

October 23, 2014

City of Woodbury
Mayor Harold J. Patrick
101 West Water Street
Woodbury, Tennessee 37190

VIA ELECTRONIC MAIL

Dear Mayor Patrick:

Thank your for your inquiry seeking an opinion on whether a general sessions judge in Cannon County may also serve as the Woodbury town attorney if so selected to serve. Your question was referred to MTAS Legal Consultant Elisha Hodge for review and response.

It is the opinion of Ms. Hodge that it does appear to be a conflict for the same person to serve as both the general sessions judge in Cannon County and Town attorney in Woodbury. Two Tennessee Attorney General opinions (#78-348 and #98-131) are attached that analyzed whether or not an individual serving as general sessions judge can also serve as the city attorney in one of the cities within the judicial district. In both opinions, the Tennessee Attorney General opined that the individual could not serve in both roles.

Following a review of the Woodbury charter and the cases and statutory provisions set out in the AG opinions, she has concluded that it does appear to be a conflict for the same person to serve as the both the general sessions judge in Cannon County and Town attorney in Woodbury.

Please let us know if you have any questions or require any additional assistance on this matter.

Very truly yours,



Jeffrey J. Broughton
Municipal Management Consultant

Cc: Elisha Hodge

Tenn. Op. Atty. Gen. No. 78-348, 1978 WL 27289 (Tenn.A.G.)

*1 Office of the Attorney

General

State of Tennessee

Opinion No. 78-348

September 22, 1978

The Honorable Stephen S. Bowden
City Attorney, City of Lewisburg
Lewisburg, Tennessee 37091

Dear Mr. Bowden:

In your letter of August 18, 1978, you request the opinion of this office concerning the following:

QUESTION

May an incumbent **City Attorney** hold that office and the office of **General Sessions**, Juvenile, and Probate **Judge** for Marshall County at the same time.

OPINION

It is the opinion of this office that a person may not hold the office of **City Attorney** and the office of **General Sessions**, Juvenile, and Probate **Judge** at the same time.

ANALYSIS

The office of **City Attorney** of Lewisburg is provided for in its Charter, Chapter 36, Private Acts of 1961, Article VI, § 2. As such it is an office of trust or profit in that the holder of the office has a 'right to exercise a public function or employment and to take the fees and emoluments belonging to it. [Frazier v. Elmore](#), 180 Tenn. 232, 173 S.W.2d 563, (1943). This specific principle was applied to and so held to the office of **General Sessions Judge** in the [Frazier v. Elmore](#), *supra* case.

[Article VI, § 7 of the Constitution of Tennessee](#) provides that

The **Judges** of the Supreme or Inferior Courts, shall at stated times, receive a compensation for their services,—[and] shall not . . . hold any other office of trust or profit under this State or the United States. (Emphasis Added).

In view of the provisions of [Article VI, § 7 of the Constitution of Tennessee](#) a **City Attorney** may not hold that position concurrent with the position of a **General Sessions, Juvenile, and Probate Judge**.

Sincerely,
K. R. Herrell
Assistant Attorney **General**

Tenn. Op. Atty. Gen. No. 78-348, 1978 WL 27289 (Tenn.A.G.)

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Tenn. Op. Atty. Gen. No. 98-131, 1998 WL 433733 (Tenn.A.G.)

Office of the Attorney
General
State of Tennessee

Opinion No. 98-131

July 27, 1998

Smithville **City Attorney** Serving as DeKalb County **General Sessions Judge**

The Honorable Frank Buck
State Representative
Suite 32, Legislative Plaza
Nashville, TN 37243-0140

QUESTION

Whether the same person can serve as both the Smithville **City Attorney**[\[FN1\]](#) and a DeKalb County **general sessions Judge**?

OPINION

No. These positions are incompatible under the common law. The Code of Judicial Conduct stresses that a **judge** must maintain independence and neutrality when carrying out his or her responsibilities. This requirement is incompatible with the Smithville **City Attorney's** duty under the City Charter to represent the City's interests in court. Further, a **general sessions judge** is a **judge** of an "inferior court." [Article VI, Section 7 of the Tennessee Constitution](#) prohibits the **judge** of an inferior court from holding another office of trust or profit under the State. The position of Smithville **City Attorney** is designated as an "office" under the Smithville City Charter. As a result, this position is an office of trust or profit within the meaning of [Article VI, Section 7 of the Tennessee Constitution](#).

ANALYSIS

This opinion concerns whether the same person may serve as Smithville **City Attorney** and a DeKalb County **general sessions judge**. This Office addressed a similar issue in Op. Tenn. Atty. Gen. U97-047 (October 14, 1997). There, this Office concluded that one person may not serve as the New Johnsonville **City Attorney** and the New Johnsonville

City **Judge**. For most of the reasons cited in that opinion and discussed in further detail below, this Office concludes that the same person may not serve as the Smithville **City Attorney** and a DeKalb County **general sessions judge**.

There is a well recognized common law prohibition against a public officer holding two incompatible offices at the same time. *State ex rel Little v. Slagle*, 115 Tenn. 336, 89 S.W. 326 (1905). The prohibition is **generally** applied when an individual occupies two inherently inconsistent offices. 63C Am. Jur. 2d *Public Officers and Employees* § 65 (1997). The question of incompatibility of necessity depends on the circumstances of the individual case, and the issue is whether the occupancy of both offices by the same person is detrimental to the public interest, or whether the performance of the duties of one interferes with the performance of those of the other, 67 C.J.S. *Officers* § 27 at 279-280 (1978).

