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CRIMES AND OFFENSES Offenses Against Public Administration: Prohibit Receipt of Remuneration by Officials in Criminal Cases for Publishing or Speaking on the Case Until Completion of Direct Appeal

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CRIMES AND OFFENSES

Offenses Against Public Administration: Prohibit Receipt of Remuneration by Officials in Criminal Cases for Publishing or Speaking on the Case Until Completion of Direct Appeal

CODE SECTION:	O.C.G.A. § 16-10-98 (new)
BILL NUMBER:	HB 105
ACT NUMBER:	411
GEORGIA LAWS:	1997 Ga. Laws 1310
SUMMARY:	The Act prohibits a judge, prosecuting attorney, investigating officer, or law enforcement officer who is a witness in a criminal case from receiving or agreeing to receive payment for publishing a book or article, making a public appearance, or participating in any commercial activity concerning a case on which they are involved from the time between indictment and completion of direct appeal.
EFFECTIVE DATE:	July 1, 1997

History

Two police officers who were the lead investigators in the murder of Sara Tokars were fired after it was discovered that they had signed an agreement to help make a movie about the case.[1] The official who advised the officers that such a deal would be legal resigned.[2] Many believed the investigation could be compromised because the agreement would be more lucrative for the officers if the victim's husband, prominent Atlanta attorney Fred Tokars, was arrested for the crime.[3] After Mr. Tokars was arrested, his defense attorneys were able to use the officers' movie deal to discredit the officers' testimony at trial.[4]

Legislators were concerned that when prosecutors, investigators, and judges could have a financial stake in the outcome of an investigation, their decisionmaking would be compromised.[5] Legislators intended to

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1. *See* Doug Payne, *Cobb Official Resigns Over Tokars Case: Gave Detectives Permission to Sign Movie Contract*, ATLANTA CONST., Apr. 6, 1994, at D3.
2. *See id.*
3. *See* Don Plummer, *Rower's Lawyers to Attack Film Deals*, ATLANTA CONST., May 6, 1994, at B5 [hereinafter Plummer, *Film Deals*]; Don Plummer, *The Tokars Trial: Cobb Police Guilty of Stupidity, Not Illegality, Boss Says*, ATLANTA CONST., Mar. 16, 1994, at B8.
4. *See* Plummer, *Film Deals, supra* note 3.
5. *See* Telephone Interview with Rep. Vernon Jones, House District No. 71 (Apr. 24, 1997) [hereinafter Jones Interview].

prevent such potential conflicts with this Act.[6] In addition, in the wake of the Tokars trial and excessive publicity surrounding the prosecution of O.J. Simpson, legislators believed that such extensive publicity could result in a conviction reversal for denying a defendant's right to a fair trial.[7]

HB 105

Introduction

As introduced, HB 105 prohibited judges and prosecutors from accepting or agreeing to accept remuneration for a book, article, public appearance, or any service relating to any criminal prosecution in which he or his office was then involved as a judge or prosecuting attorney while the case was active or on appeal.[8] Legislators believed the bill was too broad in the limitations it placed on free speech and at the same time too narrow regarding officials who would be covered.[9] The House Judiciary Committee offered a substitute to the bill that focused on the limitations, making it unlawful for officials to accept remuneration from the time of indictment through completion of direct appeal for the specific activities of: (1) publishing a book or article concerning the case; (2) making a public appearance concerning the case; or (3) participating in any commercial activity concerning the case.[10]

In addition, to answer concerns that judges and prosecutors would not be allowed to accept travel and lodging reimbursements for speaking at Bar conferences and other professional functions or that prosecutors would be more hampered than defense attorneys in appearing on legitimate news programs, the Committee inserted, "[f]or purposes of this Code section, remuneration shall not be deemed to include customary and ordinary salary and benefits of the individual or customary and ordinary expenses paid for public appearances."[11]

The Committee also moved Code section 16-10-98 from title 15, relating to general provisions of the courts, to title 16, regarding offenses related to judicial and other proceedings.[12] This change was made because the Code section is a criminal statute and therefore falls

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6. *See id.*

7. *See* Telephone Interview with Rep. Greg Hecht, House District No. 97 (Apr. 23, 1997) [hereinafter Hecht Interview].

