



California Fair Political Practices Commission

January 9, 1992

Barbara Milman
California State Assembly
State Capitol
Sacramento, CA 95814

Re: Your Request For Confirmation of
Telephone Advice
Our File No. I-91-527

Dear Ms. Milman:

You are seeking advice as an employee of the Assembly Rules Committee regarding the "ethics" provisions of the Political Reform Act (the "Act").¹ The Commission is considering regulations dealing with the issues raised by these provisions. Since the regulations have not yet been adopted, we are declining to provide formal advice on the issues. Pursuant to Regulation 18329(b)(8)(E), the Commission may decline to provide formal advice where the request presents issues requiring a policy interpretation best made by adoption of a regulation pursuant to Government Code Section 83112. We have, however, provided this informal response to your request.²

You have requested confirmation of telephone advice I gave you on November 15, 1991, pertaining to the application of the "honorarium" provisions of the Act to you as an employee of the California State Assembly and as a professional artist. You have provided additional facts in your letter of November 19, 1991, and in a subsequent telephone conversation. You have also attached your resume.

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, *et seq.* All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

This advice is limited to provisions of the Act and does not include other possible issues, such as the doctrine of incompatible activities.

QUESTION

As Chief Counsel for the Assembly Rules Committee, what restrictions does the Act impose on your ability to earn income as a professional artist in your private capacity?

CONCLUSION

Pending further decision from the Commission, you are permitted under the Act to earn income as a professional artist, provided: (1) the earned income is for personal services which are customarily provided in connection with a bona fide, business, trade, or profession; (2) the predominant activity of the bona fide business, trade or profession is not making speeches; and (3) you are not engaged in an article-writing business.

FACTS

You are employed as Chief Counsel for the Assembly Rules Committee. You have also been a professional artist for the past ten years. Your artistic activities include the review of art shows for various art newspapers and magazines. Recently you have started writing reviews for Artweek, a weekly West Coast art newspaper. Artweek generally pays its reviewers a small amount for each review. In addition to writing reviews, you are often asked to make slide presentations of your artwork, and the work of other artists, or to participate in panels or forums on professional development for artists. A small fee is sometimes paid for these activities. In the cases described above, you would expect to receive the same fee that any other artist performing the same services would receive.

The resume you have attached to your letter shows that you attended the Skowhegan School of Painting and Sculpture and have extensive expertise as a professional artist. You have participated in six solo exhibitions during the period of 1983 to 1991. You have also participated in numerous group exhibitions since 1981 and are a recipient of several awards, including the "Best of Show" in 1990 given by the Orange County Center for Contemporary Art.

ANALYSIS

A designated employee is prohibited from receiving an honorarium from any source if it would be required to be reported

on his or her statement of economic interest. (Section 89503.)
Section 89503(a) provides in pertinent part:

[N]o designated employee of a state agency, shall accept an honorarium from any source, if the . . . employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interest.

As Chief Counsel to the Assembly Rules Committee you are a designated employee of the California State Assembly requiring full disclosure of all income. (Section 82019.) As such, all income you receive is to be reported on your statement of economic interests. (Section 87302(b).)

The question you present is whether the money you may receive for work done as a professional artist would constitute an "honorarium." Section 89502 defines the term "honorarium." The definition is applicable to designated employees. (Section 89503(b).) Section 89502 states in relevant part:

(b) "Honorarium" means, except as provided in subdivision (c), any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.

(c) "Honorarium" does not include earned income for personal services which are customarily provided in connection with the practice of a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting, unless the sole or predominant activity of the business, trade, or profession is making speeches...

Section 89502(b) and (c),
emphasis added.

Earned income means income from wages, salaries, professional fees, and other amounts received or promised to be received as compensation for personal services rendered.³ (Section 82030.5.) Income earned for providing personal services which are "customarily provided in connection with a bona fide business,

³ The Commission will be considering adoption of Regulation 18932 which will further define "earned income" for purposes of the "honorarium" provisions.

trade or profession" is specifically exempted from the scope of the honoraria prohibitions. However, the exception provided in Section 89502(c) does not apply when the sole or predominant activity of the business, trade or profession is making "speeches."⁴

We must then consider whether contemplated payments to you for your "reviews" of art work and for other presentations to be given by you as a professional artist fall within the exception of Section 89502(c).

Speeches

In your letter you state that you sometimes make slide presentations of your artwork, or the work of other artists, often in connection with an art show, or participate in panels or forums on professional development for artists, all of which are customary for professional artists. Based on the facts you have presented, a slide presentation, or participation in a panel or forums would constitute a "speech."⁵ (Miller Advice Letter, No. A-90-770.) A speech may fall within the exception of Section 89502(c), however, provided it is made in connection with the practice of a bona fide business, trade or profession and the "predominant activity" of such business, trade or profession is not making speeches.

