

May 8, 1998

**Advisory Opinion 1998 - No. 4
Honoraria**

The Board has received a request for an advisory opinion on the subject of acceptance of honoraria by legislators.

QUESTIONS

The specific questions included in the request are:

1. Is a legislative issue ever sufficiently outside the "official role" of a legislator that the legislator could receive an honorarium for delivering a speech on the issue?
2. Would it be a violation of the Ethics Act for a legislator to accept an honorarium for a speech delivered solely in a campaign capacity and not as a state legislator?
3. If an organization sponsors a debate on a referendum which was passed in the prior legislative session, and offers to pay the legislator to deliver the speech and participate in the debate, could the legislator accept the honorarium if the legislator is clearly not invited in his or her capacity as a legislator?
4. Would the Board's answer be different if the legislator was the sponsor and campaign manager for the referendum?
5. If the legislator also plays an active role in the campaign for the referendum, does that role indicate that the honorarium for the speech and debate is even more outside the legislator's official role?
6. What other factors would the Board consider in determining whether honoraria are outside the legislator's official role?

OPINION

Acceptance of an honorarium for a speech in a legislator's official role is a violation of the State Ethics Act. To be outside the legislator's official role, the legislator must clearly show that the invitation was issued to the legislator in a personal capacity; that the topic is not related to legislation; and that the organization offering the honorarium is not active in the legislative arena.

ANALYSIS

Honoraria are restricted by the following provisions of the State Ethics Act. At the outset, the Board notes that the statute is not a complete ban on honoraria. The prohibition is only against honoraria offered in connection with an officer's or employee's 'official role.'

RCW 42.52.010(11) "Honorarium" means money or thing of value offered to a state officer or state employee for a speech, appearance, article, or similar item or activity in connection with the state officer's or state employee's official role.

RCW 42.52.130 Honoraria. (1) No state officer or state employee may receive honoraria unless specifically authorized by the agency where they serve as state officer or state employee.

(2) An agency may not permit honoraria under the following circumstances:

(a) The person offering the honorarium is seeking or is reasonably expected to seek contractual relations with or a grant from the employer of the state officer or state employee, and the officer or employee is in a position to participate in the terms or the award of the contract or grant;

(b) The person offering the honorarium is regulated by the employer of the state officer or state employee and the officer or employee is in a position to participate in the regulation; or

(c) The person offering the honorarium (i) is seeking or opposing or is reasonably likely to seek or oppose enactment of legislation or adoption of administrative rules or actions, or policy changes by the state officer's or state employee's agency; and (ii) the officer or employee may participate in the enactment or adoption.

A. LEGISLATIVE RULES

The statute provides that the prohibition on honoraria can be significantly changed by adopting legislative rules. Since the Legislature has not adopted such rules, the Board will strictly construe the statute in light of the stated objectives of predecessor boards and the Commission on Ethics in Government and Campaign Practices.

B. "HONORARIUM" DISTINGUISHED FROM "GIFTS" AND "COMPENSATION"

The existence of a separate provision specifically for honoraria implies that the application is broader than the general prohibition on receiving compensation or gratuities for performing official duties:

RCW 42.52.110 Compensation for official duties or nonperformance. No state officer or state employee may, directly or indirectly, ask for or give or receive or agree to receive any compensation, gift, reward, or gratuity from a source for performing or omitting or deferring the performance of any official duty, unless otherwise authorized by law except: (1) The state of Washington; or (2) in the case of officers or employees of institutions of higher education or of the Spokane intercollegiate research and technology institute, a governmental entity, an agency or instrumentality of a governmental entity, or a nonprofit corporation organized for the benefit and support of the state employee's agency or other state agencies pursuant to an agreement with the state employee's agency.

The context of these provisions clearly suggests that "official role" covers a wider range of legislator activity than "official duty." The need for a broad application was stated by the Commission on Ethics in Government and Campaign Practices. In its 1994 report to the Legislature, the Commission described the acceptance of honoraria as a two fold problem: "There is concern that honoraria could be used to influence official state action. Honoraria also may be inappropriate when provided for activities closely related to the official duties or position of an officer or employee."

In order to distinguish honoraria from compensation for which there is consideration, the Board adopts the description used by the predecessor House of Representatives Board of Legislative Ethics in its Advisory Opinion 89-3: "An honorary payment or reward usually given as compensation for services on which custom or propriety forbids any fixed business price to be set or for which no payment can be enforced at law. [An honorarium is] something not negotiated or agreed to, but is more akin to a token of appreciation."

Thus an honorarium for a single "speech, appearance, article, or similar item or activity" can be distinguished from compensation under an employment agreement, such as the teaching arrangement approved in **Advisory Opinion 1995 - No. 11**. The opinion request in that instance was phrased as "contracted for employment as an instructor."

