

Maryland Judicial Ethics Committee

Opinion Request Number: 2001-01

Date of Issue: April 30, 2001

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Judge Not to Write Recurring Column on Legal Matters In National Magazine for Compensation

Issue: May a judge write a recurring column on legal matters in a national magazine for compensation?

Answer: No.

Generally, a judge may, pursuant to Canon 4A, “speak, write, lecture, and teach on both legal and non-legal subjects” and may, pursuant to Canon 4E, accept compensation so long as the compensation does not exceed a reasonable amount nor exceed that which would be received by a person who is not a judge. The Canons, however, do not permit articles to be written if the writing of the articles could cast doubt on the judge’s capacity to act impartially as a judge, demean the judicial office, or interfere with the performance of judicial duties. In addition, Canon 2B prohibits a judge from using the prestige of judicial office to advance the private interests of others.

Facts: The inquiring judge, along with another judge, has been invited to write a recurring column for a new magazine that will be directed toward young men between the ages of 15 and 25. The proposed articles would relate to legal issues relevant to its readership. The authors would neither comment on proceedings pending in any court nor offer legal advice. The judges would each receive \$500 for each article written. A companion magazine, for girls ages 6-17, which is already being published, was submitted with the inquiry. A review of that publication reveals that the issue provided is 100 pages in length, including cover pages. Within those 100 pages are 40 full pages of ads, 4 small ads, and 6 ad inserts, one of which is 8 pages long. In addition, two of the articles include brand name advertising.

Discussion:

CANON 4B

As the inquiring judge has noted, Canon 4B authorizes a judge to write on both legal and non-legal subjects so long as the avocational activity does not conflict with other provisions of the Maryland Code of Judicial Conduct. The judge has also directed our attention to [Opinion Request No. 1999-09], issued February 2, 2000, and indicates that the proposed compensation will be no greater than that paid for a comparable non-legal column. See [Opinion Request No. 1976-08], issued July 8, 1976.

The Committee agrees that the Canons would permit the writing of articles for reasonable compensation that did not exceed what a person who is not a judge would receive for the same effort if the activity does not offend the other provisions of the Canons. See [Opinion Request Nos. 1976-08 and 1980-07], issued July 11, 1980.

PUBLIC ETHICS LAW

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In addition to the Canons, judges are subject to the Public Ethics Law, and an analysis of the inquiry before us must be made pursuant to that legislation. As stated in [Opinion Request No. 1999-09]:

However, Maryland Code, State Government Article, Title 15 (hereinafter Public Ethics Law) is also applicable to judges pursuant to § 15-102(l) which includes judges and judicial appointees as “State officials”. “Honorarium” is defined in § 15-102(r) as “the payment of money or anything of value for: (i) speaking to, participating in, or attending a meeting or other function; or (ii) writing an article that has been or is intended to be published” but excludes “payment for writing a book that has been or is intended to be published.” Analysis of the provisions of the Public Ethics Law pertaining to the acceptance of an honorarium yields a result more restrictive than that contained in the Code of Judicial Conduct.

According to § 15-505(d)(2) and (3) of the Public Ethics Law, unless the gift would impair impartiality or independent judgment, a judge may accept an honorarium if the honorarium “is limited to reasonable expenses for the official’s meals, travel and lodging, and reasonable and verifiable expenses for care of a child or dependent adult, that are actually incurred.” An honorarium which is an unsolicited gift of minimal value or is a ceremonial gift or award of insignificant monetary value may also be accepted. Under no circumstance may an honorarium be accepted if the payor “has an interest that may be affected substantially and materially, in a manner distinguishable from the public generally, by the performance or nonperformance of the official’s ... duties; and ... the offering of the honorarium is related in any way to the official’s ... position.”

Although we acknowledge the distinction made between payment for a book and payment for a magazine article, if the payment for the article is not deemed to be in the nature of a gift or honorarium, we do not believe the provisions of § 15-505(d)(2) and (3) govern the proposed undertaking. Rather, it is regulated generally by § 15-502 of the Public Ethics Law because it is compensation for other employment or for services rendered. We reach this conclusion having considered the overall scheme of the Public Ethics Law, some earlier opinions of the State Ethics Commission, the legislative history of current § 15-505, and a general advising from the Committee on Legislative Ethics regarding Public Ethics Law, Gifts, and Regulated Lobbyists, dated September 26, 1995.

