S T A T E O F T E N N E S S E E
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Opinion No. 02-004

Elected Judge Receiving Honorarium

QUESTION

Under Tenn. Code Ann. § 2-10-116, a public official is prohibited from accepting an honorarium in his or her capacity as a public official. Canon 4.B of the Code of Judicial Conduct contained in Supreme Court Rule 10 provides that a judge may speak and participate in extra-judicial activities concerning the law, the legal system, the administration of justice, and non-legal subjects. Canon 4.H provides that a judge may receive compensation and reimbursement of expenses for extra-judicial activities permitted by the Code of Judicial Conduct, 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. Can the statute and the Code of Judicial Conduct be reconciled to permit an elected general sessions judge to accept honoraria for lecturing about the creation and history of his specialized court and assisting other counties and cities in establishing such courts?

OPINION

No. The statute supersedes the rule.

ANALYSIS

This opinion concerns whether a general sessions judge may receive an honorarium for lecturing about the creation and history of his specialized court and assisting other counties and cities in establishing such courts. Tenn. Code Ann. § 2-10-116 provides:

> (a) The acceptance of an honorarium by a public official in such person's capacity as a public official is prohibited. "Honorarium" means a payment of money or any thing of value for an appearance, speech or article, but does not include actual and necessary travel expenses, meals and lodging associated with such appearance, speech or article.
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> (b) Acceptance of an honorarium for an appearance, speech or article by a public official in such person's capacity as a private business person,

> professional or tradesperson is not prohibited.

This statute was passed in 1992. Under this statutory scheme, "public office" means any state public office or local public office filled by the voters. Tenn. Code Ann. § 2-10-102(11). The statute defines the term "local public office" as follows:

> "Local public office" means any state, county, municipal, school or other district or precinct office or position, *including judges and chancellors*, that is filled by the voters, with the exception that "local public office" does not include any state public office as defined in subdivision (11)(B);

Tenn. Code Ann. § 2-10-102(11)(A) (emphasis added). Subdivision (11)(B) provides:

> "State public office" means the offices of governor, member of the general assembly, delegate to a Tennessee constitutional convention, district attorney general, district public defender, judge of the court of criminal appeals, judge of the court of appeals and supreme court judge.

Tenn. Code Ann § 2-10-102(11)(B). Knowingly performing any act prohibited by Title 2 is a Class C misdemeanor. Tenn. Code Ann. § 2-19-102. Thus, under Tenn. Code Ann. § 2-10-116, a popularly elected judge — including a general sessions judge — is prohibited from accepting an honorarium for an appearance, speech, or article made in his or her capacity as a public official. A court would probably conclude that where an individual uses his or her judicial title in public appearances and makes a speech or provides information or guidance relative to the organization of his or her court, he or she is acting as a public official.

The request points out, however, that Tennessee Supreme Court Rule 10, the Code of Judicial Conduct, expressly authorizes judges to participate in certain extra-judicial activities and also expressly provides that judges may receive honoraria for such activities. The current rules of the Tennessee Supreme Court were adopted January 28, 1981. The relevant provisions of Rule 10 do not appear to have been amended since that time. Rule 10, Canon 4 expressly provides that a judge may "speak, write, lecture, teach, and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice, and non-legal subjects, subject to the requirements of this Code." Rule 10, Canon 4.B. Canon 4.C prohibits a judge from consulting with various government officials except in connection with matters concerning the law, the legal system, or the administration of justice. Canon 4.H provides:

> (1) Compensation and Reimbursement. 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.

> (a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.
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> (b) Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.
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> (2) Public Reports. A judge shall report the date, place, the nature of any activity for which the judge received compensation, the name of the payor, and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves and in the Administrative Office of the Court.

The question, then, is whether the statute prohibiting any elected official from accepting honoraria can be enforced against elected judges, even though Supreme Court rules appear to allow the practice. The statute was evidently enacted several years after the Supreme Court adopted Rule 10. In addition, Rule 10 generally requires a judge to respect and comply with the law. Rule 10, Canon 2.A. As used in Rule 10, "law" includes court rules as well as statutes, constitutional provisions, and decisional law. Rule 10, Terminology. It is therefore not entirely clear that the two provisions really conflict, or whether the rules incorporate and, by their own terms, are amended by later statutes. Under this reasoning, the statute prohibiting elected judges from accepting honoraria simply supersedes Rule 10, Canon 4.H to the extent the rule is inconsistent with the statute.

Even if the rule and the statute conflict, however, we think the statute may constitutionally be enforced against elected judges. Article 2, Section 1 of the Tennessee Constitution establishes the legislative, executive and judicial departments of government. Article 2, Section 2 prohibits the members of one department from exercising the powers belonging to either of the others. The Constitution does not define in express terms what are legislative, executive, or judicial powers, but the Tennessee Supreme Court has said that the legislative power is to make, order, and repeal laws, the executive power is to administer and enforce laws, and the judicial power is to interpret and apply laws. *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975); *Richardson v. Young*, 122 Tenn. 471, 493, 125 S.W. 664 (1909). Thus, "[a] legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of government." *Underwood*, 529 S.W.2d at 47 (statute permitting one who has successfully defended a criminal charge to have all public records of the case expunged upon filing a petition is not a violation of the separation of powers doctrine). The Tennessee Supreme Court has previously recognized that areas exist in which both

the legislative and judicial departments have an interest. *See, e.g., Petition for Rule of Court Activating, Integrating and Unifying the State Bar of Tennessee*, 199 Tenn. 78, 282 S.W.2d 782 (1955) (both the legislative and judicial departments have an interest in prescribing the qualifications of attorneys; the legislature, under its police powers, could prescribe reasonable conditions and qualifications to which the Supreme Court could add). Similarly, this Office has concluded that the General Assembly may constitutionally regulate campaign finances of candidates in judicial elections because the conduct of judicial elections is an area in which both the legislative and judicial departments have an interest. Op. Tenn. Atty. Gen. 96-021 (February 16, 1996).

We have found no case either in Tennessee or in any other jurisdiction that directly addresses this issue. Courts have found that a state supreme court may, by rule, impose higher standards on judges than those set by the legislature. *Collins v. Godfrey*, 324 Mass. 574, 87 N.E.2d 838 (1949) (the Massachusetts Supreme Court could validly prohibit a special justice of a district court from practicing as an attorney on the criminal side of any court, even though no statute prohibited the practice). We have found no authority, however, that a court may, by rule, exempt judges from a restriction imposed on all elected officials. We think the General Assembly may constitutionally prohibit all elected officials, including judges, from accepting honoraria for any activity performed in that individual's official capacity. This measure is a legitimate exercise of the legislature's police powers in preserving the integrity of, and public confidence in, all elected officials. Further, it does not interfere with the adjudicative functions of judges.

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