



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
428 J Street • Suite 620 • Sacramento, CA 95814-2329  
(916) 322-5660 • Fax (916) 322-0886

May 23, 2017

Steven A. Herum  
Attorney-at-Law  
Herum Crabtree Suntag  
5757 Pacific Avenue, Suite 222  
Stockton, CA 95207

Re: Your Request for Informal Assistance  
**Our File No. I-17-099**

Dear Mr. Herum:

This letter responds to your request for advice on behalf of an unnamed public official regarding the gift/honoraria provisions of the Political Reform Act (the "Act").<sup>1</sup> As we noted in our prior correspondence of April 17, 2017, Regulation 18329(b)(2) states:

"Requests for formal written advice will not be acted upon unless the following requirements are met:

"(A) The name, title or position, and mailing address of the person whose duties are in question are provided. In addition, if the request is submitted by an authorized representative, it shall contain a specific statement that such authorization has been made.

"(B) All the facts material to the consideration of the question or questions presented have been provided in a clear and concise manner."

Given that you have not provided the name of the official on whose behalf you request the advice, we treat your request as one for informal assistance. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

Also, note that we do not advise on any other area of law, including common law conflicts of interest or the doctrine of incompatible activities which may also impact your client's participation in such activities.

---

<sup>1</sup> 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.

## FACTS

Your office represents a client who is also a full time elected official. The public agency that the client serves does not have direct influence or regulatory control over educational programs or policies.

Previously the client served as a part time public official and was employed as a schoolteacher and educational consultant. The client also has an expertise in educational policy and holds a highly aspirational personal biography that starts with growing up in a challenging neighborhood with a single mother and culminating in receiving two degrees from a prestigious private university.

In order to be compensated for speaking at educational conferences and forums the client proposes that the professional speaking contract with the organization sponsoring the event and paying the speakers contain the following provisions:

- The client's presentation shall be limited to educational matters and he/she shall not address nor answer questions of political nature not directly related to educational policy or programs;
- The client shall decline to answer any questions or participate in any discussions relating to his/her elected position or policy issues facing the public agency he/she represents;
- He/she shall limit the speech or presentation and any written material to educational matters only, shall not be introduced as an elected official during the speaking engagement or referred to as an elected official in any advertising materials prior to the speaking engagement, and will decline questions or participating in any discussions relating to the elected position; and
- He/she shall automatically without providing the organizing entity any written notice recuse himself/herself from any and all government business. Decisions or actions by the public agency he/she represents that relate to the event sponsor or the entity directly or indirectly paying compensation to the speakers at the event.

You stated that the limiting provisions are intended to give assurance that this is a legitimate educational speaking function and not a disguised honorarium. You also stated that the public official's automatic recusal from participating in any government decision involving the event sponsor is intended to demonstrate that the payment is not a disguised political contribution.

## ANALYSIS

### *General Conflicts of Interest*

You asked whether your client may receive compensation for speaking on educational policy or programs, in contrast to political or other governmental topics, at conventions and other events. As an initial matter, be aware that the Act prohibits an official from making, participating in making or using his or her official position to influence a government decision in which the official has a financial interest, such as a source of income of \$500 or more. (Section 87100.)

Section 87103 of the Act provides that an official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the source of income. You noted that:

- The client shall automatically without providing the organizing entity any written notice recuse himself/herself from all government business, decisions or actions by the public agency the client represents that relate to the event sponsor or the entity directly or indirectly paying compensation to the speakers at the event.

So long as the client does not make, participate in making, or influence a governmental decision that will foreseeably and materially affect a source of income, the client will not be violating the conflict of interest provisions of the Act.

#### *Honoraria<sup>2</sup>*

Section 89503(a) *prohibits* a designated employee of a state agency from accepting honoraria from any source, if the official would be required to report the receipt of income or gifts from that source on his or her statement of economic interest. "Honorarium" means . . . 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. (Section 89502(b).) You noted:

- The client's presentation shall be limited to educational matters and he/she shall not address nor answer questions of political nature not directly related to educational policy or programs.
- The client shall decline to answer any questions or participate in any discussions relating to his/her elected position or policy issues facing the public agency he/she represents.
- He/she shall limit the speech or presentation and any written material to educational matters only and shall not be introduced as an elected official during the speaking engagement or referred to as an elected official in any advertising materials prior to the speaking engagement and will decline answering questions or participating in any discussions relating to the elected position.