Obviously, the General Assembly’s use of the word “honorarium” in § 15-102(r) should be read in context applying the usual and plain meaning of the word. The *Oxford American Dictionary of Current English* 376 (Frank Abate ed., 1999) defines “honorarium” as a “voluntary payment for professional services rendered without the normal fee.” The *Random House Webster’s Unabridged Dictionary* 918 (2d ed., 1999) defines “honorarium” as “a payment in recognition of acts or professional services for which custom or propriety forbids a price to be set: The mayor was given a modest honorarium for delivering a speech to our club.” *Black’s Law Dictionary*, 736 (Bryan A. Garner ed., 7th ed., West 1990) defines “honorarium” as follows:”

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In the civil law, an honorary or free gift; a gratuitous payment, as distinguished from hire or compensation for service.”

In *Cunningham v. Commissioner of Internal Revenue*, 67 F.2d 205 (3rd Cir., 1933), in considering whether an honorarium was income or a gift under federal tax laws, the court said that the word honorarium “in common understanding, means voluntary reward for that for which no remuneration could be collected by law.”

We also note that the State Ethics Commission has held that “the term ‘honorarium’ should generally be applied only to those situations where an official or employee is presented with a gratuitous gift in recognition of some charitable, scientific, educational, artistic, civic or other similar achievement. We believe the honoraria exception is intended to cover those situations where an official or employee is presented with a free and gratuitous gift for which he has neither rendered nor is expected to render any significant service to the organization making the gift. The definition of honoraria is distinguishable from the payment of fees for services rendered.”

State Ethics Commission Advisory Opinions, Opinion No. 80-8 (May 28, 1980). *See also* Opinion No. 83-9 (April 21, 1983). Even though the “honoraria” provisions of current law, Chapter 804, Laws of 1989, were enacted after the two referenced advisory opinions, there is no indication in the history of the bill that the General Assembly intended to alter the usual meaning of “honorarium” as it had developed in law and by administrative interpretation.

We also note that issues of constitutionality are presented if the purpose of the legislation is to prevent all State officials and employees from receiving any compensation for any articles or speeches regardless of whether they are related to public employment. In *United States v. NTEU*, 513 U.S. 454 (1995), the Supreme Court struck down as violative of the First Amendment of the U.S. Constitution a similar provision of the federal code that prevented federal employees from accepting any compensation for making speeches or writing articles. The Court struck down the prohibition on federal employees, although it indicated that a more narrowly drafted restriction could be constitutional. The restriction in the Public Ethics Law is virtually identical to the restriction in federal law found to be unconstitutional. To avoid an issue of constitutionality, it is appropriate to construe § 15-102(r) in a manner less likely to render it unconstitutional. Thus, we conclude that compensation for writing a magazine article that is not in the nature of an honorarium is not automatically precluded by the Public Ethics Law.

OTHER PROVISIONS OF THE CANONS

Ultimately, all conduct by members of the judiciary, whether in the performance of judicial duties or in extra-judicial activities, must maintain the integrity of the judiciary (Canon 1) and avoid impropriety or the appearance of impropriety (Canon 2). As indicated, the Canon 4 authorization to write is subject to these general prohibitions and the prohibition against demeaning or detracting from the dignity of the office. Thus, even an ostensibly permitted activity must be examined in the light of all the circumstances.

The request is to write a “regular column titled ‘Tell It To the Judge,’ to which readers can

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write to request information on legal related matters.” Although, the publisher indicates that you can title your own column, it would appear that invitation has been based, at least in part, on the office of the author and seeks to trade on the fact that the authors are judges. Although the goals of the publication may be laudable, the venture is clearly a commercial venture, as is demonstrated by the numerous product advertisements. Thus, the judge could be perceived to be part of the staff of the magazine and using the prestige of judicial office to support private interests. Canon 2B. Moreover, the authors would control only the content of their articles and not the content and position taken in other articles published. This could be construed as a tacit endorsement of the positions taken in the other articles and the advertising, which may demean the office. The problems of publication policy are enhanced when articles are recurring rather than an isolated article. When we review the request in the context of the proposed publication and consider the recurring nature of the judge’s obligation, we reach the conclusion that the offer should be declined.