C. APPLICATION OF "OFFICIAL ROLE" TO LEGISLATIVE SPEECHES

By using the term "official role," and by setting out a specific additional prohibition, the statute is intended to cover all aspects of activity related to the position of state legislator. **Advisory Opinion 1995 - No. 17, legislator letters**, explicitly recognized this broad role, stating that "legislators do possess expansive authority to carry out these community or public purpose functions."

The questions in the advisory opinion request pose several different hypothetical situations, but all involve a speech related to a "legislative issue" or a "referendum." Speaking on any legislative matter is closely related to the role of being a legislator, and would always invoke the statutory prohibition. To be outside the official role, the substance of the speech would need to be a personal matter unrelated to legislative action. An example given by the predecessor Joint Legislative Board of Ethics was a legislator fly fisherman speaking on casting techniques to a fishing club.

In determining whether a speech is on a personal topic, rather than a legislative one, the Board will presume that all such invitations are issued to the member in an official role. This interpretation is consistent with the former Legislative Joint Rule 1(a)(3): "A legislator shall not accept an honorarium if it can be reasonably concluded that the honorarium would not have been made but for the legislator's status as a legislator."¹ The burden is on the legislator to show that the invitation comes to him or her in a personal capacity; that the topic is not related to legislation; and that the organization is not active in the legislative arena.

The opinion request asks whether the limitations on use of public facilities to campaign for or against a ballot measure create the necessary separation from the legislator's official role when the legislative issue has become a ballot proposition. If the separation was a complete one, that conclusion would be appropriate. However, as the Board has noted in the following opinions, RCW 42.52.180 contains several exceptions which permit legislators to comment on ballot measures using public resources in certain circumstances.

Advisory Opinion 1995 - No. 18, ballot measure exceptions, states that the statute permits legislators to speak out on ballot measures under any circumstances where there is no measurable expenditure of public funds. In addition, legislators may use public funds to state their views on ballot measures at an open press conference or in response to an inquiry. This use may not include direct appeals to vote for or against the measure.

¹ The former Code of Legislative Ethics portion of the Joint Rules was given precedential status by the Board in **Advisory Opinion 1995 - No. 1**.

Advisory Opinion 1996 - No. 11, legislative press releases, allows responsive press releases, depending on timing and substance. The opinion finds that it would not be a violation of the ethics law to communicate, using public resources, on ballot propositions, in response to statements by the governor or other state-wide elected official.

Advisory Opinion 1997 - No. 5, legislator initiatives, endorses the expectation that legislators will express their views "on public policy issues, including ballot propositions." However, the opinion also states that official legislative duties do not include promotion and signature gathering for an initiative. Nor do they include a press conference called to start off the initiative campaign.

Advisory Opinion 1997 - No. 9, ballot measure hearings, found that the statute allows legislative committees to meet in workshop fashion to study and review ballot measures, but not to structure or conduct the hearing in a manner designed to favor or oppose the measure.

As these opinions show, there are strict limitations on the use of public resources, but the prohibition is by no means a complete one. Additionally, as the Board stated in **Advisory Opinion 1996 - No. 11**, "we remind legislators that they are always free to speak or write on any issues at any time, as long as they do not use public facilities for campaign purposes." Since legislators are free to use their title regardless of whether they are using public resources, it is quite conceivable that a speech could be offered in an "official role" without any use of state resources.

The opinion request also asks whether there are constitutional problems with a limitation on honoraria that restricts arguably personal speech. Although it is not the purview of the Board to decide constitutional questions, support for a restrictive view is found in the leading U.S. Supreme Court case on the topic, *United States v. National Treasury Employees Union*, 513 US 454 (1995). In 1989 Congress enacted a prohibition on receipt of any payment for appearances, speeches or articles, regardless of subject, by government officials and employees. The Supreme Court struck down the ban as a violation on First Amendment free speech rights as applied to executive branch employees below employment grade GS-16.

In striking the application to lower-level employees, the Court's opinion endorsed the application to "legislators and policymaking executives." Recognizing the difficulty in separating official from personal appearances for such officials, the Court stated: "the absorbing and time-consuming responsibilities of legislators and policymaking executives leave them little opportunity for research or creative expression on subjects unrelated to their official responsibilities. Such officials often receive invitations to appear and talk about subjects related to their work because of their official identities. In contrast, invitations to rank-and-file employees usually depend only on the market value of their messages." While the part-time nature of the Washington legislature leaves more opportunity for outside employment and activity, the invitations described in this opinion request are closer to "subjects related to their [legislative] work," rather than invitations based on "the market value of their messages."