

## Behested Payments: Now, It's L.A.'s Turn

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On February 17, 2019, the Los Angeles Times ran a story with the headline: “An L.A. councilman promoted a charity. Should he have disclosed the donors?”

The story was about (former) Councilman Mitchel Englander who, for many years, had taken an active part in fundraising for the North Valley Family YMCA. Mr. Englander had, according to this reporting, probably run afoul of a California law requiring “... elected officials to report any donation request they make that results in a charitable contribution of \$5,000 or more, which are known as ‘behested’ payments.”

Anyone who read our post from about a year ago titled [Behested Payments: Critics Take Aim](#) would certainly know all there is to know about “behested payments.” Apparently, the Nonprofit Blogger missed that one. (The Nonprofit Blogger is a collective name for a group of distinguished professors of nonprofit law who rotate writing posts of interest to the charitable community, each one of which we devotedly read and admire.)

This time, it was Professor Daryll K. Jones who quickly dashed off: [What’s Wrong with “Behested” Payments to Charity \(Part I\)?](#): He begins: “There was an interesting [article in yesterday’s L.A. Times](#) regarding something the left coasters call ‘behested payments.’ On the right coast, the practice is probably more often referred to as ‘pay to play’.”

Professor Jones is correct on several points: (1) It’s mostly a “left coast” thing; wildly popular among California pols; (2) “politicians’ habit and history of soliciting charitable donations to their favored causes” is not as prevalent elsewhere in the U.S. and is outlawed in some jurisdictions; and (3) there is enough wrong with this practice or at least ripe for abuse that eventually government bodies react to public outrage and rein it in.

That's what happened in the past year or so in San Francisco; hence, our blog post last February. This time, it's the Los Angeles City Council that took action just a few days after the L.A. Times' Englander story ran. That's what we're covering now.

### *Behested Payments: What are They?*

By way of recap, the word "behest" does, indeed, sound like something draconian out of the Middle Ages.

The first known use of the word is from 12th century England, meaning: 1. An authoritative order, command; 2. An urgent prompting." It evokes an image of "...Sir Guy of Gisborne galloping through the Nottinghamshire countryside announcing the Sheriff's latest behest that lord and serf alike hand over their valuables forthwith: a behested payment, so to speak."

Nowadays in 21st century California, it's a practice "where an officeholder either requests or suggests that people in the community make donations to one or two of the official's favorite charities. In some cases, the official sets up a new 501(c)(3) which receives theses donations and then makes grants for charitable activities and services benefiting the community." The consequences today of not complying with the behest are nothing like being thrown in a dungeon, but you may not get that contract with City Hall your business needs desperately.

A few decades ago, behested payments produced only a trickle of activity. But in recent years, it's become a popular "gesture" involving big bucks from major business interests in the community. An eye-opening article from 2017 in the L.A. Times – 'A tricky area of philanthropy: LA mayor solicits millions for his favored causes' – describes how this practice has ballooned at all levels of government, across party lines, and without regard to an officeholder's previously announced disdain for big money in politics.

Back in 1997, a "number of legislators were seeking advice" on how – or if – to report certain types of contributions. What if an "official asks a person or business to make a donation to the official's favorite charity or to contribute to an agency project; for example, a skate park?" That year, the legislature responded by amending California Government Code section 82015, the state's political campaign disclosure law.

The practice is legal in California, but there are some restrictions. "According to guidance from the California Fair Political Practices Commission (FPPC), a "payment is considered 'behested' and subject to reporting if:

- it is made at the request, suggestion, or solicitation of, or made in cooperation, consultation, coordination or concert with the public official;
- it is made for a legislative, governmental or charitable purpose; and
- it does not qualify as a gift (made for personal purposes), or a contribution (made for election-related activity) to the elected official."

See also, a helpful publication by The Institute for Local Government: Understanding the "Behested Payments" Issue (2012); "Ask and Ye Shall Report" is the key takeaway."

“These payments are not considered campaign contributions or gifts,” the state’s political watchdog explains, “but are payments made at the ‘behest’ of elected officials to be used for legislative, governmental or charitable purposes.”

But where – exactly – is a line that shouldn’t be crossed, regardless of complying with the rather minimal disclosure requirement? As Professor Jones so aptly points out: “The ... sinister implication is that the donors are doing two bad things. First, they are avoiding campaign donation limitations by steering campaign contributions to a candidate’s favorite charity, through which the candidate receives some sort of implicit benefit associated with the donation. Secondly, the donor is buying access to city hall....”

More particularly, as to the idea that the officeholder receives a benefit, “the candidate who can steer donations to a charity by sending out personal “behests’ [sic], is treated as the charity’s favorite son or daughter, though the charity never implicitly tells its stakeholders to “vote for so and so because he supports us.”

### *L.A. Takes Action*

There were a number of factors precipitating the current action by Los Angeles Council members to put some curbs on behested payments.

First, the LA Times article on February 17, 2019, highlighted what made the Mitchell Englander situation somewhat more egregious than the run-of-the-mill behested payment scenario. “For years, local businesspeople had contributed sums [to the named charity] way over the \$5,000 public disclosure threshold, but Englander had not complied with that rule at all.”

Also, the former councilman’s involvement in the charity’s fundraising events went far beyond his usual level of involvement; that is, “identifying him as chair of the group’s Booster Club Dinner with photos of him surrounded by children.” This time, “he went an extra step, signing a letter to potential donors — one with an image of City Hall — encouraging them to contribute to the event.” (And, of course, not complying with the disclosure duty at all.)

Second, for months the FBI has been investigating “possible corruption at City Hall” and amid this probe, “the practice of fundraising for charities favored by politicians has come under new scrutiny.”

By February 20, 2019, – three days after the *LA Times* article – the City Council Ethics Committee had convened and recommended action. This was adopted by the full Council. The provision includes “banning non-individuals and developers from contributing to local elections, along with a ban on some ‘behested’ payments made to a charity or government program at the request of an elected government official.”

Apparently, the idea to ban certain behested payments had been raised before but hadn’t passed the Council. It was also fueled by a newspaper article last year on donations by another Councilman, Jose Huisar, (named but not yet charged in the FBI probe) to his Catholic high school alma mater, for which his wife worked as a paid fundraiser.

The “behested payments” rule – for which there are certain exceptions – includes a ban of payments from “restricted” sources, which includes a lobbyist, a lobbying firm, a bidder, a contractor, a person who attempted to influence the elected official in the previous 12 months, and developers.”

### *Conclusion*

This recent move by the Los Angeles City Council will undoubtedly not be the last word on “behested payments” in the State of California. There will likely be moves in other counties and municipalities, as well as on a state-wide level, to reconsider this practice.

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