8. HB 105, as introduced, 1997 Ga. Gen. Assem.

9. *See* Telephone Interview with Rep. Roy Barnes, House District No. 33 (Apr. 23, 1997) [hereinafter Barnes Interview].

10. HB 105 (HCS), 1997 Ga. Gen. Assem.

11. *Id.*

12. *Compare* HB 105, as introduced, 1997 Ga. Gen. Assem., *with* HB 105 (HCS), 1997 Ga. Gen. Assem.

more accurately under crimes and offenses.[13] Finally, the Committee added language specifying that violation of this law would be a misdemeanor and expanded the officials who were included under the new law.[14] Under the Committee substitute, in addition to prosecutors and judges, the law would cover investigating officers and law enforcement officers who were witnesses in the case.[15]

A final change made on the House floor added that it is not only unlawful to receive remuneration during the course of the trial and appeal, but it is also unlawful to reach an agreement during that time that would provide later remuneration.[16] The bill was approved unanimously in the House and the Senate.[17]

Why is the Law Needed?

At least one committee member said that Georgia's Canons of Ethics[18] may already suggest that lawyers should not accept such fees, but said it is still important to make it "abundantly clear" that participating in such a venture is beyond the bounds of a responsible attorney.[19] Directory Rule 7-107, regarding trial publicity, states:

> (A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration: (1) information contained in a public record; (2) that the investigation is in progress; (3) the general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim; (4) a request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto; (5) a warning to the public of any dangers.
> (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of the complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the

13. *See* Telephone Interview with Rep. Jim Martin, House District No. 47 (June 13, 1997) [hereinafter Martin Interview].
14. *See id.*
15. *See id.*; HB 105 (HCS), 1997 Ga. Gen. Assem.
16. HB 105 (CSFA), 1997 Ga. Gen. Assem.
17. *See* Final Composite Status Sheet, Mar. 28, 1997.
18. *See* STATE BAR OF GEORGIA HANDBOOK, [hereinafter HANDBOOK], Part III: Canons of Ethics.
19. *See* Telephone Interview with Rep. Robert Reichert, House District No. 126 (Apr. 24, 1997) [hereinafter Reichert Interview].

> commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to: (1) the character, reputation, or prior criminal record . . . of the accused; (2) the possibility of a plea of guilty to the offense charged or a lesser offense; (3) the existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement; (4) the performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests; (5) the identity, testimony, or credibility of a prospective witness; (6) any opinion as to the guilt or innocence of the accused, the evidence or the merits of the case.[20]

Directory Rule 7-107(C)[21] discusses what information a lawyer may release and Directory Rule 7-107(E)[22] extends the limits on what a lawyer may say publicly through sentencing of the defendant.[23]

While the bill was under consideration, Gwinnett District Attorney Daniel J. Porter said these rules would probably lead to a lawyer being disbarred for selling a story during a trial.[24] Although the rules appear to make it a violation to actually publish a book or article on the case containing any information beyond the public record, lawyers are not subject to discipline for violating a Directory Rule.[25] The Canons of Ethics serve as "a general guide,"[26] and lawyers are subject to discipline only if they violate a Standard, none of which cover the activities prohibited by the Act.[27] Even if the Canons of Ethics apply to such situations, they do not appear to prohibit a prosecuting attorney or judge from selling the rights to the story to be published at the completion of the trial or sentencing.[28] The Directory Rules would not apply to police officers working on the case, as in the situation of the two officers in the Tokars case.[29]

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20. HANDBOOK, *supra* note 18, at 37-H.
21. *Id.*
22. *Id.*
23. *See id.*
24. *See* Sandra Eckstein, *DAs Say Profit-Ban Bill Not Needed: Disbarment Called Adequate Deterrent*, ATLANTA J. & CONST., Feb. 6, 1997, at G2.
25. *See* HANDBOOK, *supra* note 18, at 24-H.
26. *Id.*
27. *Compare id.* at Part IV: Discipline, 40-H-46H, *with* O.C.G.A. § 16-10-98 (Supp. 1997).
28. *See* HANDBOOK, *supra* note 18.
29. *Id.*

In spite of any prohibition the Directory Rules may impose, the General Assembly believed the problems in the past have made it clear that there is an issue to be addressed.[30] The General Assembly has no control over State Bar rules and cannot rely on other bodies to settle public policy questions.[31]

First Amendment Considerations

Does Limiting Financial Incentive Limit Free Speech?

