



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 524

February 13, 2015

Whether a legislator may receive, donate to charity, or otherwise attribute to out-of-pocket expenses the proceeds from certain book sales. (AOR-592)

The requestor of this opinion, a member of the Texas Legislature (“legislator”), has asked whether he may receive, donate to charity, or otherwise attribute to out-of-pocket expenses the proceeds from certain book sales.

Background

The legislator states that he had a personal experience that “moved [him] to sponsor and advance legislation” in the legislature. The legislator then sponsored and supported a bill to authorize public school districts to educate students regarding the celebration of certain holidays, to permit students and staff to offer traditional holiday greetings, and to permit school districts to display certain traditional holiday scenes or symbols. The bill ultimately became law.

The legislator subsequently co-authored a children’s book that, in part, celebrates one of the holidays at issue in the bill. The legislator states that the entire book “is a project undertaken by [the legislator] as an individual—as an author and artist—as the next step in protecting the religious freedom to celebrate“ certain traditional holidays. The introduction of the book provides background concerning the legislator’s inspiration for the bill. The main text of the book is described as a “humorous verse” that tells a story related to the holiday in Texas and that includes one reference to the bill. The book also contains two appendices. The first provides historical background for the bill; it reiterates the legislator’s reason for introducing the bill, states the policy and legal basis for the bill, and provides a list of states in which similar bills have passed. The second appendix is the text of the bill itself.

The legislator states that he and his co-author planned to proceed under a contract with a publishing company that agreed to publish and distribute the book. The legislator states that the agreement allocated a “commercially normal” share of proceeds to the legislator and his co-author, pursuant to a usual and normal agreement such as the publisher offers to other authors. The legislator further states that the publisher would collect the proceeds from book sales and then forward the agreed portion of proceeds to the authors, and that the publisher would use its personnel and resources to promote the book through commercial advertisements and potential book-signing events, just as it does for its other books and with other authors. The promotional communications by the publisher would reference the legislator as the author, as book advertisements commonly do, but would not reference any election or advocate for the legislator’s candidacy.

The legislator’s co-author of the book is retired, but formerly served on the legislator’s official staff for over 10 years. The legislator states the idea for and discussions about the book were generated after his co-author left government employment. The idea for the book originated with the legislator, who discussed it with his co-author and later approached the publisher.

Based on the facts presented, the legislator asks whether he may accept the proceeds from book sales and whether the publisher’s efforts to promote and advertise the book would be permissible. A secondary question is

whether the legislator may use the proceeds to make a donation to a charitable organization or to pay his personal expenses incurred in writing the book.

Penal Code

In considering whether any benefit to a legislator is permissible, all of the laws under the commission's jurisdiction must be considered.¹ The laws under the commission's jurisdiction do not specifically prohibit a member of the legislature from receiving compensation from private employment outside the legislature. See, e.g., Ethics Advisory Opinion No. 508 (2013) (citing several additional opinions). As a general rule, a legislator may receive compensation for work performed in a capacity other than as a legislator. Ethics Advisory Opinion No. 371 (1997). However, section 36.08 of the Penal Code prohibits a legislator from soliciting, accepting, or agreeing to accept a benefit from any person unless a specific exception under section 36.10 of the Penal Code applies. Penal Code § 36.08(f).²

A "benefit" is "anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest." *Id.* § 36.01(3). A benefit would include monetary compensation received for personal services, and thus could not be accepted by a legislator unless the law provides a specific exception.

Section 36.08 does not prohibit a fee or benefit for which a public servant gives legitimate consideration in a capacity other than as a public servant. *Id.* § 36.10(a)(1). In the case of a legislator receiving compensation for services, requiring "legitimate consideration" means that the fee or benefit received must be commensurate with the actual value of the services rendered by the legislator. Ethics Advisory Opinion No. 508 (2013). It must be the services rendered, and not the official status of the legislator, that is of value to the person paying for the legislator's services. *Id.*

Also relevant to this issue is whether the proceeds from the book sales would be a prohibited honorarium. Section 36.07 of the Penal Code prohibits a public servant from accepting an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties.³

We recognize that the subject matter of the book is intimately tied to actions that the legislator took in his official capacity as a legislator, such as sponsoring, supporting, and voting for a bill. These actions, by themselves, do not necessarily mean that the publisher found the legislator's official status of value, that the legislator wrote the book in his official capacity, or that the publisher requested the legislator to write the book or was motivated to publish the book because of the legislator's official status.⁴ It is conceivable that a publisher may agree to publish a book written by a legislator or other public servant solely because the publisher believes that the publication of the book would be profitable and that the status of the author as a public servant is not a factor in their agreement. Whether the legislator's status as a public servant was a basis for the publisher agreeing to publish the book depends upon the specific facts.

