



FAIR POLITICAL PRACTICES COMMISSION

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April 6, 2006

This advice letter is SUPERSEDED. This letter was rescinded by the *Ashburn* Advice Letter, No. A-07-119, which found that hosting a radio show is not a "speech" under Regulation 18931.1. Additionally, this letter is superseded to the extent it conflicts with Section 89501(b)(1) and Regulation 18932.1, which establish that the exception for earned income from the honorarium prohibition does not apply where the sole or predominant activity of the business, trade, or profession is making speeches. (See the earned income exception analysis in the *Halderman* Advice Letter, No. I-08-073.

The Honorable Todd Spitzer
California Assembly - 71st District
1940 North Tustin Avenue, Suite 103
Orange, CA 92865

**RE: Your Request for Advice
Our File No. A-06-029**

Dear Assemblymember Spitzer:

This letter is in response to your request for advice regarding the honorarium provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. Would compensation paid to you for hosting a two-hour radio program on public affairs be considered an honorarium prohibited by the Act?
2. Would the compensation paid to you for hosting the program be classified as a contribution by the broadcaster to your campaign, or as a payment subject to section 85310?

CONCLUSIONS

Question 1. As we understand the facts, we conclude that any payment you receive for hosting the radio program you describe would be an honorarium prohibited by the Act.

Question 2. As noted above, you may not accept compensation for hosting this program.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations.

If you choose not to accept compensation for your services as host, the broadcaster's payment of costs otherwise associated with producing the show may not be contributions regulated by the Act's campaign provisions, provided you avoid express advocacy relating to your own campaigns. Finally, we do not believe that section 85310 was intended to apply to the circumstances you have described.

FACTS

A radio station that broadcasts into your Assembly district has proposed that you host a public affairs program to discuss current events and issues. The program would be broadcast every Saturday for two hours, for an indefinite period. You would be paid for your work on this program. You would not discuss or expressly advocate your candidacy for elective office on the program, nor would you discuss or oppose any candidates who might be running against you. However, it is possible that from time to time you might express your positions on other candidates and issues on the ballot. You would also regularly discuss your position on various issues of public policy and legislation.

ANALYSIS

Question 1.

Section 89502(a) provides:

"No elected state officer, elected officer of a local government agency, or other individual specified in Section 87200 shall accept any honorarium."

As a current member of the state Assembly, you are an "elected state officer" within the meaning of section 89502(a), and are therefore subject to the Act's ban on honoraria. (See sections 82021 and 82024.)²

Section 89501(a) defines the term "honorarium," in pertinent part, as follows:

"(a) For purposes of this chapter, 'honorarium' means, except as provided in subdivision (b), 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." "(b) The term 'honorarium' does not include:

(1) 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. The Commission shall adopt regulations to implement this subdivision."

Regulation 18931.1 also provides, in pertinent part, that: "For purposes of Government Code Sections 89501 through 89506, 'speech given' means a public address, oration, or other form of oral presentation." This definition of the "speech given" for

² The honorarium ban also applies to candidates for elective state office, as defined at section 89502(b)(1).

purposes of the honorarium ban at section 89502 is broad enough to include the oral presentations of a radio talk-show host, but this fact is not dispositive of your question.

Over the years we have construed the term "bona fide profession" in our advice letters to include a variety of paid activities. As you note in your request for advice, in the *Tribe* Advice Letter, No. A-95-310, we concluded that the Deputy Executive Director of this agency would not be receiving a prohibited honorarium if he accepted paid employment as a radio talk show host. Similarly, in the *Leach* Advice Letter, No. A-97-160, and in the *Kahn* Advice Letter, No. A-99-296 (copies enclosed), we found that compensation given for instructional presentations were not honoraria, but were "earned income" for services rendered in a bona fide business, trade, or profession, under section 89501(b).

In all of these cases, however, the official had engaged in the same business, trade or profession *before* he or she entered public service. Both the *Leach* and *Kahn* advice letters concerned business activities of Assembly "candidates." In each case the candidate had been engaged for 19 or 20 years in a business unrelated to the duties or expertise of Assembly members. Our analysis in such situations is summarized in the *Kahn* letter:

"You have indicated that you have been in business for approximately 20 years and that you advertise your services as a seminar leader to various trade and professional associations which elect either to hire or not to hire you based on the specialized expertise you offer. Consequently, any payments received by you as a seminar leader presumably reflect the value of the presentations for which you were hired and cannot be attributed to your status as a candidate for the Assembly. As we concluded in both the *Tribe* and the *Leach* Advice Letters, payments in such cases are properly characterized as income earned as compensation for services of commensurate value, not for a 'speech' within the meaning of Regulation 18931.1."

A business that may provide such "earned income" is presumed to be "bona fide" under Regulation 18932.1 (a) and (b) (copy enclosed) if the business has maintained specified books and records for two calendar years. Subdivision (c) presumes that a profession or trade is "bona fide" *without* a showing that business records have been kept over a period of years, under the following circumstances:

"(c) For purposes of Government Code Sections 89501 through 89506, a trade or professional practice is presumed to be 'bona fide' if either of the following applies:
(1) The tradesperson or professional practitioner possesses current licensure or certification which is issued by state or

federal occupational licensing authority, the issuance of which requires a demonstration of skill and knowledge in connection with the relevant trade or profession.

