



## FAIR POLITICAL PRACTICES COMMISSION

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November 24, 1999

Gerald F. Uelman  
Professor of Law  
Santa Clara University  
500 El Camino Real  
Santa Clara, California 95053-0421

**Re: Your Request for Advice  
Our File No. A-99-281**

Dear Mr. Uelman:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter does not evaluate any conduct that has already occurred. The Commission does not give advice on past conduct. (Regulation 18329(b)(8)(A).)

### QUESTIONS

1. Should your position as a volunteer member of the California Habeas Resource Center's board of directors be designated in the center's conflict of interest code?
2. As a designated employee of a state agency, do the honoraria provisions of the Act prohibit you from accepting payments for presenting lectures and writing articles if these activities are in connection with your profession as a law professor?

### CONCLUSIONS

1. We cannot advise you as to whether the CHRC correctly included your position in its conflict of interest code. The Act does, however, have procedures in place that allow you to seek review of your agency's conflict of interest code.

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<sup>1</sup> California Government Code sections 81000-91015. Commission regulations appear at title 2, sections 18109-18996, of the California Code of Regulations.

2. No. The honoraria prohibition does not apply to speeches and articles provided in connection with the practice of teaching law.

## FACTS

The California Habeas Resource Center ("CHRC") is an agency in the judicial branch of the State government. (Gov. Code § 68660.) You were appointed to the CHRC's board of directors in January 1998. You do not receive any compensation as a board member, except for reimbursement of travel expenses incidental to your duties. (Gov. Code § 68664(c).) Your position as a board member is designated in the CHRC's conflict of interest code.<sup>2</sup> The conflict of interest code requires board members to disclose all investments, sources of income, interests in real property, and business positions.

In addition to your membership on the board, you are also a full-time law professor at Santa Clara University. Santa Clara University is a private institution operated by the Jesuit order, and accredited by the American Bar Association and the Western Association of Schools and Colleges. You have been a law professor for 30 years. Throughout your teaching career, you have received royalties from the publication of books, and payments for presenting lectures and writing articles. You would estimate that approximately 10 percent of your annual income in the last 10 years is derived from giving lectures and writing articles. Your speeches and articles are on subject matters that are within your professional expertise. The law school encourages all law professors to engage in these types of activities because they bring favorable publicity to the law school. You have never spent more than 20 percent of your teaching time on these activities.

In addition to your teaching position, you are also a practicing attorney. You have been an attorney for 32 years. You are presently in an "of counsel" position with the Law Offices of Ephraim Margolin in San Francisco. You devote an average of 50 hours per month to the practice of law, primarily drafting and arguing pre-trial motions and appeals in criminal cases.

## ANALYSIS

### **The CHRC's Conflict of Interest Code**

The Act requires every state agency to adopt a conflict of interest code applicable to its designated employees. (Section 87300.) A conflict of interest code must be approved by a code reviewing body. The review and preparation of a conflict of interest code must be carried out under procedures that guarantee members and employees of the agency adequate notice and fair opportunity to present their views. (Sections 87311, 87311.5(a).)

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<sup>2</sup> Effective March 10, 1999, the CHRC adopted a conflict of interest code that incorporated Regulation 18730 by reference.

Once a code reviewing body approves a conflict of interest code, a designated employee may petition his or her agency for reconsideration of its code. If the petition is denied, the employee may appeal to the code reviewing body. The code reviewing body may either dismiss the appeal or issue an appropriate order to the agency. (Section 87307.) If the code reviewing body dismisses the appeal, the employee may seek judicial review. (Section 87308.)

The Commission is the code reviewing body for most state agencies. But since the CHRC is an agency within the judicial branch of government, its code reviewing body is the Judicial Council of California. (Section 82011(h).) When the Commission is not the code reviewing body for an agency's code, it is only empowered to offer general advice and technical assistance to the agency preparing the conflict of interest code. (Section 87312.) This advice, however, is not binding on the agency or its code reviewing body.

Accordingly, we cannot advise you as to whether the CHRC correctly included your position in its conflict of interest code. The Act does, however, have procedures in place that allow you to seek review of your agency's conflict of interest code, as described above.

### **The Honoraria Ban**

The Act prohibits a designated employee of a state agency from accepting 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 interests. (Section 89502(c).) You are a designated employee of CHRC, a state agency. (Section 82049.) In your position, you are required to report all sources of income and gifts on your statement of economic interests. Therefore, the honoraria prohibition applies to you.

The term "honorarium" includes any payment made in consideration of a speech given or an article published.<sup>3</sup> (Section 89501(a).) It does not include earned income for personal services that are customarily provided in connection with the practice of a bona fide business, trade, or profession, such as teaching, unless the predominant activity of the business, trade or profession is making speeches. (Sections 82030.5, 89501(b)(1).)

An official is presumed to be engaged in the bona fide profession of teaching if he or she is employed to teach at an accredited university. (Regulation 18932.2(a).) You are a full-time law professor at Santa Clara University, which is accredited by the American Bar Association. Therefore, you are presumed to be engaged in the bona fide profession of teaching.

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<sup>3</sup> Regulation 18931.1 defines "speech given." Regulation 18931.2 defines "article published."

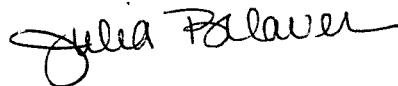
Whether speeches and other similar activities are customarily provided in connection with the practice of a bona fide profession must be determined on a case-by-case basis. You indicate that Santa Clara University encourages its law professors to present lectures and write articles in addition to teaching because these activities bring favorable publicity to the school. You also indicate that, before becoming a designated employee, you regularly engaged in these activities. Based on these facts, we agree that presenting lectures and writing articles on subject matters that are within your professional expertise are personal services that are customarily provided in connection with the practice of teaching law.

Nevertheless, the "earned income" exception to the honoraria ban does not apply if the predominant activity of the profession is making speeches. (Section 89501(b)(1).) Speechmaking is presumed to be the predominant activity of an official's profession if: (1) the official has engaged in the profession for one year or more; and (2) during the 12-month period before the speech and including the date of the speech, more than 50 percent of the hours spent on the profession is devoted to, or more than 50 percent of the gross income from the profession comes from, the preparation or delivery of speeches. (Regulation 18932.3(a).) You indicate that you do not spend more than 20 percent of your teaching time preparing and presenting lectures or writing articles. You also indicate that approximately 10 percent of your annual income is derived from giving lectures and writing articles. Accordingly, you may accept payments for your lectures and articles under the "earned income" exception to the honoraria ban.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
Assistant General Counsel



By: Julia Bilaver  
Staff Counsel, Legal Division

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