Courts have struck down numerous attempts to limit individuals from profiting from their speech in recent years.[32] In *Simon & Schuster, Inc. v. New York State Crime Victims Board*[33] the Supreme Court held that New York's "Son of Sam" law, written to prevent criminals from profiting from their crimes, violated the First Amendment.[34] In *Simon & Schuster*, the Court stated that the Son of Sam law, which required that the income an accused or convicted criminal derived from works describing his or her crime be deposited in an escrow account to compensate the victims, did not meet strict scrutiny and was presumptively invalid under the First Amendment.[35] "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."[36] The Court found that the Son of Sam law was content-based because "[i]t singles out income derived from expressive activity for a burden the State places on no other income and it is directed only at works with a specified content."[37]

Although the Court agreed that the state had a compelling interest in preventing criminals from profiting from their crimes and in compensating the victims, the Court stated that those victims were no more entitled to the proceeds of a publishing contract than they were any other assets the criminal may have amassed.[38] "Thus, even if the State can be said to have an interest in classifying a criminal's assets in this manner, that interest is hardly compelling."[39]

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30. *See* Martin Interview, *supra* note 13.
31. *See generally id.*
32. *See* United States v. National Treasury Employees Union, 513 U.S. 454 (1995); Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105 (1991); California First Amendment Coalition v. Lundgren, 1995 WL 482066 (N.D. Cal. Aug. 10, 1995).
33. 502 U.S. 105 (1991).
34. *See id.* at 116.
35. *Id.*
36. *Id.* at 115.
37. *Id.* at 116.
38. *See id.* at 119.
39. *Id.* at 120.

The Court also stated that the law was over-inclusive, rather than narrowly tailored to meet the state's interest.[40] Because the law covered income of any author who admitted to committing a crime in his or her work, it would have covered such works as *Civil Disobedience* by Henry David Thoreau and *The Autobiography of Malcolm X*.[41] Soon after the law was struck down, New York passed a new Son of Sam law that did away with the escrow account, but allowed the Crime Victims Board to help victims pursue all criminal proceeds for victims, including those derived from works describing the crimes, under traditional tort law.[42] That law has not yet been tested in the courts.[43]

In a more recent decision, the Supreme Court struck down part of a law that prohibited members of Congress, federal officers, or other government employees from accepting honoraria for articles or speaking engagements because the law violated federal employees' right to free speech.[44] The disputed law that *United States v. National Treasury Employees Union*[45] addressed states:

> [A] payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed.[46]

This law did not include any payments for artistic works or teaching courses.[47]

The Court based its analysis on *Pickering v. Board of Education of Township High School District*[48] in which the Court held that public employees' First Amendment rights must be balanced against the interests of the state as employer.[49] In balancing those interests, the

40. *Id.* at 121.
41. *See id.*
42. *See* N.Y. EXECUTIVE LAW § 632-A (McKinney 1996).
43. *See id.*
44. *See* United States v. National Treasury Employees Union, 513 U.S. 454 (1995).
45. *Id.*
46. 5 U.S.C. App. § 505(3) (1988 & Supp. V).
47. *See National Treasury*, 513 U.S. at 459.
48. 391 U.S. 563 (1968).
49. *Id.*

Court in *National Treasury* found that the government had a heavy burden to carry because the restriction, although prohibiting only payment, not actual speech, affected so many individuals[50] and large quantities of speech.[51] The government's interest in this law was to prevent federal officers from misusing or appearing to misuse the power of their offices by being paid for unofficial writing and speaking engagements.[52] The Court found that:

> This interest is undeniably powerful, but the Government cites no evidence of misconduct related to honoraria in the vast rank and file of federal employees. . . . Instead of a concern about the "cumulative effect" of a widespread practice that Congress deemed to "menace the integrity and the competency of the service" . . . the Government relies here on limited evidence of actual or apparent impropriety by legislators and high-level executives, together with the purported administrative costs of avoiding or detecting lower-level employees' violations of established policies.[53]

Because there is a thin nexus between the stated purpose of the law and the law's actual effect, the Court said the Government could not meet its burden of showing a more compelling interest in restricting the speech of lower level employees than the employees had in profiting from their speech.[54] Because portions of the law relating to higher-ranking members of the administration and members of Congress were not challenged, the Court did not rule on them.[55]

