



FAIR POLITICAL PRACTICES COMMISSION

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June 25, 2008

Linda Halderman, MD
Senior Policy Consultant
Office of Senator Sam Aanestad
State Capital, Room 2054
Sacramento, CA 95814

Re: Your Request for Informal Assistance
Our File No. I-08-073

Dear Dr. Halderman:

This letter responds to your request for advice regarding the honorarium provisions of the Political Reform Act (the "Act").¹ Because your question seeks general guidance and is not limited to a specific speech given or article published, we are treating your request as one for informal assistance.² Also, please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application of any other bodies of law such as Government Code Section 8920 or any incompatible activities restrictions your agency may impose under Government Code Section 19990.

QUESTIONS

1. Is compensation for continuing your work as a professional writer a prohibited honorarium?
2. Is a salary of \$150 per column for a bimonthly health related column a prohibited honorarium?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3), copy enclosed.)

3. Are payments for a book you have authored that is currently being reviewed for publication prohibited honoraria?

4. Are payments for your participation in speaking engagements and debates potentially including travel cost, expenses, and stipends prohibited honoraria?

5. If a payment is a prohibited honorarium under the Act, may you donate the payment to a charity of your choice in lieu of accepting the payment?

CONCLUSIONS

1. You may continue to receive compensation for articles published relating to your medical practice, health care reform, and Middle East affairs as it appears you have bona fide professions related to each of these subject matters.

2. As a medical doctor, payments for bimonthly articles related to the areas of medicine in which you practice and conduct research are earned income for personal services in connection with a bona fide profession. Additionally, in your circumstances it appears that payments for bimonthly articles related to health care reform are also earned income for personal services in connection with a bona fide business as a health care reform expert. Accordingly, payments for bimonthly articles related to your medical practice or health care reform are not prohibited honoraria.

3. Payments for a book you have authored are not prohibited honoraria because a book is not considered an "article" under the honorarium ban.

4. Payments for your participation in speaking engagements and debates are prohibited honoraria if speech making is the predominate activity of the business. However, some reimbursement or payments for travel may be permissible even in those circumstances in which you are not permitted to accept payment in consideration for a speech given.

5. If a payment is a prohibited honorarium under the Act, the payment may be donated directly to a charity, but only as permitted in Regulation 18932.5, explained below.

FACTS

You are a practicing surgeon. Your medical practice has been incorporated in the state of California under the name "Linda Halderman, MD, Inc." since 2003. In addition to your medical practice, over the past two years you have regularly authored newspaper articles and magazine columns and engaged in public speaking, for which you were paid as an independent contractor.

In a telephone conversation on May 12, 2008, you stated that the majority of your articles and speaking engagements over the last two years were related to issues regarding healthcare reform and, more specifically, your experiences with health care funding as a breast cancer surgeon practicing in a rural area. Occasionally, you have also written articles and given speeches on Middle East affairs. In a telephone conversation on June 2, 2008, you stated that you have actively marketed your activities as an author and speaker by maintaining the website "www.lindahalderman.com," have maintained records of income and expenses related to these activities, have reported the income from these activities on your personal income tax returns, and have maintained records of supplies purchased for the sole use of the business.

In regards to your activities as a health care reform expert, you have stated that less than 20 percent of the time spent on these activities in the last year was devoted to speaking, and less than 20 percent of the income from these activities in the last year was derived from speaking. Furthermore, you have stated that your activities related to Middle East affairs make up only a small portion of your overall writing and speechmaking. However, you estimate that approximately 80 percent of the time spent on activities related to Middle East affairs in the last year was devoted to speechmaking and 80 percent of the income from these activities in the last year was derived from speechmaking.

ANALYSIS

Section 89502(c) provides that "no designated employee of a state or local government agency shall accept an honorarium from any source if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interests." As a designated employee of the California Senate, you are required to disclose all sources of income and gifts; therefore, you are prohibited under Section 89502(c) from accepting any honoraria.

Section 89501 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.”³

Interpreting Section 89501(b)(1), Regulation 18932 provides:

“(a) ‘Honorarium’ does not include income earned from personal services if:

“(1) The services are provided in connection with an individual’s business or the individual’s practice of or employment in a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting, pursuant to [Regulations 18932.1 through 18932.3]; and

“(2) The services are customarily provided in connection with the business, trade, or profession.”

Under the facts you have provided, you are a board-certified general surgeon. Your medical practice is operated as a corporation, which you have owned since 2003. As provided in Regulation 18932.1(c)(1), a trade or professional practitioner is presumed to be “bona fide” if “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.” Undoubtedly, your medical practice is a “bona fide” profession.