The legislator has not provided a detailed account of the terms of the contract with the publisher or of the terms that are typical of the industry. Thus, we cannot make a determination whether the proceeds would be commensurate with the value of the services he provided or whether the actual services, and not his official status, was the basis for the publisher agreeing to publish the book. However, the legislator has asked us to assume that he has arranged to receive proceeds through the sales of the published book that he has co-authored pursuant to a contract with the publisher that contains terms that are usual and normal in the publishing industry, without respect to the legislator's official status. The legislator further states that he provided legitimate consideration to the publisher for the sale proceeds by conceiving of the book, developing the idea, and writing the book with his co-author in equal parts. The legislator also states that he and his co-author worked together throughout the drafting process and that the book is a product of their work collectively. The legislator assures us that he provided consideration "in a nonpublic capacity by conceiving and drafting the book, and his contract with the publisher would entitle him to a portion of proceeds on par with other authors of comparable works."

If the facts as presented by the legislator are true, then any proceeds received for the sale of the book would be a fee or benefit for which the legislator gave legitimate consideration in a capacity other than as a public servant. Therefore, the proceeds would not be a benefit prohibited by sections 36.08 or 36.09 of the Penal Code. Furthermore, assuming that the publisher did not request the legislator to provide any service because of his official status, the proceeds from the sales of the book would not be a prohibited honorarium under section 36.07 of the Penal Code.

Campaign Finance Law

The legislator also asks if either the proceeds from the book sales or the communications made by the publisher to promote the book would be a political contribution.

A “political contribution” is a campaign contribution or an officeholder contribution. Elec. Code § 251.001(5). A campaign contribution is a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. *Id.* § 251.001(3). An officeholder contribution is a contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office and are not reimbursable with public money. *Id.* § 251.001(4). A contribution is a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement to make such a transfer. *Id.* § 251.001(2). A contribution does not include a transfer for consideration of any thing of value pursuant to a contract that reflects the usual and normal business practice of the vendor. 1 T.A.C. 20.1(3).

In Ethics Advisory Opinion No. 143, we considered whether a transaction between a corporation and a candidate would result in a prohibited political contribution. Ethics Advisory Opinion No. 143 (1993). In the situation presented, the candidate intended to hold a campaign fundraiser, including a carnival presented by a corporation. The proceeds from the carnival portion of the event would be allocated between the carnival corporation and the candidate. The corporation would collect funds by selling tickets to the carnival and then remit a percentage of the proceeds to the candidate. We stated:

[W]e believe that by specifying that the transfer be made with the intent that it be used in connection with a campaign or to defray officeholder expenses, the legislature meant to exclude transfers made in connection with normal business transactions. Although a carnival corporation contracting to be part of a fundraiser in some sense “intends” that the candidate use the share of proceeds it remits to him in connection with a campaign, the corporation’s principal intent in making the contract is to take advantage of a situation that seems likely to yield an audience and profits for itself.

We stress that an exchange of consideration between a candidate and a corporation will not by itself change the character of the transfer from a prohibited political contribution to a permissible commercial transaction. It is critical that the terms of the transaction reflect the usual and normal practice of the industry, and be typical of the terms the commercial party offers to political and non-political entities alike. In this case, the requestor has stated that contracts such as the one he proposes are a common fundraising technique for non-political entities, such as charities. The Texas Ethics Commission is not in a position to determine what the usual and normal practice is in the carnival industry. If the usual and normal practice of the carnival business is in fact to enter into contracts under similar terms with non-political as well as political groups, remitting to the group a like percentage of gross ticket proceeds, the arrangement proposed in this request would not result in a prohibited corporate contribution to the candidate.

Ethics Advisory Opinion No. 143 (1993) (footnote omitted).

In determining whether a contract between a corporation and a candidate is typical of the terms the corporation offers to political and non-political customers, the history of comparable transactions with other non-political customers is relevant. Ethics Advisory Opinion No. 398 (1998).

As we noted previously, the legislator has not provided a detailed account of the terms of the contract with the publisher or of the terms that are typical of the industry. Thus, we cannot make a determination whether the terms of the agreement between the legislator and the publisher reflect the usual and normal practice of the industry or whether the terms are typical of those the publisher has offered to political and non-political entities. However, the legislator assures us that the sale proceeds would not be offered or given with the intent that they be used in connection with an election, that the proceeds are apportioned pursuant to the usual and normal practice of the industry, and that the terms are typical of those offered to political and nonpolitical entities alike. The legislator also states that the publisher intends to make communications promoting the book for commercial purposes that are typical of other book promotions made for commercial purposes and that the communications would include references to the legislator as a co-author, but would not reference an upcoming election, mention the legislator's candidacy for re-election, or "include any election advocacy."

