

December 20, 2007

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Re: VanNatta v. Oregon Governments Ethics Commission and State of Oregon
Case 07C20464

Dear Mr. Fletcher and Mr. DiLorenzo:

The above matter came before the court on November 26th, 2007 for oral argument on plaintiff's Motion for a Preliminary Injunction and defendant's Motion for Summary Judgment. At the conclusion of oral argument, I took the matter under advisement. I have now been able to review the legal memorandums filed, the relevant case law and my notes from the court proceedings.

Plaintiff's are seeking a preliminary injunction enjoining defendants from enforcing Section 18 (1), (2), (3) and (4), and Section 24 (1) and (2) of 2007 Senate Bill 10. (Hereafter referred to as SB 10). The defendants seek to enforce the provisions of SB 10 which places restrictions upon gifts to elected officials. At issue is whether the gifts by lobbyists to political officials are protected forms of expression under Article I, Section 8 of the Oregon Constitution, and, if so, do they survive further scrutiny?

During the 2007 session, the Oregon Legislature passed Senate Bill 10, which (among other things): a) prohibits a person with a legislative or administrative interest from giving gifts with an aggregate value of more than \$50.00 per year to a public official or candidate for public office; b) prohibits a person with a legislative or administrative interest from giving gifts of entertainment to a public official or candidate for public office; and c) prohibits a person from providing honorarium to a public official or candidate for public office in connection with the official duties of the public office.

Plaintiffs¹ bring this action to obtain a preliminary injunction declaring that Senate Bill

10 (SB 10) violates Article I, section 8 (and other provisions) of the Oregon Constitution. Plaintiffs claim that lobbying, which includes the act of obtaining good will of a public official, is free speech that the Legislative Assembly may not restrict. The restrictions in SB 10 are therefore, unconstitutional.

In response, Defendant filed its Motion for Summary Judgment, arguing that the offering of gifts to public officials and candidates – as opposed to the offering and giving of campaign contributions – has never been a form of protected expression under Oregon law. Defendant points out the term “gift” has always been excluded from campaign contributions. Defendant claims that Article I, section 8, should not be expanded so as to protect public confidence in government.

ORCP 79A provides the standards for issuance of preliminary injunctions by Oregon courts. Because of the lack of Oregon case law construing ORCP 79A, Oregon courts have looked to the analogous federal standards. Under generally recognized principles, a moving party must show a likelihood of success on the merits, that irreparable harm will be suffered in the absence of preliminary relief, and that the “balancing of hardships” favor such relief. *See e.g. Mentor Graphics Corp. v. Quickturn Design Sys.*, 150 F.3d 1374, 1377 (9th Cir. 1998).

The initial issue before the court is whether gifts to political officials are protected forms of expression under Article I, section 8 of the Oregon Constitution. Article I, section 8 provides:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

The court begins with the proposition that statutes are presumed to be constitutional. *See Molodyh v. Truck Insurance Exchange*, 304 Or. 290, 299, 744 P.2d 992 (1987); *State ex rel. Juvenile Dept. v. Orozco*, 129 Or. App. 148, 878 P.2d 432 (1994) (en banc); *rev. denied*, 326 Or. 58 (1997).

Oregon courts have held that the act of lobbying is protected expression under Article I, section 8. *Fidanque v. State ex rel. Oregon Gov't Standards and Practice Commission*, 328 Or. 1, 969 P.2d 376 (1998). The *Fidanque* court stated, “[l]obbying is political speech, and being a lobbyist is the act of being a communicator to the legislature on political subjects.” *Id.* at 7. Moreover, Oregon has held that political contributions are protected political expression and such contributions may not be limited. *VanNatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997) (*VanNatta I*). The *VanNatta* court found that a “contribution, in and of itself, is the contributor’s expression of support for the candidate or cause – an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put.” *Id.* at 522. The court ultimately found that “many -- probably most” contributions are a form of expression under Article I, section 8. The Plaintiff would ask this court to extend the *VanNatta* holding to cover not only political contributions, but also the giving of gifts without restriction.

While the *VanNatta I* court found that political contributions were protected expression and that such contributions could not be limited, the court provided limiting language concerning contributions, gifts, and bribery. The court states that probably most contributions were a form of expression under Article I, section 8. However, in footnote 10 following this statement, the court stated:

We qualify our statement with the limiting word, “many,” because there doubtless are ways of supplying things of value to political campaigns or candidates that would have no expressive content or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent. To give but a few examples: A bribe may be an expression of support (with an anticipated *quid pro quo*), but it is not a protected expression; a gift of money to a candidate from a corporation or union treasury may be expression, but if it is made in violation of neutral laws regulating the fiscal operation of corporations or unions, it is not protected; a donation of something of value to a friend who later, and unexpectedly, uses that thing of value to support the friend’s political campaign is not expression.