However, the fact that your medical practice is a bona fide profession is not dispositive of your questions. We must also determine if the activities in which you wish to engage are services customarily provided in connection with the business, trade, or profession. In terms of how the honorarium ban relates to the medical profession, we have previously advised:

- Proceeds received by a public official, who was also a medical professional and had written over 300 articles and three textbooks, for publishing books/articles was “earned income” and not considered honoraria if the books/articles were published as part of the official’s medical/professional activities. (*Donald Advice Letter, No. A-00-276.*)
- The earned income exception applies to lectures given by a physician to health-care professionals related to areas of medicine in which he practices and does research. (*Phillips Advice Letter, No. A-91-137.*)

³ As defined by Regulation 18931.2, the term “article published” does not include books, plays, or screenplays.

- A speech regarding healthcare to a group of companies that manufacture pharmaceuticals, diagnostic equipment, and various medical supplies does not appear to be the type of service that is customarily provided in connection with the practice of medicine. (*Filante* Advice Letter, A-92-141.)

While the determination of whether any particular speech given or article published is “customarily provided” in connection with your bona fide profession must be made on a case-by-case basis (*Donald* Advice Letter, *Supra*; *Uelman* Advice Letter, No. A-99-281; and *Greenwald* Advice Letter, No. A-95-290A), it is generally true that a speech given or article published relating to the areas of medicine in which you practice or conduct research is earned income not subject to the honorarium ban.

Notwithstanding this general guidance, you seek assistance regarding articles and speaking engagements with a scope broader than the area of medicine in which you practice. As you have explained, you have been publishing articles and publicly speaking for pay for the last two years. The majority of your articles and speaking engagements are related to issues regarding healthcare reform and issues related to the Middle East.

Under the facts you have provided, there are no indications that your articles or speeches pertaining to healthcare reform or Middle East affairs are customarily provided by a medical professional. However, we must still determine whether this work constitutes broader “bona fide” professions notwithstanding your medical practice.

Under Regulation 18932.1(a), a business is presumed to be “bona fide” if the owner has maintained the following documents for the two calendar years immediately preceding the year in which the consideration for the payment for an article published or a speech given is provided:

“(1) Books and records of accounting consistent with the operation of a business; and

“(2) Copies of tax returns filed in connection with the operation of the claimed business.”

For businesses in existence for less than two calendar years, the business is presumed to be a “bona fide” if:

“(1) Its owner has maintained records of income and expenses, consistent with the operation of the claimed business; and,

“(2) Any three of the following are maintained:

“(A) Copies of tax returns filed in connection with the operation of the claimed business for one year;

“(B) Records of bank accounts or lines of credit in the name of the business;

“(C) Records of purchase, lease, or rental of equipment or supplies for use solely by the business;

“(D) Records of expenditures for rent, wages, business or professional insurance, or other similar, customary costs of doing business;

“(E) Records of efforts to market goods or services provided by the business; or

“(F) Documentation of expertise by the business operator in connection with the service provided or product sold by the business.”
(Regulation 18932.1(b).)

Additionally, a business is not “bona fide” if the predominant activity of the business is making speeches. (Regulation 18932.1(d).) For a business in existence for one year or more, speech making is presumed to be the predominant activity of the business if:

“(1) During the 12-month period prior to and including the date of the speech, more than 50 percent of the hours spent on an individual’s business, trade, or profession is devoted to the preparation and/or delivery of speeches; or

“(2) During the 12-month period prior to and including the date of the speech more than 50 percent of the gross income of the individual’s business, trade, or profession is derived from the preparation and/or delivery of speeches.” (Regulation 18932.3(a).)

For a business in existence less than one year, speech making is presumed to be the predominant activity of the business if:

“(1) During the 30-day period prior to and including the date of the speech, more than 50 percent of the hours spent on an individual’s business, trade, or profession is devoted to the preparation and/or delivery of speeches; or

“(2) During the 30-day period prior to and including the date of the speech, more than 50 percent of the gross income of the individual’s

business, trade, or profession is derived from the preparation and/or delivery of speeches.” (Regulation 18932.3(b).)

Health Care Reform Expert –

From the facts submitted, you have published articles and given speeches related to Health Care Reform for the last two years; have actively marketed these activities by maintaining the website “www.lindahalderman.com;” and have maintained records of income and expenses related to these activities, copies of your personal tax returns on which you reported the income from these activities, and records of supplies purchased for the sole use of the business. Moreover, in regards to your activities as a health care reform expert, you have stated that less than 20 percent of the time spent on the business in the last year was devoted to speaking, and less than 20 percent of the income from the business in the last year was derived from speaking.

Based upon the facts provided, your activities related to health care reform appear to be a bona fide business. So long as speechmaking is not the predominate activity of this business, the payments for or income earned from your activities are not prohibited honoraria under the Act, and you may continue writing articles and given speeches⁴ addressing health care reform.⁵

Middle East Affairs Expert –

Turning to your activities as an expert in Middle East affairs, it appears you have maintained sufficient records to trigger the presumption that your activities as a Middle East affairs expert constitute a “bona fide” business under either Regulation 18932.1(a) or (b). However, you have stated that approximately 80 percent of the time spent on the business is devoted to speechmaking and 80 percent of the income from the business is derived from speechmaking. As stated in Regulation 18932.1(d), the business will not be considered “bona fide” if speechmaking is the predominate activity of the business under Regulation 18932.3.

