May 20, 2002

Dear Mayor:

You have the following question: Can the city attorney hold the position of chancery court judge?

The answer is probably no.

On January 13, 1998, I gave the same opinion to the Smithville City Attorney with respect to the question of whether he could also hold the office of general sessions judge. On July 27, 1998, the Tennessee Attorney General in TAG 98-131 came to the same conclusion. Since then Tennessee Attorney General's Opinion 99-156 has opined that the Wayne County attorney cannot be the Wayne County sessions court judge, and Tennessee Attorney General's Opinion 98-171 has opined that the sessions court judge for Coffee County cannot be the city court judge for the City of Manchester.

All those Tennessee Attorney General's Opinions are based, in part, on Article VI, ' 7,of the Tennessee Constitution, which provides that:

> The Judges of the Supreme or Inferior Courts, shall, at stated times receive a compensation for the services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office nor hold any *office of trust or profit* under this State or of the United States. [Emphasis is mine.]

I do not generally agree with the Tennessee Attorney General that the office of city attorney is an "office of trust or profit under this State..." within the meaning of Article VI, ' 7, of the Tennessee Constitution. In addition, there is no indication in your City Charter that the city attorney is even an officer. However, I believe that those Tennessee Attorney General's opinions are correct for the other reason they cite. It is also my opinion that under Rule 10, Cannon 4, of the Rules of the Tennessee Supreme Court, a person cannot be both a chancery court judge and a city attorney at the same time.

Article VI, ' 7

Your question involves the dual positions of the offices of city attorney and of chancery court judge. All of the above attorney general's opinions involve the dual positions of city or county attorney and the office of sessions court judge. However, that distinction is not significant because it has been held that the compensation provision of Article VI, ' 7, specifically applies to the judges of the circuit and chancery courts. [Colbert v. Bond, 110 Tenn. 370, 75 S.W. 1061 (1903).] There is no apparent reason that the prohibition against holding

other offices of trust or profit provision contained in Article VI, ' 7, would not apply to circuit and chancery court judges.

The above Tennessee Attorney General's opinions cite for support Frazier v. Elmore, 173 S.W.2d 563 (Tenn. 1943). There the judge of the Knox County General Sessions Court was inducted into the military during WWII. His office was temporarily filled under a state statute passed in 1943 that preserved the offices of various office holders inducted into the military, that provided for the temporary filling of such offices, and that gave the salaries of the office to the temporary office holders. The judge sued for his salary, arguing that under Article VI, Section 7, of the Tennessee Constitution, the salary of a judge of an Inferior Court could not be diminished during his term of office.

The Court rejected the judge's argument, reasoning that to accept it would put the judge in the untenable position of violating the same provision of the Tennessee Constitution. Not only did that provision prohibit the diminution of an Inferior Court judge's salary, it also declared that, "They [judges] shall not be allowed any fees or perquisites of office, *nor hold any office of trust or profit under this State or the United States*." [The Court's emphasis.]

The Court noted that the facts did not indicate whether the judge was in service as an officer or as an enlisted man. But it did not matter if the judge was an officer or "a private" in the military, concluded the Court:

> The bill does not disclose the precise character of the duties, the nature of the military service he is rending to "the United States," nor the compensation he is receiving, but however this may be, he is in the position of high "trust" and receives at least some financial compensation, some "profit." The term "office" in its context, must be given its broad meaning, so as to effectuate the apparent intent of the constitutional prohibition against a diversion or division of the time and labor, energies and abilities of judges of our courts, which might destroy or diminish their capacity to discharge the exacting duties of their responsible positions; and also to limit them to one source of compensation.... Whatever may be the post or station in the military service of the United States which complainant is occupying, he is in a place of trust and honor and is receiving compensation therefrom. And if not technically holding another "office," within the letter of the prohibition, he is certainly within its spirit. The letter killeth, the spirit maketh alive. [At 563, 566.]