According to the 1990 census, DeKalb County had a population of 14,360 and therefore qualifies as a Class Five County. Tenn. Code Ann. § 8-24-101(a)(5); 1996-97 *Tennessee Statistical Abstract*. By statute general sessions judges in class five counties are part-time judges and “shall not be prohibited from the practice of law or other gainful employment while serving as judge *except to the extent such practice or employment constitutes a conflict of interest.*”Tenn. Code Ann. § 16-15-5002(b)(emphasis added). We think this statute either incorporates or has not replaced the common law prohibition against the same individual serving in incompatible offices.

*2 Under Section 5 of the Smithville City Charter, the Smithville City Attorney, like all “employees or appointed officials of the City,” is employed by a majority vote of the Aldermen, and in case of a tie vote of the Aldermen in this and any other question voted on by the Aldermen, the Mayor is required to cast the deciding vote in “such election.” The Smithville City Attorney is accorded the following duties under Section 16 of the Smithville City Charter:

* * *

2. It shall be his [the City Attorney's] duty to represent the municipality in all suits in which the City of Smithville shall be engaged or concerned in any of the Courts of the City or State.

3. He shall give legal advice and written opinions to any of the City officials on any and all legal matters concerning the City of Smithville when requested so to do by the Mayor or the Board, and shall attend all meetings of the Board when requested so to do by the Mayor or any member of the Board.

4. He shall, when requested by the Mayor or the Board of Mayor and Aldermen, draft any and all ordinances; and, when requested, examine any or all ordinances considered by the Board of Mayor and Aldermen and pass upon their validity and legality, and shall perform such other and further legal services as are consistent to said office.

Thus, the **City Attorney** is under a duty to advise the City Council and to represent the City in all cases in which the City is a party, including those cases brought in the **general sessions** court. The **City Attorney** must therefore act as an advocate for the City's interests in court. By contrast, a **general sessions judge** must act as a neutral decision maker. This requirement is clearly set forth throughout the Tennessee Code of Judicial Conduct. *See, e.g.*, Rules of the Tennessee Supreme Court, Rule 10, Canon 2.A. (“A **judge** should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”) Although a part-time **general sessions judge** who also serves as **city attorney** might recuse himself or herself in any case involving the city, that practice would likely disqualify the **judge** from presiding in a large volume of cases, given the frequency with which a governmental litigant such as a city finds itself in court, and might therefore seri-

ously compromise the ability of the **judge** to discharge his or her judicial duties fully and effectively. For these reasons, we think a court would conclude that these positions are incompatible under the common law.

In addition, [Article VI, Section 7 of the Tennessee Constitution](#) provides:

Compensation of judges.--The Judges of the Supreme or Inferior Courts, shall, at stated times, receive a compensation for their 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 of perquisites of office *nor hold any other office of trust or profit under this State or the United States.*

***3** [Tenn. Const. art. VI, § 7](#) (emphasis added). General sessions courts are inferior courts under Article VI of the Tennessee Constitution. [Franks v. State](#), 772 S.W.2d 428 (Tenn. 1989); *see also* [State v. Harmon](#), 882 S.W.2d 352 (Tenn. 1994). Under [Article VI, Section 7](#) a general sessions judge is therefore constitutionally prohibited from holding any other “office of trust or profit under this State or the United States.”

The case of [Frazier v. Elmore](#), 180 Tenn. 232, 173 S.W.2d 563 (1943), defined office as follows:

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. Webster defines “office” as an “assigned duty or function.” Synonyms are post, appointment, situation, place, position; and “office commonly suggest 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 Revisions, 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.”

[Frazier v. Elmore](#), 180 Tenn. at 238. In that case, the Court concluded that active service in the military was an office of trust or profit within the prohibition of [Article VI, Section 7](#).

This Office has stated that the office of **city attorney** is an “office of trust or profit under this State” within the meaning of this provision. Op. Tenn. Atty. Gen. 78-348 (September 22, 1978)(a **general sessions judge** is constitutionally prohibited from holding the office of **city attorney**). Op. Tenn. Atty. Gen. U97-047 (October 14, 1997)(a **city judge** is prohibited from holding the office of **city attorney**). As cited above, Section 5 of the City Charter includes the **City Attorney** in a list of “[a]ll employees or appointed officials of the City,” and provides that the **City Attorney**, like the other individuals in this list, is “employed” by a vote of the Aldermen. The same section also provides, “It shall also become the duty of said Board [of Aldermen] to fix by ordinance the salaries of all employees and officials employed by the City.” Thus, within the context, the use of the term “employed” refers to employees or officials. But Section 16(4) of the Smithville City Charter refers to the position of **City Attorney** as an “office.” In view of the broad definition of office set forth in [Frazier](#), we think a court would conclude that the position of Smithville **City Attorney** is an “office of trust or profit” within the meaning of [Article VI, Section 7 of the Tennessee Constitution](#). As a result, a DeKalb County **general sessions judge** is constitutionally prohibited from serving as Smithville **City Attorney**.

***4** John Knox Walkup

Attorney **General** and Reporter

Michael E. Moore
Solicitor **General**

Ann Louise Vix
Senior Counsel

[FN1]. Your request originally referred to the “City Prosecutor.” It is our understanding that the terms “City Prosecutor” and “**City Attorney**” are used interchangeably, and our analysis proceeds on that basis.

Tenn. Op. Atty. Gen. No. 98-131, 1998 WL 433733 (Tenn.A.G.)

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