

**STATE OF TENNESSEE**

OFFICE OF THE  
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December 1, 2003

Opinion No. 03-155

Judicial Commissioner Practicing Law in Criminal Court

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**QUESTIONS**

1. May a part-time judicial commissioner serving the Shelby County General Sessions Criminal Court practice law in the same court?
2. May a part-time judicial commissioner serving the Shelby County General Sessions Criminal Court practice law in the Criminal Court for Shelby County?

**OPINIONS**

1. A part-time judicial commissioner is subject to the Code of Judicial Conduct as a “continuing part-time judge.” Only the Judicial Ethics Committee and reviewing courts may authoritatively interpret the Code of Judicial Conduct. But the Code expressly prohibits a continuing part-time judge from practicing law in the court on which the judge serves. In our opinion, therefore, a part-time judicial commissioner serving the Shelby County General Sessions Criminal Court may not practice law in the same court.
2. Circumstances under which a part-time judicial commissioner serving the Shelby County General Sessions Criminal Court may practice law in the state Criminal Court for Shelby County should be addressed by the Judicial Ethics Committee. But the Code of Judicial Conduct prohibits a continuing part-time judge from acting as a lawyer “in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.” Whether this provision precludes a judicial commissioner from representation of a client in the Criminal Court for Shelby County will depend on particular facts and circumstances. Further, such a practice could, in some circumstances, prevent the judicial commissioner from acting as a “neutral and detached magistrate” in probable cause determinations. In light of *State v. White*, 114 S.W.3d 469 (Tenn. 2003), a court could conclude that an individual who serves as defense attorney cannot, in some circumstances, be a neutral and detached magistrate. A court could also conclude that an individual who serves as a judicial commissioner cannot, in some circumstances, adequately carry out the duties of a defense attorney.

**ANALYSIS**

This opinion concerns whether an individual who serves as a part-time judicial commissioner for the Shelby County General Sessions Criminal Court may practice law in the same court or the state Criminal Court for Shelby County. We assume the question refers to representation of criminal defendants in those courts. Judicial commissioners in Shelby County are appointed under Tenn. Code Ann. § 40-1-111. That statute contains several provisions applicable to counties that fall within certain population brackets. A judicial commissioner in Shelby County must be licensed to practice law in Tennessee. Tenn. Code Ann. § 40-1-111(a)(1)(C).

A judicial commissioner is subject to the Code of Judicial Conduct. Tenn. R. Sup. Ct. 10, Application of the Code of Judicial Conduct, Part A. Only the Judicial Ethics Committee and reviewing courts may authoritatively interpret the Code of Judicial Conduct. Tenn. R. Sup. Ct. 9, § 26.6. A part-time judicial commissioner is a “continuing part-time judge” within the meaning of Part C. of the Application of the Code of Judicial Conduct. A continuing part-time judge is not required to comply with Canon 4G of the Code of Judicial Conduct. That provision forbids a judge from practicing law. But Section C.(3) of the Application of the Code of Judicial Conduct provides:

A continuing part-time judge:

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(3) *shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as judge or in any other proceeding related thereto.*

(Emphasis added). Under the Code of Judicial Conduct, therefore, a part-time judicial commissioner serving the Shelby County General Sessions Criminal Court may not practice law in the same court.

Under the same provision of the Code of Judicial Conduct, a continuing part-time judge “shall not act as a lawyer in a proceeding in which the judge has served as judge or in any other proceeding related thereto.” Because a judicial commissioner is a “judge” for these purposes, a part-time judicial commissioner may not act as a lawyer in a proceeding in which the judicial commissioner has served as judicial commissioner, or in any other proceeding related thereto. Whether this provision precludes a judicial commissioner from undertaking representation of a particular client in a proceeding in the Criminal Court for Shelby County will depend on particular facts and circumstances. Because a continuing part-time judge is not completely prohibited from practicing law, there may be circumstances where this practice is permissible. This issue, however, should be referred to the Judicial Ethics Committee.

Such a practice could, in some circumstances, prevent the judicial commissioner from acting as a “neutral and detached magistrate” in probable cause determinations. The Fourth Amendment to the United States Constitution requires that a party who determines probable cause to issue a

search warrant must be neutral and detached and capable of determining whether probable cause exists. *State v. Bush*, 626 S.W.2d 470, 473 (Tenn.Crim.App. 1981), citing *Shadwick v. City of Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972). See also *State v. White*, 114 S.W.3d 469 (Tenn. 2003), referred to in the opinion request. In that case, the Tennessee Supreme Court found that a part-time assistant district attorney could not constitutionally serve as defense counsel in the same county because the two roles were “inherently antagonistic.” While a judicial commissioner, unlike a district attorney, is not a prosecutor, a court could conclude that an individual who serves as defense attorney cannot, in some circumstances, be a neutral and detached magistrate. A court could also conclude that an individual who serves as a judicial commissioner cannot, in some circumstances, adequately carry out the duties of a defense attorney.

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