(2) Where licensure or certification is not required by a governmental licensing authority, the practitioner is employed as a researcher or is a member of the faculty of a college or university."

Given your account of the facts, the anticipated compensation for your appearance on the show would not be "earned income," but an "honorarium" for a "speech" within the meaning of Regulation 18931.1. You have not previously served as a talk-show host, have not told us that you are a faculty member at an institution of higher learning, and it does not appear that the proposed activity is a licensed or certificated trade or profession. Accordingly, we may not presume, as we did in the letters referenced above, that any compensation paid to you as host "cannot be attributed to your status" as a public official. To the contrary, the absence of a prior history of such activity, along with the evident connection between your experience as an assemblymember and the subject matter of the proposed talk show, would justify an assumption that the invitation to host this program *is* based, at least in part, on your status as a state legislator.³

As we observed in the *Greenwald* Advice Letter, No. A-95-290 (copy enclosed), the "earned income exception" to the honorarium ban is applicable only to speaking engagements that arise in the ordinary course of employment in a bona fide trade or profession. Under the circumstances here, we cannot connect your employment as a radio talk-show host to any profession or employment other than your service as a state legislator or status as candidate (as that term is defined at section 89502(b)(1)). So we must conclude that any payment for your appearances on this program would constitute an honorarium prohibited under section 89502.

Question 2.

Because it would be a prohibited honorarium, you may not accept compensation for hosting this radio program, and we therefore do not reach your specific question on the treatment of such payments under the Act's campaign provisions.⁴ However, we can offer you informal assistance on the treatment of broadcasting costs as contributions by the broadcaster, in the event you choose to host this program without compensation.

In the *McAteer* Advice Letter, No. I-97-600 (copy enclosed), we engaged in a lengthy analysis of section 82015 and regulation 18215 to conclude that a candidate's weekly radio talk-show, which included a "donation of free air time to a candidate,"

³ In the *Tribe*, *Leach* and *Kahn* letters, the officials taught recreational or business skills that were unrelated to public affairs, governmental policy, legislation, election campaigns, or politics.

⁴ Please note that regulation 18933 (copy enclosed) does provide detailed instructions which, if followed, permit the return or disposition-of an honorarium within 30 days.

would not be a contribution to the candidate if the program's contents were accurately described by regulation 18215(c)(4), which provides the following exception to the Act's definition of "contribution:"

"(c) Notwithstanding any other provision of this section, the term 'contribution' does not include:

(4) A payment made at the behest of a candidate, which is for a communication by the candidate or any other person that meets all of the following:

(i) Does not contain express advocacy;

(ii) Does not make reference to the candidate's candidacy for elective office, the candidate's election campaign, or the candidate's or his or her opponent's qualifications for office; and

(iii) Does not solicit contributions to the candidate or to third persons for use in support of the candidate or in opposition to the candidate's opponent."⁵

Regulation 18225.7 provides that a payment is "made at the behest" of a candidate when, among other things, the payment is made "in cooperation, consultation, coordination or concert with" the candidate. Your regularly scheduled appearance on the program would therefore amount to cooperation or coordination in the donation of free air time, such that this "payment" would be made at your behest.

If the stated preconditions for application of this exception apply to the program as it is actually broadcast (a determination that must always be made case-by-case), the air time donated to you would not be considered a contribution under the Act.⁶

As to the possible application of section 85310 to the anticipated radio program, this is a question of first impression which the Commission has not yet addressed. We note that the Official Voter Information Guide for the November 7, 2000 General Election, at page 15, described to the voters the purpose of section 85310 as follows:

"This measure would generally require an on-line or electronic report before the election when someone is purchasing campaign advertisements involving payments of \$50,000 or more that clearly identify a candidate for

⁵ Also see section 82015(b)(2)(C).

⁶ You should bear in mind, of course, that while state and federal campaign law defers to the broadcast licensing provisions administered by the Federal Communications Commission, federal law does regulate extensively in this area, as for example with the "equal time" provision of 47 USC section 315(a). We are not authorized to offer you advice on the requirements of law beyond the narrow purview of the Act.

state office but do not expressly advocate the candidate's election or defeat."

This critical element of the statute's legislative history indicates that the voters would have understood that section 85310 required electronic reporting by purchasers of large campaign advertisements, but it does not suggest an intention that these reports be filed by newspapers or broadcast outlets which afford space or air time to a candidate for commentary on current affairs that does not include discussion of the candidate's campaign or opposition. Similarly, there seems to be no intent that these reports be filed by the candidate who provides such commentary. Accordingly, we do not construe section 85310 as applying to the radio broadcasts you describe.

Sincerely,

Luisa Menchaca
General Counsel

A handwritten signature in cursive script, reading "Lawrence T. Woodlock", followed by a vertical line.

By: Lawrence T. Woodlock
Senior Counsel, Legal Division

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