In subsequent cases, it has been held that general sessions judges are county, not state, officers, but that Article VI, Section 7, of the Tennessee Constitution applies to them. In Durham v. Dismukes, 333 S.W.2d 935 (Tenn. 1960), it is said that:

> Because a Sessions Judge is subject to Article 6, Section 7 of the

> Constitution wherein his salary cannot be increased during his term does not make him a State officer--he is still a county officer. A county official is likewise subject to the mandates of the constitution. [At 937.]

The same thing is said in Franks v. State, 772 S.W.2d 428 (Tenn. 1989).

Presumably, then, the second, as well as the first, part of Article VI, Section 7, of the Tennessee Constitution applies to general sessions judges. Under Colbert, above, both the first and second parts of Article VI, ' 7, also apply to chancery court judges.

But those cases do not answer the question of whether a city attorney is an "officer" and the office of city attorney a "State" office within the meaning of Article VI, Section 7.

The Frazier Court painted the term "office" in extremely broad strokes:

> Webster defines "office" as an "assigned duty or function." Synonyms are post, appointment, situation, place, position; and "office commonly suggests a position of (especially public) trust or authority." Bouvier defines "'office' as a right to exercise a public function or employment, and to take the fees and emoluments belonging to it;" again, "a public charge or employment." 2 Bouv. Law Dict., Rawles Third Revision, p. 2401. The opinion of this Court in Jones, Purvis & Co. v. Hobbs, 63 Tenn. 113, at page 120, quotes Blackstone's definition of office as "a right to exercise a public or private employment, and to take the fees and emoluments thereto belonging." [At 563.]

The Court went on to point out that those whose duties it is to preserve the peace, without regard to rank, are commonly referred to as peace or law enforcement "officers."

The Courts have painted the same broad picture of the term "officer" in other cases. Indeed, it is easy to be an officer in Tennessee. In Sitton v. Fulton, 566 S.W.2d 995 (Tenn. Ct. App. 1978), it is said that:

> "Public Officer" has been defined as an incumbent of a public office; an individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law. 67 C.J.S. Officers, Sec. 2.
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> Also, as pointed out at 63 Am.Jur.2d, Public Offices and Employees, Sec. 10 "a public office embraces the idea of tenure, duration and continuity, and the duties connected therewith are generally continuing and permanent.''

The Director of Law of the Nashville-Davidson County Metropolitan Government was held to be an officer in that case.

In Gamblin v. Town of Bruceton, 803 S.W.2d 690 (Tenn. Ct. App. 1990), the city recorder was held to be an officer. There the recorder argued that he was an "employee," entitled to the protection of the town's personnel policies regarding termination. In rejecting that claim, the Court simply pointed to a provision of the charter under which the board of mayor and aldermen appointed the recorder and which prescribed his duties: "Section 3.04. Town recorder--appointment and duties. The board shall appoint a town recorder who shall have the following powers and duties as may be provided by ordinance not inconsistent with this Charter:..." On the meager ground, the Court concluded that:

> Plaintiff argues that he is an employee and therefore entitled to the benefit of the town's employee personnel policies established by ordinance. We cannot agree with this argument. The Bruceton Charter plainly provides for the appointment of the town recorder by the Board of Aldermen. In Sitton v. Fulton, 566 S.W.2d 887 (Tenn. App. 1978), this Court, quoting from 67 C.J.S. Officers, Section 2, said:
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> "Public officer" has been defined as an incumbent of a public office; an individual who has been appointed in a manner prescribed by law, and who has a designation of title given him by law, and who exercises the functions concerning the public assigned to him by law. 566 S.W.2d at 889. It is clear that Gamblin is a public officer and not an employee. [At 693.]

Many municipal charters in Tennessee clearly point to the city attorney as an officer. But there is not a word in your City Charter about the city attorney, let alone any words that prescribe his office and duties. For that reason, it is likely that your City Attorney is an employee rather than an officer.

