

**ARKANSAS ETHICS COMMISSION**  
**OPINION NUMBER 97-EC-010**

ISSUED: August 21, 1997

The Arkansas Ethics Commission has been requested to address four related questions involving the ability of an officeholder to accept compensation for speaking engagements, and a separate question concerning the reporting of independent expenditures, following the passage of Initiated Act 1 of 1996.

**ISSUE No. 1:** *May Arkansas elected officials accept honoraria or other fees for public appearances, whether acting in official or unofficial capacity?*

**BRIEF RESPONSE:** If the official is acting in an unofficial capacity, he may accept honoraria or other fees for public appearances. If he is acting in his official capacity, he may accept expenses or reimbursement for expenses, but not honoraria or fees.

**DISCUSSION:** Generally, state employees and public officials have a right to receive funds for outside activity. A state employee/public official is not prohibited per se from simultaneously holding both state and private employments. With this stated, it should be noted that as public employees and/or public officials this ability to receive compensation from sources other than the State of Arkansas is restricted in several ways. If a conflict of interest exists, a state agency may prohibit the outside employment. Most of these laws fall outside the purview of the Arkansas Ethics Commission. Ark. Code Ann. § 19-11-704 sets out the general standards of ethical conduct for public employees. Ark. Code Ann. § 19-11-707 prohibits various forms of gratuities and kickbacks in connection with a public employee's ability to approve, recommend or otherwise influence a contract or purchase request involving the State. Ark. Code Ann. § 19-11-708 prohibits a public employee from being retained to secure a contract with the state on a contingent fee basis. Ark. Code Ann. § 19-11-709 prohibits among other things, employees, involved in procurement for the State from participation in certain contractual matters.

To the extent that the matter is not governed by these laws noted above, the issue of fees for public officials generally is guided by the principles of Chapter 8 of Title 21 of the Arkansas Code. Ark. Code Ann. § 21-8-801(1) prohibits a public official from receiving compensation by sources other than state government for performing the duties and responsibilities associated with one's job or official position. Part of a public official's job duties would necessarily include appearing publicly in an official capacity. When he does so, he cannot be paid by any source other than the State of Arkansas. However, as anticipated by Ark. Code Ann. § 21-8-701(d)(8), a public official may accept a nongovernmental payment for the official's expenses for food, lodging or travel when the official is appearing in his official capacity and the appearance bears a relationship to the public servant's office. If the expenses incurred exceed \$150.00, the public official must report the payment on his annual Statement of Financial Interest.

A different situation arises if the public official is appearing outside of his official capacity. A reading of several different statutes together is important to understand the difference. Public officials are required to list and identify each source of income in excess of \$1,000.00 or \$12,500.00 annually. Ark Code Ann. § 21-8-701(d)(1) and (2). The statutes read together indicate that public officials are free to earn income for outside occupations, but are required to report such income on the appropriate Statement of Financial Interest form.

Ark. Code Ann. § 21-8-701(d)(7) allows for the receipt of gifts by public officials. Ark. Code Ann. § 21-8-402(5)(A) defines "gift" as the payment of anything of value unless consideration of equal or greater value has been given. Ark. Code Ann. § 21-8-402(5)(B) specifically excludes from the definition of "gift" the giving or receiving of food, lodging or travel when the official appears in his official capacity. Therefore, when the official appears in his "unofficial" capacity, the giving or receiving of food, lodging or travel would have to be reported on the official's annual Statement of Financial Interest as a "gift," if more than \$100.00 in value. Since the reporting of such items is anticipated by the law, it is lawful for officials to receive income from sources, other than government job, for performance of services not related to the job.

Therefore, construing these laws together, public officials may receive payment for outside activity. Such payments must be reported on the official's Statement of Financial Interest, either as "income" if the amount sufficiently qualifies under § 701(d)(1) or (2), as a "gift" if it qualifies under § 701(5) or as a "nongovernmental source of payment" if the payment is for reimbursement of expenses and the appearance bears a relationship to the official's position.