However, under the current statute, state elected officers are prohibited from accepting an honorarium for any speech given, *regardless of the content of the speech*. In 1990, in the *Watson* Advice Letter, No. I-90-742, we stated:

"The former statute relating to the limitations on gifts and honorarium, Section 85400, had placed a \$1,000 limit on any speech relating to the

---

<sup>2</sup> Generally, the gift and contribution provisions are not implicated by the receipt of "speaking fees" since gifts and contributions are defined to not include payments for which full consideration was provided. (See Section 82028 and Section 82015.)

governmental process. This statute was repealed and replaced by Sections 89501 – 89506 . . . Under the current statute, state elected officers are prohibited from accepting an honorarium for any speech given, regardless of the content of the speech.”

The statute was amended again in 1996 to apply the same rule prohibiting state officials from accepting an honorarium for any speech given, regardless of the content of the speech, to local public officials. The content-based \$1,000 limit was repealed.

Thus, while the precautionary actions may be prudent to prevent violations of an agency’s statement against incompatibility activities, they would not impact the application of the honoraria prohibition. Thus, absent an exception, your client’s activity as a paid speaker is an activity covered by the honoraria prohibitions and the funds the client would receive are payments made in consideration for the “speech given” would be prohibited.

### *Statutory and Regulatory Exceptions*

#### *1. Earned Income*

Section 89501(b)(1) provides that the term “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. The Commission shall adopt regulations to implement this subdivision.”

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

“(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.”

Thus, personal services provided by an individual in connection with that individual’s bona fide business are not included within the Act’s definition of an honorarium. Regulation 18932.1(b) sets forth the test for determining when an individual’s business that has been in existence for less than two calendar years is “bona fide” and provides as follows:

“(b) For purposes of Government Code Sections 89501 through 89506, a business that has been in existence for less than two calendar years is presumed to be “bona fide” if:

“(1) Its owner has maintained records of income and expenses, consistent with the operation of a business, from the date of inception 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 and 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 good 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.”

A business that has been in business for less than two years is “bona fide” if the official has maintained records of income and expenses consistent with the operation of a business since the inception of the business and if you have maintained specified other records.

Despite meeting the requirements of Regulation 18932.1(b), a business is not a “bona fide business” if speechmaking is its sole or predominant activity. Regulation 18932.3(a) provides that the “predominant activity” of a business in existence for one year or more is presumed to be speechmaking if during the 12-month period prior to and including the date of the speech, more than 50 percent of the hours spent on the business is devoted to, or more than 50 percent of the gross income of the business is derived from, the preparation and/or delivery of speeches.

## *2. Direct Charitable Donations (Regulation 18932.5.)*

A charitable donation made in lieu of a speaking fee is not an honorarium if:

(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 speaker does not make the donation a condition for his or her speech, article, or attendance;

(3) The speaker 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 speaker, or on any member of the speaker's immediate family; and

(5) The speaker is not identified to the recipient organization in connection with the donation. If the speaker knows or has reason to know that a donor intends to make such a donation, the speaker must inform the donor that the donation cannot be made in the speaker's name.

*3. Returning Honoraria (Regulation 18933.)*

(a) The prohibitions imposed on acceptance of an honorarium by Section 89502 do not apply if, within 30 days of receipt of an honorarium, any of the following occurs:

(1) The speaker returns the honorarium, unused, to the source of the payment or the source's agent or intermediary, if any;

(2) The speaker delivers the honorarium to the Controller for donation to the General Fund (in the case of state officials or candidates), or to the speaker's agency for donation to an equivalent fund (in the case of local officials or candidates), and does not claim the donation as a deduction for income tax purposes; or

(3) If the honorarium is not a payment of money and if the speaker is unable to comply with subdivision (a)(1) or subdivision (a)(2) above, the speaker reimburses the donor or the donor's agent or intermediary, if any, for the value or use of the honorarium.

(b) Neither the speaker nor the donor shall be required to report any honorarium returned, delivered or reimbursed pursuant to subdivision (a) as an honorarium, income, gift, or activity expense.

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

Sincerely,

Hyla P. Wagner  
General Counsel

By:  John W. Wallace  
Assistant General Counsel  
Legal Division

JWW:jgl