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OPINION COMMITTEE

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March 9, 2005

FILE # ML-44156-05

The Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711

I.D # 044156-05

RQ-0324-GA

RE: Whether an elected official may accept an honorarium in an amount greater than fifty dollars for completion of its presidency from an association of elected officials, when such service would not have been requested but for the public servant's official position.

Whether the elected officials association is prohibited from offering an honorarium in excess of fifty dollars to an outgoing president when such honorarium is over and above the reimbursed expenses.

FACTS:

Both the Kerr County District Clerk and County Clerk were on the Board of Directors for the Texas Association of District and County Clerks. They discussed with me that each year the Texas Association of District and County Clerks selects by ballot the officers for the upcoming year. The association is solely comprised of elected officials. Historically, each year the association has given the outgoing president an honorarium of five thousand dollars. The five thousand dollars was line item budgeted under "gifts and awards". There is also a question of whether or not the association has issued supporting tax documents. The president's expenses incurred during office are reimbursed by the association at the time of such expense. The association is primarily funded from public monies.

AUTHORITY:

Texas Penal Code Section 36.07 Acceptance of Honorarium states:

(a) A public servant commits an offense if the public servant solicits, accepts, or agrees to accept an honorarium in consideration for services that the public servant would not have requested to provide but for the public servant's official position or duties.

(b) This section does not prohibit a public servant from accepting transportation and lodging expenses in connection with a conference or similar event in which the public servant renders services, such as addressing an audience or engaging in a seminar, to the extent those services are more than merely perfunctory, or from accepting meals in connection with such an event.

Ethics Advisory Opinion No. 125 establishes the test as: whether the public servant would have been asked to speak but for his official position. Ethics Advisory Opinion 173, 1993 includes

Ethics Advisory Opinions Nos. 148, 125(1993), 97, 19, 17(1992) in clearly stating the location and audience are not relevant to the qualification of an honorarium. Opinion No. 173 concludes that "Texas law prohibits a public servant from accepting an honorarium for services that the public servant would not have been asked to perform but for his or her official position or duties. The location of a speech, the nature of an audience, or the speaker's expertise may be factors to consider in determining whether an honorarium is a prohibited one, but if the public servant would not have been asked to speak but for his official status, a payment for speaking would be a prohibited honorarium."

Texas Penal Code Sections 36.09 addresses offering gifts to public servants. Section 36.09 states in subsection (a) A person commits an offense if he offers, confers, or agrees to confer any benefit on a public servant that he knows the public servant is prohibited by law from accepting. Section 36.10 addresses "non-applicable gifts" but does not appear to apply to the above fact situation because the honorarium is not used "solely to defray the expenses".

Texas Penal Code Section 36.10 states the exceptions to the above statutes. It is my opinion that none apply.

ARGUMENT:

It is my interpretation that the honorarium is directly related to the past-president's elected position. It is paid in addition to the reimbursement of expenses incurred. The association is composed of elected officials and as such the recipient would not receive the honorarium but for the public servant's official position or duties and knowledge gained from such. The acceptance of the honorarium is a violation of the Penal Statute.

It is my opinion that it is also illegal for the Elected Officials Association to offer the honorarium to the retiring president. Although this honorarium is not exactly like those offered for a speech, the test remains the same: whether the elected official would have qualified for the honorarium but for her official position or duties. Penal Code Section 36.10 addresses exceptions to Sections 36.08 and 36.09. It is my belief that none of the exceptions apply to our facts and the offering of the honorarium violates the statute.



Rex Emerson
Kerr County Attorney