**ISSUE No. 2:** *Is there a way to define when a public appearance is an outgrowth of public office or "unofficial"?*

**BRIEF RESPONSE:** Yes. A public official is acting or appearing in his official capacity when his appearance would not be compelled but for his official position. As noted below, reaching this determination involves a review of several factors associated with the particular official and particular position and should be viewed on a case by case basis.

**DISCUSSION:** A public official is acting in his official capacity when he is asked to participate because of his official status. Thus the test for determining whether a public appearance for a private concern is an outgrowth of the person's official capacity is whether the person would not have been asked to appear or speak on a private matter but for his official public employee's status or position. The burden rests upon the public official to insure that, before he accepts an honorarium, his appearance has been requested for reasons other than his official position.

This is essentially a question of fact, which should be determined on a case by case basis. There are a variety of factors in gauging whether the official's appearance is an outgrowth of his official position. Recognition of the public official as an expert in a particular field would be one factor in analyzing whether the fee was a prohibited honorarium. Certainly, if the field is one completely unrelated to the official's governmental job, it would tend to show that he has been asked to appear or speak unofficially and therefore a fee would not be prohibited. On the other hand, if the subject of the appearance is the person's job then it would be appear to be one generated as an outgrowth of his official capacity.

Another factor might be to ascertain if the appearance occurred during normal working hours and whether the official was on leave. Who provides the transportation of the official is a factor and whether the official seeks government reimbursement for expenses related to the appearance. Certainly there are other factors (the topic of the speech, the name of the conference, the types of attendees, etc.) which also may come into play in deciding whether the appearance is "in the person's official capacity."

However, it is not crucial where the speech is given or whether the audience has any direct interest in the official duties of the public official. The speech may be given out of state or to a disinterested audience. If the official would not have been asked to speak but for his official status, the appearance is an "official" one and a payment for appearance is inappropriate.

**ISSUE No. 3:** *Is the source of each fee paid for a public appearance required to be specifically disclosed on a public official's annual statement of financial interest?*

**BRIEF RESPONSE:** Yes. The source of income and/or the amount of the fees shall be disclosed if the amount sufficiently meets the minimum limits for "income" or "gift" or, in the case of reimbursement for expenses, if the amount paid sufficiently meets the minimum reporting levels required for "nongovernmental expenses for food, lodging or travel."

**DISCUSSION:** As discussed above, an official may receive speaking fees if appearing outside his official capacity and such fees may be sufficient as to constitute income for disclosure purposes. If a particular "speaking fee" is for more than \$1,000.00 for the public official, the fee should be listed as income and reported on the applicable section of the Statement of Financial Interest. The official should also provide a brief description of the nature of services performed for which income was received. The law does not require disclosure of individual items of income which constitute a portion of the gross income of the business from which the official derives income.

For instance, if a particular group/employer paid an official for more than one speech, the total income could be listed. The general rule is that the \$1,000.00 trigger requirement for speaking applies to each entity which pays the official to appear or speak.

Similarly, for all other money received at any time by a public official in excess of \$100 which is not related to a person's official capacity, if not otherwise reported on the Statement of

Financial Interest as income, it should be reported as a gift, unless an exception applies. Thus, if an official receives a fee of \$200 for speaking to a particular group, and it is the only fee received from this group, the money should be listed as a "gift" and described properly on the annual Statement of Financial Interest. This example applies to public officials who rarely receive honoraria, as opposed to someone who regularly receives speaking fees from outside groups.

Finally, if a person is appearing in his official capacity and receives more than \$150 in food, lodging, etc. from a nongovernmental source, then it has to be reported in section 9 of the Statement of Financial Interest.

**ISSUE No. 4:** *(a) Is it sufficient for a public official who receives speaking and appearance fees to report that income in total amounts received from a family company or a nonprofit, tax-exempt organization that the official and associates control? (b) Is the official required to report the individual payments made to the official's family company or the nonprofit, tax-exempt organization that the official and associates control?*

**BRIEF RESPONSE:** (a) Yes, if the public official and his or her spouse derive income from a family company or a nonprofit, tax-exempt organization that the public official and associates control, the annual Statement of Financial Interest does not require disclosure of individual items of income (i.e., speaking and appearance fees) that constitute a portion of the gross income of the family business or the nonprofit, tax-exempt organization.