In *California First Amendment Coalition v. Lungren*[56] the District Court for the Northern District of California rejected another law passed in the wake of the O.J. Simpson case. The law sought to prohibit witnesses of crimes from selling their stories until the case had reached final judgment, but the court found that the law was overbroad and because it was content-based, it must withstand strict scrutiny, which the law could not do.[57]

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50. *National Treasury*, 531 U.S. at 471 ("Like the Hatch Act, the honoraria ban affects hundreds of thousands of federal employees.").
51. *Id.* at 473 ("[O]ne can envision scant harm, or appearance of harm, resulting from the same employee's accepting pay to lecture on the Quaker religion or to write dance reviews.").
52. *See id.* at 455.
53. *See id.*
54. *See id.*
55. *See id.* at 464.
56. 1995 WL 482066 (N.D. Cal., Aug. 10, 1995).
57. *See id.*

Efforts to Limit Scope

Based on these cases, Code section 16-10-98 likely would be considered a content-based restriction[58] because it specifically limits payment on cases in which judges, prosecutors, and investigating officers are involved.[59] As such, it must withstand strict scrutiny, meaning it must be narrowly tailored to serve a compelling governmental interest.[60] In this case, the governmental interests are to "make sure the justice system proceed[s] in an orderly fashion,"[61] to ensure a fair trial and to ensure that public officials do not cash in on criminal proceedings before performing their duty to the public.[62]

The California law was broader than Code section 16-10-98 in two significant respects: first, Code section 16-10-98 only covers people who are on the public payroll rather than private citizens who may or may not be called as witnesses to any crime; second, it applies only through "direct appeal,"[63] rather than the more vague California statute's "final judgment."[64] But, as shown in *National Treasury* and *Pickering*, the fact that the Act covers only public employees is not in itself enough to overcome a First Amendment challenge.[65] Nor is the fact that it merely prohibits remuneration, not the speech itself, enough to overcome a First Amendment challenge.[66] The Court noted in *National Treasury*, "[p]ublishers compensate authors because compensation provides a significant incentive toward more expression. By denying respondents that incentive, the honoraria ban induces them to curtail their expression if they wish to continue working for the Government."[67]

If a First Amendment challenge is mounted and the Court applies *Pickering*, it will balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [Government], as an employer, in promoting the efficiency of the public services it performs through its employees."[68] A trial or criminal

58. *See* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 115 (1991).

59. O.C.G.A. § 16-10-98 (Supp. 1997).

60. *See Simon & Schuster*, 502 U.S. at 115.

61. Barnes Interview, *supra* note 9.

62. *See* Jones Interview, *supra* note 5.

63. O.C.G.A. § 16-10-98 (Supp. 1997).

64. *Compare id., with* California First Amendment Coalition v. Lundgren, 1995 WL 482066 (N.D. Cal., Aug. 10, 1995).

65. United States v. National Treasury Employees Union, 513 U.S. 454, 491 (1995) (Rehnquist, C.J., dissenting) (citing Pickering v. Board of Educ. of Township High Sch. Dist., 391 U.S. 563, 568 (1968)).

66. *See id.* at 454.

67. *Id.* at 469.

68. *Pickering*, 391 U.S. at 568.

investigation with enough public interest to draw offers of a book or movie deal would likely be deemed a matter of public interest, but it would be a matter directly relating to the performance of the duties of the participants. In *Pickering*, the plaintiff was dismissed from his teaching position after he wrote a letter to the editor criticizing the way the school board had handled proposals to raise new revenue for the schools.[69] This was at a time when a tax hike was pending, so the board found that the plaintiff's letter was "detrimental to the efficient operation and administration of the schools of the district."[70] While the Court found that the state's interest in the efficient operation of the schools was an important one, the plaintiff's right to free speech outweighed that interest.[71] And while that language sounds similar to the interest the state seeks to protect with this Act, the Court would also take into account deep involvement of the employee's activity in the speech, as opposed to a teacher's lack of involvement in a tax proposal. Whether the state's interest in the orderly administration of justice would outweigh a prosecutor, judge, or investigating officer's interest in selling his story, would likely be a close call.

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69. *Id.*
70. *Id.*
71. *See id.*