The court finds that this footnote offers insight in the analysis as to whether the giving of gifts are a protected expression under Article I, section 8. From a reading of this footnote, “things of value”, such as gifts, that “have no expressive content” cannot be “expressions” for the purposes of Article I, section 8. Further, if there is an anticipated *quid pro quo*, then the gift is a bribe and is not a protected expression.

Plaintiff asserts that gifts all fall within the same category as campaign contributions. However, the term “gift” has been excluded from the definition of campaign contributions.² Moreover, campaign contributions may only be used to further their expressive content and may not be used for personal gain. *See* ORS 260.407(2). Gifts may not have expressive content and may certainly be used for personal gain. Thus, there is a line between what constitutes campaign contributions and what constitutes a gift.

That is not to say that *all* gifts do not have expressive content. In fact, SB 10 appears to regulate gifts that would have an expressive content – SB 10 only regulates gifts *from a person with a legislative or administrative intent*. SB 10 does not regulate gifts from those persons who do not have a legislative or administrative intent. Thus, from a reading of footnote 10, there are several categories of gifts: a group of gifts that have no expressive content, and therefore, are not an expression for the purposes of Article I, section 8; a group of gifts that are given with an anticipated *quid pro quo*, and therefore, a bribe, which is not protected expression; and also a

group of gifts that do have expressive content, and therefore, are protected expressions. Seemingly, SB 10 regulates gifts that do have an expressive content in that SB 10 only regulates gifts from a person with a certain political or administrative agenda. Accordingly, the court finds that the gifts at issue in this particular case are indeed expressions for the purposes of Article 10, section 8.

However, expression may still be subject to regulation if the expression is incompatible with the public official's official duties, known as the incompatibility exception. *See In re Schenk*, 318 Or. 402, 870 P.2d 185 (1994); *In re Fadeley*, 301 Or. 548, 802 P.2d 31 (1990); *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983).

In *Fadeley*, a candidate for election to the Oregon Supreme Court was charged with violation of judicial ethics because he personally solicited campaign contributions. The court stated:

The stake of the public in a judiciary that is both honest in fact and honest in appearance is profound. A democratic society that, like ours, leaves many of its final decision, both constitutional and otherwise, to its judiciary is totally dependant on the scrupulous integrity of that judiciary. A judge's direct request for campaign contributions offers a *quid pro quo*, or at least, can be perceived by the public to do so. Insulating the judge from such direct solicitation eliminates the appearance (at least) of impropriety and to that extent, preserves the judiciary's reputation of integrity.

One of the purposes of SB 10 is to maintain the appearance of propriety among public officials. The public has an expectation that decisions made by public officials and candidates be made honestly, objectively, and without favor. Allowing unlimited gifts to public officials and candidates can create the opportunity for and appearance of impropriety and corruption. SB 10 applies to those who have a legislative or administrative intent. Thus, unlike *VanNatta I* and limitations on campaign contributions, SB 10 applies only where the risk of the appearance of impropriety is at its greatest.

SB 10 does not prohibit all gifts given by those with a legislative or administrative intent. Gifts with an aggregate value of \$50.00 per year are permissible. Plaintiff contends that there should be no limitations on gift giving. Plaintiff states that, as with the contribution limits in *VanNatta I*, the notion that gifts to elected officials will lead to corruption, bribery or other impropriety is unsubstantiated by law. This argument is supported by *VanNatta I* – “an underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who are elected will put aside personal advantage and vote honestly and in the public interest. The political history of the nation has vindicated that assumption time and again.” *VanNatta I*, 324 Or. at 541. However, the issue is not whether gifts to public officials or candidates actually leads to corruption, bribery

or other impropriety. The issue is whether such gift giving *creates the appearance* of bribery, corruption and impropriety. The court finds that unlimited gift giving would create such an appearance and therefore, the incompatibility exception applies.

The court finds that the gifts at issue in this case are forms of protected expression. However, the court further finds that such expression may be regulated because the giving of unlimited gifts to public officials and candidates is incompatible with their official duties. Therefore, SB 10 properly regulates such gift giving to public officials and I find it to be lawfully enacted by the legislature. Accordingly, plaintiff's Motion for Preliminary Injunction is denied. Defendant's Motion for Summary judgment is allowed. Mr. Fletcher may prepare an Order and Judgment consistent with this opinion.

Very Truly Yours,

Joseph C. Guimond
Circuit Court Judge

JCG:js