



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 14, 1980

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1980-115

Ms. Judith Boggs
Chairperson
Pierce O'Donnell Democrat for Congress
106 N. Allen Avenue, Suite 202
Pasadena, California 91104

Dear Ms. Boggs:

This responds to your letter of September 16, 1980 requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act") to the payment of compensation to Mr. O'Donnell by his law firm.

You state that Mr. O'Donnell is an attorney, a partner in a Los Angeles law firm, and a 1980 congressional candidate. The law firm desires to continue to distribute to Mr. O'Donnell his regular monthly and quarterly advances against his share of the firm's profits. However, the firm wishes to avoid making a contribution to the O'Donnell campaign, as the firm believes such contribution should be made on an individual basis.

Mr. O'Donnell's percentage ownership interest in the firm's profits (or losses) was set at a partnership meeting held in January of 1980. A similar meeting is held each January. This percentage of participation is based on a wide variety of factors, including seniority of service in the firm, stature in the Bar, number of client billable hours, results achieved for clients, ability to attract clients, effectiveness in problem solving, value as an advisor to other attorneys in the firm, and other considerations.

At the end of 1979, Mr. O'Donnell's firm set informal targets for its attorneys regarding the number of billable hours of client work projected for the next calendar year. This target is not a requirement, and attorneys in the firm have sometimes fallen below targets set for past years.

No monetary penalty has ever been imposed on any partner for failure to reach a targeted figure. In Mr. O'Donnell's case, the target for 1980 is 1600 hours. This represents the highest level set by the firm and was set without consideration of his potential candidacy. As of the end of July, Mr. O'Donnell had already billed 1,019 hours of client work - a figure in excess of the targeted rate of 933 hours for the first months of the year.

Mr. O'Donnell plans to continue to participate in his law practice during the period leading up to the November 1980 election. He will be maintaining responsibility for, and will make court appearances in connection with, the major litigation matter on his calendar. He will also be available to consult with his partners on other matters. However, Mr. O'Donnell will be necessarily spending the majority of his time in the coming weeks on his election campaign, and the number of client hours he works will be substantially reduced during that period. You add that it is possible that the total number of hours Mr. O'Donnell works for the calendar year may fall somewhat below the targeted figure.

Mr. O'Donnell's firm has a long history of encouraging and affording the opportunity for its attorneys to engage in various forms of pro bono publico, bar association, and public service activities, including active involvement in elective politics. Attorneys from the firm (including Mr. O'Donnell) have regularly devoted substantial amounts of time to such activities in the past, at the expense of the hours they could devote to client work, without any adverse effect on their receipt of their usual distribution from the firm.

In January of each year, the partnership makes a final review and determination of each partner's income for the just completed calendar year. Ordinarily, if there is additional income for distribution (other than monthly and quarterly distributions), the partners receive any such distributions on the basis of their ownership percentage interest in the firm. In the past, adjustments have been made in the final year-end distribution for a variety of reasons. Mr. O'Donnell's final year-end distribution, if any, will be governed by the partnership's established adjustment review practice outlined above. At that time, the number of hours billed by Mr. O'Donnell in 1980 will be considered, along with a number of other factors, including an overall assessment of Mr. O'Donnell's past and anticipated future contributions to the firm, results obtained for clients, and the fact that Mr. O'Donnell's client billable hours for 1979 were among the highest of any of his partners. You further add that at the present time, it cannot be predicted whether a reduced number of billable hours in 1980, if it occurs, will have any material effect on Mr. O'Donnell's final year-end distribution of partnership profits.

Under these circumstances you ask whether Mr. O'Donnell may continue to receive his regular monthly and quarterly distributions as an advance against his share of firm profits, despite the time away from his practice that his campaign will require, without the firm or the other partners being deemed to have made a contribution to his campaign.

Commission regulations define as personal funds "salary and other earned income from bona fide employment." 11 CFR 110.10(b)(2). An employer who pays compensation to an employee while that employee is a candidate for office is not considered to have made a

contribution to that individual's campaign so long as there is a bona fide employment relationship that exists between the candidate and his/her employer for a purpose genuinely independent of his/her candidacy, and provided that any compensation paid to the candidate is exclusively in consideration of employment services performed by him. See Advisory Opinion 1977-68, copy enclosed.

As recognized in your request, the Commission in Advisory Opinion 1979-58, which concerned political activity on behalf of a presidential committee by a senior partner in a law firm during normal business hours, considered a number of factors to conclude that the income paid by the firm to the partner did not constitute an in-kind contribution to the Committee. There the request represented that the partner's compensation was not tied to the number of hours worked but, rather, was based on a proprietary interest in the firm which reflected a number of other factors. That request also represented that the partner had complete discretion in the use of his/her time and that no reduction of income from the firm would be made even if, for whatever reason, the partner spent less time on firm matters than may have been spent during a previous period when no services were provided to the committee. That opinion, however, specifically distinguished the situation presented here and in Advisory Opinion 1978-6, where the compensation from the law firm was dependent, at least in part, on the number of hours the partner recorded as client work for the firm.

In Advisory Opinion 1978-6 (copy enclosed) the Commission concluded that where compensation is at least partially based on the number of hours "recorded on client work in the office", an in-kind contribution from the law firm to the partner/candidate would result if the compensation from the firm were not reduced to reflect the lower number of hours worked for the firm because of that candidacy.

Because compensation paid to Mr. O'Donnell is dependent in part on the "number of client billable hours," the Commission concludes that Advisory Opinion 1978-6 is applicable to the situation presented here, and that Advisory Opinion 1979-58 is distinguishable. Accordingly, the Commission concludes that to the extent compensation paid to Mr. O'Donnell from the firm is not reduced to reflect the lower number of hours he will work for the firm because of his candidacy, there is a contribution from the firm to Mr. O'Donnell's campaign unless there is an indication that Mr. O'Donnell's value to the firm throughout the year has increased to offset the reduction in Mr. O'Donnell's client billable hours. This contribution is subject to the limitations and the reporting requirements of the Act. See 2 U.S.C. 434, 441a; 11 CFR 104, 110, especially 110.1(e): contributions by a partnership. The partnership contribution includes, of course, any increase in the firm's overhead or operating costs which are attributable to Mr. O'Donnell's campaign. See 11 CFR 100.7(a)(1)(iii).

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Max L. Friedersdorf
Chairman for the
Federal Election Commission

Enclosures

P.S. Commissioner Reiche voted to approve this opinion and will be filing a statement of his concurring views at a later date.