Predominant Activity

The Commission has not yet defined what constitutes "predominant activity." However, the Commission will be considering proposed Regulation 18932.3 for adoption in the near future which defines what constitutes a "predominant activity" in the conduct of a business, trade or profession. The regulation distinguishes between a business, trade or profession that has been in existence for one year or more, and one that has been in existence for less than one year. The regulation proposes that for a business, trade or profession that has been in existence for one year or more, speechmaking is a predominant activity if, during the 12-month period prior to the speech, more than 50-percent of the hours spent in the business, trade or profession

⁴ The Commission will also be considering adoption of Regulations 18931.1 and 18932.3 which define what constitutes a "speech given" and "predominant activity," respectively, for purposes of the "honorarium" provisions.

⁵ Proposed Regulation 18931.1 defines "speech given" to include participation in a panel, seminar, or debate (and as an option, "talk show program"). The regulation does not include presentations of a "substantive nature" as an option, and it excludes comedic, dramatic, musical or other similar artistic performance from the definition.

are devoted to the delivery of speeches or more than 50-percent of the gross income during the period is derived from speechmaking.

You state in your letter that newspaper reviews are a "common activity" for professional artists and that artists are "often" asked to make slide presentations or participate in various panels or forums. Pending further Commission interpretation of the meaning of a "predominant activity," you should apply the aforementioned criteria during the specified time periods to ensure you are not engaged in a business, trade or profession which has speechmaking as its predominant activity.

In making this determination, you should also be cognizant of the following staff advice, pending further Commission consideration of this section. We have previously advised that income earned by an individual covered by the new honoraria provisions from the practice of making speeches, such as a speakers' panel, is deemed to be an honorarium. (Watson Advice Letter, No. I-90-742.) In addition, we have advised that activities as a professional speaker clearly fall within the general definitions of activities covered by the honoraria prohibitions. (Miller, supra.) Thus, if you are a member of a speakers' bureau, or if you are earning income as a professional speaker, as opposed to a professional artist, a payment received in connection with those activities would constitute a prohibited honorarium.

Article Writing

In your letter, you state that as part of your professional artistic activities, you also review art shows for various art newspapers and magazines, and that this is a common activity for professional artists. Recently, you have started writing reviews for Artweek, a weekly West Coast art newspaper which generally pays its reviewers a small amount for each review. According to your facts, an "article published" as used in Section 89502 would include "reviews" for an art newspaper. Thus, a payment received for the works you describe would be an "honorarium" pursuant to the statutory definition in the Act.

We have also advised, pending further Commission determination, that employees covered by the new honoraria provisions may accept payments for articles if the articles are in connection with the practice of a bona fide business, trade or profession other than an article-writing business.⁶ (Esgro Advice

⁶ The Commission will also be considering adoption of Regulation 18931.2 which defines "article published" for purposes of the "honorarium" provisions.

Letter, I-91-339.) Your request for advice presents a situation where you may receive compensation for writing articles for a weekly art newspaper. The exception would apply to you as a professional artist, provided the articles are published in connection with a bona fide business, trade or profession other than an article-writing business.

Bona Fide Business

Your contemplated activities may be analyzed as activities in connection with the practice of a bona fide "business." Although what constitutes a "bona fide business, trade or profession" is not specifically defined in the statute, we have provided advice concerning this definition.⁷

Currently, staff is advising that a business would be treated as "bona fide" if the owner of the business maintained books and records of accounting for the business and tax records filed in connection with the business for the two calendar years preceding the payment in question. (Greene Advice Letter, I-91-282.) In our conversation on December 9, 1991, you stated that you are established as a business and have filed a Schedule C with the Internal Revenue Service for at least five years. Thus, your business would meet the criteria established to determine if a business is "bona fide."

In addition, a designated employee of the Legislature is prohibited from making, participating in making, or using his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment. (Section 87407.) Consequently, while you remain an employee of the Legislature, should you receive inquiries or make decisions which could raise a potential conflict-of-interest situation through an offer of income or other financial benefit, you may want to request specific advice from this office regarding your responsibilities under the Act at that time.

Also, please note that the "honorarium" provisions do not apply if you do not use the honorarium, and within 30 days either return the honorarium to the donor or donate the honorarium to the State's General Fund without taking a deduction for tax purposes. (Sections 89502(e) and 89503.)

⁷ The Commission will also be considering adoption of Regulation 18932.1 which codifies staff advice concerning the definition of "bona fide business, trade or profession."

If you have any further questions regarding this matter please contact me at (916) 322-5901.⁸

Sincerely,

Scott Hallabrin
Acting General Counsel



By: Luisa Menchaca
Counsel, Legal Division

SH:LM:aa

⁸ Copies of Commission regulations and opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.