

JUDGE'S RECEIPT OF COMPENSATION FOR A PODCAST

Opinion No. 300 (2016)

QUESTION: Can a judge accept compensation for a podcast under the following circumstances?

The podcast is on an academic topic covering Texas history and culture, rather than on a judicial topic, and the judge does not primarily feature his judicial position, although the podcast title will include his last name and the fact that he is a judge may be known during certain broadcasts. The podcast would be published and advertised on iTunes, other podcasting platforms and social media, but the advertising would not feature the author's judicial office and would not be solicited from third parties or paid for by the judge. People also would not pay to access the content. However, the website might provide for listeners to sign up to pay some amount for the podcast at the listener's option. Payment, if any, for the podcast would be transacted through a third-party online funding platform and would be at the option of the listeners. A solicitation would be part of each episode and would be more informative than solicitous, stating, for example, (1) "To support the show go to [site]," or (2) "This podcast is made available to the public free of charge. Voluntary contributions to support this podcast may be made at [site] but are not a condition of continued receipt of the material." The payment site would make available payment options in a reasonable amount that would not exceed what a person who is not a judge would receive for the same activity.

ANSWER: Canon 4(B) (1) of the Code provides that a judge may "speak, write, lecture, teach and participate in extra-judicial activities concerning the law . . . and non-legal subjects, subject to the requirements of this Code." Canon 4(D)(1) states in relevant part, "A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves." Canon 4(I) states that "[a] judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety." And Canon 4(I)(1)(a) requires that compensation and reimbursement

received “not exceed a reasonable amount” and “not exceed what a person who is not a judge would receive for the same activity.”

Although we are not bound by the ethical opinions of other states, we observe that several other jurisdictions have addressed the issue of a judge’s receipt of compensation for a publication authored by the judge and have determined that the judge is allowed to receive compensation for a publication within canonical guidelines. *See, e.g., U.S. Advisory Opinion 114* (2014) (judge may mention judicial position, length of service, and court on book jacket without embellishment and in context of other biographical information, but information should not be used in other advertising material and should not use title “judge” in advertisements; judge may appear as author at free events in book stores and other venues and may sign and sell books but there should be no suggestion that attendees are required to purchase books or that participants may enjoy special influence over judge; judge may participate in media interviews to discuss books written by judge in dignified manner, ensuring that discussion and any mention of judicial position do not appear to exploit or detract from office; judge should undertake reasonable efforts to guard against subsequent use of review or foreword in promotional materials that may tend to exploit prestige of office or violate ethical guidelines); *Ohio Advisory Opinion 89-21* (judge may write article on legal topic for publication in newspapers and receive compensation provided source of payment does not give appearance of influencing judge and amount is reasonable and does not exceed compensation offered non-judge). Opinion 114 makes it clear that an author who is a judge may solicit payment for a book in the form of a book signing so long as there is no suggestion that attendees are required to purchase books or that participants may enjoy special influence over the judge.

We believe the same principles apply here, with additional safeguards to account for the special nature of podcasts. Unlike books, most podcasts are works in progress in that the podcaster usually releases one podcast every couple of weeks. Typically, if the podcaster is seeking compensation or support, the podcaster states during the podcast, “If you want to see this podcast continue, please go to our website at _____ and make a voluntary contribution,” or something to that effect. With each episode, the podcaster continues to make solicitations. In those circumstances, the solicitation of contributions by the simple statement “To support the show go to [site]” may give the appearance that that there is no limit on the amount of the donation that may be made and that listeners are supporting continuation of the broadcast (and the publisher) through their donations or seeking to influence the judge through their contributions. Likewise, continuously requesting contributions to continue the broadcast may run afoul of the admonition to authors in U.S.

Advisory Opinion 114 (2014) that “a judge should not urge attendees to buy the book.” Thus, any solicitation which implies that attendees are supporting the continuation of the broadcast by their contributions and must or should pay money to continue to access the material, as in example (1) above, should be avoided to avoid giving the appearance of impropriety. The source of payment and the reasonableness of the payment for the type of podcast are likewise principal concerns in avoiding the appearance of impropriety. Therefore, the podcaster should set reasonable limits on contributions consistent with other podcasts of the same type and should take care to avoid the appearance that donors are in a position to influence the judge, as in example (2).

We conclude that Canon 4 of the Texas Canons of Judicial Ethics does not prohibit a judge from receiving voluntary contributions to support the costs associated with production and research in response to solicitations in the podcast, given the limited way in which the judge’s judicial status would be used, so long as the solicitation is non-coercive and makes clear that contributions are welcome but entirely voluntary and are neither an express nor an implied condition of continuing to receive the broadcast, and so long as compensation is reasonable for the type of publication, no more than a similarly situated podcaster who is not a judge would receive, and does not create the appearance of influencing the judge or otherwise give the appearance of impropriety.