

Office of Government Ethics

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Letter to a Private Attorney dated August 2, 1991

This responds to your letter of July 19, 1991 concerning the restrictions which may apply to your client, an employee [of an executive branch agency]. As I understand it, your client has been asked to consider writing a book about a case recently litigated, and to consult on a dramatic presentation of the story to be made for television or the movies. Although the facts are not entirely clear, I assume that the case may be a matter which was handled by your client in his official capacity or by others within the [agency]. You ask whether your client may accept a fee under the circumstances described, whether there is a limitation on the amount of any such fee, and whether the fee may be donated to a non-profit organization or others.

BAN ON RECEIPT OF HONORARIA

The Ethics Reform Act of 1989 restricts federal employees from receiving honoraria for certain speeches, articles, or appearances. The Act, at section 601(a), amended section 501(b) of the Ethics in Government Act to state that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." The term "honorarium" is defined for the purposes of this section as "a payment of money or anything of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed." 5 U.S.C. App. § 505(3). This section became effective on January 1, 1991.

Regulations implementing the honoraria ban are published at 5 C.F.R. Part 2636 (55 Fed. Reg. 1721 (January 17, 1991)). These regulations describe the extent of the honoraria ban, as well as specify the areas which are outside of the scope of the restriction. Under the regulations, an executive branch employee may receive compensation for certain activities, such as writing books, chapters of books, or works of fiction without violating the honoraria ban. On the other hand, the honoraria ban would,

for example, prohibit an executive branch employee from writing and selling a nonfiction story on a free-lance basis. The honoraria ban does not require any nexus between the appearance, speech or article and an employee's Government employment.

STANDARDS OF CONDUCT RESTRICTIONS

In addition to the bar on honoraria, a Federal employee must determine whether any writing or consultation he wishes to undertake outside the scope of his official duties is consistent with his agency's Standards of Conduct regulations. In the case of your client, the applicable Standards of Conduct prohibit the receipt of compensation or anything of monetary value for any consultation or writing the subject matter of which is devoted substantially to the programs, operations or responsibilities of the [agency]. If the subject matter of this proposed book or your client's consultation on a dramatic presentation is related to a case in which the [agency] is or has been involved, I believe it would be impermissible for your client to receive any fees in connection with this matter. Moreover, the [agency] regulations prohibit the donation of such fees to any charity or third party.

ACCEPTANCE OF FEES AND DONATIONS TO CHARITABLE ORGANIZATIONS

If the book which would be produced by your client falls outside the honoraria ban, and is otherwise permissible under agency Standards of Conduct, there is no specific limitation on the amount of fee that may be accepted. Of course, if the fee were extraordinarily large or considerably in excess of the fees normally received by authors for works of this type, there may be an impression that your client has received the fee because of his status as a Government employee. Under these circumstances, receipt of the fee might amount to a violation of the Standards of Conduct applicable to Federal employees. See 5 C.F.R. Part 735.

Any fee which may properly be accepted by a Federal employee may also be donated to another person or entity by that employee. Fees that amount to prohibited honoraria usually may be paid on behalf of the employee to a charitable organization as defined in 5 C.F.R. § 2636.203(f). However, certain limitations apply to the payment of honoraria to charitable organizations. No payment of an honorarium may be made to a charitable organization under

the following circumstances:

- The employee would be prohibited from receiving and retaining the honorarium by any conflict of interest statute or regulation;
- The amount to be contributed is in excess of \$2,000 per appearance, speech, or article; or
- The employee, the employee's spouse, parent, sibling, child, or dependent relative would derive any direct financial benefit from the charitable organization that is separate from and beyond any general benefit conferred by the organization's activities. 5 C.F.R. § 2636.204(b). Additionally, as mentioned above, fees and compensation which may not be accepted under [agency] Standards of Conduct regulations may not be donated to any charity or third party.

Since the resolution of this question involves an interpretation of the [agency's] Standards of Conduct rules, I strongly urge you to advise your client to contact his Agency Ethics Official before proceeding further in this matter.

Sincerely,

Stephen D. Potts
Director