(b) No, a public official does not have to report the individual payments made to a family company or a nonprofit, tax-exempt organization that the public official and associates control.

**DISCUSSION:** The answers to these questions are found within the statutory language of Ark. Code Ann. § 21-8-701(d)(2)(A) and (B). These sections prescribe what sources of income must be disclosed by public officials on their annual Statement of Financial Interest and which are set out below:

(2)(A) Identification of each employer and of each other source of income amounting to more than one thousand dollars (\$1,000) annually received by the person or his or her spouse *in their own names, or by any other person for the use or benefit of the public servant or his or her spouse*, and a brief description of the nature of the services for which the compensation was received, *except that this subdivision (d)(2) shall not be construed to require the disclosure of individual items of income that constitute a portion of the gross income of the business or profession from which the public servant or his or her spouse derives income; and*

(B) In addition thereto, identification of each source of income as described above of more than twelve thousand five hundred dollars (\$12,500), *except that this shall not be construed to required the disclosure of individual items of income that constitute a portion of the gross income of the business or profession from which the public servant or his or her spouse derives income;* (emphasis added)

Ark. Code Ann. § 21-8-701(d)(2)(A) specifically does not require a public official to disclose individual items of income that constitute a portion of the gross income of the business or profession from which the public servant or his or her spouse derives income. The language contained on the actual Statement of Financial Interest is illustrative. Section 3 of the form entitled "Sources of Income" contains the following language:

(You are not required to disclose the individual items of income that constitute a portion of the gross income of the business or profession from which you or your spouse derives income.) For example: accountants, attorneys, farmers, contractors, etc. do not have to list their individual clients.

Just as farmer who is paid by his farm corporation does not have to disclose to whom his crops are sold, nor does a professional speaker have to disclose the individual speaking and appearance fees paid to a family company or nonprofit, tax-exempt organization for which he or she works.

The answer to this inquiry is different if the public official receives the speaking or appearance fees in his/her own name, or from any other person<sup>1</sup> for the use or benefit of the public servant or his or her spouse. When speaking or appearance fees are paid directly to the public official or to another person for the use and benefit of the public servant, such must be disclosed as individual sources of income in Section 3 of the annual Statement of Financial Interest in accordance with Ark. Code Ann. § 21-8-701(d)(2)(A) and (B).

**ISSUE No. 5:** *Are independent committees that make independent expenditures on federal election campaigns in Arkansas required now to report their contributors? Were they required to do so in 1996?*

**BRIEF RESPONSE:** This request is outside the jurisdiction of the Arkansas Ethics Commission.

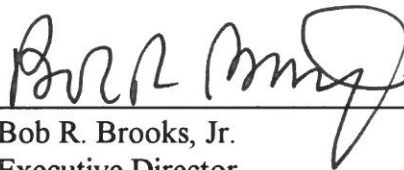
**DISCUSSION:** To the extent that prior to the passage of Initiated Act One independent

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<sup>1</sup> Ark. Code Ann. § 21-8-402(13) defines "person" to mean "a business, individual, corporation, union, association, firm, partnership, committee, club, or other organization or group of persons."

expenditures were required to be reported by federal campaigns, federal law governs. For interpretations of applicable federal law, the Commission refers the requestor to the Federal Election Commission in Washington, D.C., which handles the registration and reporting requirements for independent expenditures in federal elections.

Initiated Act One of 1996 is the first Arkansas law specifically concerning independent expenditures. Prior to the enactment of Initiated Act One, there was no Arkansas requirement for independent expenditure committees to report their contributions. Therefore, an independent expenditure made with respect to a federal election would not fall under the guidelines of Arkansas law, but rather under federal law. This Commission has no authority to issue advisory opinions concerning the campaign finance reporting requirements of independent expenditure committees as they relate to federal elections and declines to do so.

A handwritten signature in black ink, appearing to read "Bob R. Brooks, Jr.", is written over a horizontal line.

Bob R. Brooks, Jr.  
Executive Director