the public receiving cold calls from the committee. Thus, staff recommends further amending the “mass telephone communications” definition to expressly state that it applies to advocacy calls and polling calls.

Attached for your review is a strike-out version of the relevant provision in ECCO that includes the proposed updated definition.

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Stacey Fulhorst  
Executive Director