If the facts as presented by the legislator are true, then neither the proceeds received by the legislator for the sale of the book, nor the publisher's promotional communications, would be a political contribution.

Use of Proceeds

The legislator asks whether he may use his portion of the book sales proceeds to pay for his expenses incurred in writing the book or to make a donation to a charity. Based only on the facts as they are presented in this request, the laws under the commission's jurisdiction would not prohibit the legislator from receiving the proceeds from the book sales and using his portion of the proceeds to either pay for his own expenses incurred in writing the book or make a donation to a charity.⁴

Standards of Conduct

The legislator also asks whether the facts as stipulated in the request "raise any conflict of interest problems."

Section 572.001 of the Government Code provides the state's policy that a state officer or employee should not have a direct or indirect interest or engage in any professional activity that is in substantial conflict with the proper discharge of their public duties. Gov't Code § 572.001. To further this policy, section 572.051 sets out standards of conduct to guide the actions of state officers and employees. For example, a state officer should not accept employment or compensation that could reasonably be expected to impair the officer's independence of judgment in the performance of the officer's public duties. *Id.* § 572.051(a)(3). Additionally, a state officer should not intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer's official powers or performed the officer's official duties in favor of another. *Id.* § 572.051(a)(5).⁵

The facts provided by the legislator do not raise any obvious conflict with this policy or these standards of conduct. In our opinion, a legislator would not violate these standards by merely authoring (or co-authoring) a book for profit. However, in this case, the subject matter of the book relates directly to actions the legislator took as a legislator—specifically, his sponsorship and support of a bill in a legislative session. Depending on the specific facts, we believe a conflict can arise between the legislator's public interest and the obligation to vote on legislative matters without undue influence and the legislator's personal interest in profiting from the sale of a book relating to those same matters. As we have noted in previous opinions, the commission does not have authority to enforce these standards of conduct. *Id.* § 572.051(e). A state officer must decide for himself whether his actions violate these standards. Ethics Advisory Opinion Nos. 371 (1997), 192 (1994), and 156 (1993).⁶

SUMMARY

Under the facts as they are presented in this opinion, a legislator is not prohibited from receiving proceeds from the sales of a book he co-authored or using the proceeds to pay for his out-of-pocket expenses or donate to a charity.

- ¹ The test for determining whether an honorarium is prohibited is whether the public servant would not have been asked to speak but for his official position. Ethics Advisory Opinion No. 173 (1993). In other words, the permissibility of an honorarium depends on the motivation of the person seeking the services of a public servant. Ethics Advisory Opinion No. 273 (1995).
- ² We have previously stated, for example, that a fee paid to a state employee is not a prohibited honorarium simply because the public employee uses skills or knowledge he acquired as a public servant. Ethics Advisory Opinion No. 192 (1994). See also Ethics Advisory Opinion Nos. 305 (1996) (honorarium law does not prohibit professor at state university from accepting fee for performing services outside their regular job duties if academic expertise, and not their official status, was the reason for being asked to perform the services) and 294 (1995) (honorarium law does not prohibit an executive branch agency official or employee from accepting payment for teaching a course at a state university if the individual was asked to teach because of his or her expertise and not because of their official status).
- ³ The revolving door restriction applies to state employees of executive branch agencies who were compensated over a certain amount prescribed by the General Appropriations Act. *Id.* § 572.054(c)(2). The requestor states that his compensation met or exceeded that amount.
- ⁴ We note that sources of occupational income must be listed on a personal financial statement covering the calendar year in which the occupational activity occurred, in addition to an identification of each source and the category of the amount of income in excess of \$500 derived from each source from interest, dividends, royalties, and rents. *Id.* §§ 572.023(b)(1), (4). See also Ethics Advisory Opinion No. 392 (1998) (requiring disclosure of income derived from current occupational activity and certain retirement income).
- ⁵ A legislator should also be aware of various restrictions in chapter 572 of the Government Code that might be relevant to a particular contract. For example, a legislator may not vote on a measure or bill that will directly benefit a specific business transaction of a business entity in which the legislator has a controlling interest unless the bill or measure will affect an entire class of business entities. Gov't Code § 572.053(a).
- ⁶ Chapter 305 of the Government Code prohibits a registered lobbyist from providing a gift of cash to a legislator. Similarly, a legislator is prohibited from accepting a gift of cash from a registered lobbyist. Gov't Code § 305.024. The legislator presents no facts indicating that a lobbyist is involved in the publication of the book or that the book proceeds would constitute a gift. Assuming such, the lobby law would not prohibit the book proceeds.