It is questionable to me that a city attorney is a "State" officer within the meaning of Article VI, ' 7, of the Tennessee Constitution, notwithstanding the above Tennessee Attorney General's Opinions. There are no cases directly on that question, but the question of whether municipal officers are lucrative "State" officers under Article II, ' 26, of the Tennessee Constitution, has arisen several times. Article II, ' 26, provides that:

> No Judge of any Court of law or equity, Secretary of State, Attorney General, Register, Clerk of any court of Record, or person holding any office under authority of the United States, shall have a seat in the General Assembly; *nor shall any person in this State hold more than one lucrative office at the same time*....

Both county and municipal offices have been held not to be "State" offices within the

meaning of that provision. [Boswell v. Powell, 43 S.W.2d 495 (Tenn. 1931); Phillips v. West, 213 S.W.2d 3 (Tenn. 1948); Wallace v. Grubb, 289 S.W. 530 (Tenn. 1926).] A constable who held the office of deputy sheriff is an exception. [State ex rel. v. Slagle, 115 Tenn. 336 1905).] In Phillips, the Court said:

> The office of Superintendent of County Schools is a county office, while that of a State Senator is a State office. The question stated is, therefore, foreclosed by the decision of this Court in Boswell v. Powell, 163 Tenn. 445, 43 S.W.2d 495, wherein it is held:
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> "The constitutional provision above quoted is against any person holding more than one lucrative office 'in this state.' It has not been supposed in this jurisdiction that a municipal office was reached by the provision so as to render the tenure of such an office incompatible with the tenure of a State office." [At 6.]

It remains to be seen whether the Court would see things differently if the dual offices in question involved the office of a state or county judge and the office of city attorney, under Article VI, ' 7, but it seems to me that the argument that the latter is an office of trust under the "State" is a far stretch. Furthermore, it is an impossible stretch where, as in your City, the city attorney does not even appear to be an officer.

Incompatible Offices

The above Tennessee Attorney General's opinions opine that the offices of general sessions judges and the offices of city and county attorneys are incompatible offices. In my opinion, those conclusions are on the mark. Indeed, they are probably even more on the mark with respect to chancery court judges.

Rule 10, Cannon 4

Rules of the Tennessee Supreme Court, Rule 10, Cannon 4C(2), says that:

> A judge shall not accept appointment to a governmental committee or commission or *other governmental position* that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge may, however, represent a county, state or locality on ceremonial occasions or in connection with historical, educational, or cultural activities.

The Commentary on Section 4C(2) says that:

> *Section 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system, or administration of justice as authorized by Section 4C(3).* The

> appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

A city attorney is concerned with the issues of fact and policy in matters that involve his city, and those matters do not involve the improvement of the law, the legal system or the administration of justice; they involve the direct legal interest of his city.

Both Section 4C(2) and its Commentary suggest that a judge is prohibited from accepting any governmental position, except a position authorized by Section 4C(3), even if the judge is a part-time judge, and the governmental position is a part-time position. The policy considerations cited in the Commentary—"demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial"--appear to apply to the positions a judge is authorized to accept under 4C(3). Moreover, Section 4C(2) declares the limit on the representation of a state or local government: "on ceremonial occasions or in connection with historical, educational, or cultural activities." The prohibition on a judge functioning in a governmental office, except an office authorized under Section 4C(3), appears to be total, even if those policy considerations do not come into play in that office.

Section 4C(3) provides that:

> A judge may serve as an officer, director, trustee, or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice or an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

The Commentary to Section 4C(3) declares that, ASection 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system, or the administration of justice; see Section 4C(2). For that reason, Section 4C(3) offers no ground for a part-time general sessions judge to be even a part-time city attorney.

For all of the above reasons, it is my opinion that:

1. Under Article VI, ' 7, of the Tennessee Constitution "the office of city attorney is not an office of trust under this State...," and for that reason does not generally appear to prohibit a city attorney from serving as chancery court judge. Moreover, in the particular case of your City, the city attorney is not an officer of the city.

2. The office of chancery court judge and the office of city attorney are incompatible

offices.

3. Rule 10, Cannon 4, of the Rules of the Tennessee Supreme Court, appears to prohibit a city attorney from serving as a chancery court judge.

Sincerely,

Sidney D. Hemsley
Senior Law Consultant

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