⁴ You may continue to give speeches only to the extent that speechmaking does not become the predominate activity of the business. Future speaking engagements must be analyzed on the date the speech is given. If more than 50 percent of the hours spent on the business are devoted to speechmaking or more than 50 percent of the income from the business is derived from speechmaking in the 12-month period prior to and including the date of the speech, you may not accept any payment made in consideration for the speech.

⁵ We note that a payment made for transportation, lodging, and subsistence, which payment is reasonably necessary in connection with a bona fide business, trade, or profession, and which satisfies the criteria for federal income tax deductions for business expenses specified in Sections 162 and 274 of the Internal Revenue Code, is not an honorarium or gift unless the sole or predominant activity of the business, trade or profession is making speeches. (Regulation 18950.1(e).)

Accordingly, you may continue to write articles related to Middle East affairs since the article writing business would be considered a "bona fide" profession, and you may accept payment for the articles under the earned income exception to the honorarium ban. However, because speechmaking may not be the predominate activity of the business, you may not accept payment in consideration for any speech relating to Middle East affairs if more than 50 percent of your time spent on the business is devoted to speechmaking or more than 50 percent of the income from the business is derived from speechmaking in the 12-month period prior to and including the date of any particular speech.⁶

Travel and Other Exceptions to the Honorarium Ban

Notwithstanding the honorarium ban, some payments in connection with a speech given are not considered income or a gift. Accordingly, these payments fall outside the honorarium ban and may be accepted even in those circumstances in which you are prohibited from accepting other payments in consideration for the speech given. For example, Regulation 18931.4(e) provides that the following is not an honorarium under the Act:

"Free admission, and refreshments and similar non-cash nominal benefits provided to a filer during the entire event at which the filer gives a speech, participates in a panel or seminar, or provides a similar service, and actual intrastate transportation and any necessary lodging and subsistence provided directly in connection with the speech, panel, seminar, or service, including but not limited to meals and beverages on the day of the activity...."

Under this regulation, payments for meals during the event in which you make a speech, and payments for intrastate transportation and necessary lodging⁷ directly connected to the speech, are not considered reportable income or gifts. Accordingly, these payments may be accepted notwithstanding the honorarium ban.

Additionally, Regulation 18950.1(a) provides an exception to the Act's prohibition or limitations on honorarium or gifts for travel within the United States in connection with a speech given by the official if the travel is "reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international

⁶ Note that income, even if not a prohibited honorarium under the earned income exception to the honorarium ban, is still subject to the Act's reporting requirements and may give rise to a conflict of interest disqualifying you from making, participating in making, or using your position to influence a governmental decision if the decision will have a reasonably foreseeable material financial effect on the source of the income.

⁷ "Necessary lodging" is generally limited to the day of the speech, but may include the day before or after, if necessary due to travel arrangements. (*Allen Advice Letter*, No. I-94-270.)

public policy.”⁸ Similarly, Regulation 18950.1(b) provides an exception for travel (including travel outside of the United States) provided by governmental entities, certain educational institutions, and certain nonprofit organizations if the travel is “reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy.”⁹

With this letter, we have enclosed two fact sheets entitled “Limitations and Restrictions on Gifts, Honoraria, Travel and Loans” and “Travel Guide for California Officials and Candidates” to assist you in determining whether you may accept reimbursement or payments for travel provided for a speaking engagement.

Donating Honorarium to Charity

In those circumstances in which a payment would be a prohibited honorarium under the Act, you have asked whether you may donate the payment to a charity of your choice in lieu of accepting the payment. Regulation 18932.5 provides for an exception to the honorarium ban for direct charitable donations. However, a payment will be considered a direct charitable donation and not a prohibited honorarium only if all of the following apply:

“(1) The donation is made directly to a bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, and is not delivered to the individual;

“(2) The individual does not make the donation a condition for his or her speech, article, or attendance;

“(3) The individual does not claim the donation as a deduction from income for tax purposes;

“(4) The donation will have no reasonably foreseeable financial effect on the individual, or on any member of his or her immediate family; and

“(5) The individual is not identified to the recipient organization in connection with the donation. If the individual knows or has reason to

⁸ For purposes of Regulation 18950.1, the term “travel” includes transportation and related lodging and subsistence. However, payments for “related lodging and subsistence” are limited to the day immediately preceding, the day of, and the day immediately following the speech.

⁹ We note that travel payments as specified in Regulation 18950.4(e) need not be reported by an official subject to the Act’s filing requirements. However, except as otherwise provided by Regulation 18950.3, payments made for travel as specified in Regulation 18950.1(a) and (b) must be reported in accordance with Section 87207(c).

know that a donor intends to make such a donation, the individual must inform the donor that the donation cannot be made in the individual's name." (Regulation 18932.5.)

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in black ink, appearing to read 'B. Lau', written over a horizontal line.

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl

Enclosure