

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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February 15, 2008

Opinion No. 08-29

Private attorneys selected to be Special Substitute General Sessions Judges under Tenn. Code Ann. § 16-15-209.

QUESTIONS

1. Can a General Sessions Judge appoint a private attorney to act as a special or substitute judge without first complying with the procedure outlined in Tenn. Code Ann. § 16-15-209?
2. Are the actions of a special judge selected by a duly elected General Sessions Judge but not in compliance with Tenn. Code Ann. § 16-15-209 considered valid?
3. May the District Attorney General refuse to attend the court hearing presided by a special judge who was not selected in accordance with Tenn. Code Ann. § 16-15-209?
4. Does an inherent conflict of interest exist in appointing a private attorney as a special judge to preside over criminal cases when the attorney practices criminal law in the same court?

OPINIONS

1. No. Tenn. Code Ann. § 16-15-209 specifies the procedure for selecting a special judge, and private attorneys are to be selected as special judges only as a last resort as set forth in the statute.
2. Yes. If there is a defect in the appointment of a special judge but no party to a case contemporaneously objects to the special judge's participation on account of the defect, the special judge acts as a de facto judicial officer whose actions are deemed valid.
3. No. An appearance is necessary under Tenn. Code Ann. § 16-15-209(a)(4)(B) to object to the appointment and/or to move to continue the case pending the return of the duly elected or appointed judge.
4. No, except to the extent such practice constitutes an actual conflict of interest under Tenn. Code Ann. § 17-2-101.

ANALYSIS

1. Tenn. Code Ann. § 16-15-209 addresses the procedure for selecting substitute or special judges and provides in part:

If the judge of a court of general sessions . . . finds it necessary to be absent from holding court such judge may select a special judge in accordance with the requirements of and *in the numerical sequence* designated by this section[.]

Tenn. Code Ann. § 16-15-209(a) (emphasis added).¹ Thus, if a General Sessions Judge decides to exercise the option of selecting a substitute or special judge to hold court during his or her absence, the judge must make the selection by following the requirements set forth in subdivision (a) and in the precise order set forth therein. First, a General Sessions Judge must attempt to select from or interchange with other General Sessions Judges in the same county or district.² *See* Tenn. Code Ann. § 16-15-209(a)(1). Second, if no other General Sessions Judge can serve by interchange or if there is only one General Sessions Judge in the county or district, the selecting judge must find a special judge from “any current, former, or retired judge, who will, by mutual agreement, sit as special judge.” Tenn. Code Ann. § 16-15-209(a)(1), (2). If a special judge is selected in this manner, the chief justice of the supreme court will designate the special judge as a sitting judge. *Id.* Third, if a General Sessions Judge is still unable to secure a special judge under subdivisions (1) and (2), “the judge may apply to the administrative office of the courts for assistance in finding a judge to sit by designation as special judge.” Tenn. Code Ann. § 16-15-209(a)(3).

Last, “[o]nly after exhausting” the options set out in subdivisions (1), (2), and (3) may a judge select a special judge from a list of attorneys who have been previously approved “by the judge or judges of the district” and who are “constitutionally qualified, in good standing, and possess sufficient experience and expertise.” Tenn. Code Ann. § 16-15-209(a)(4).

Attorneys selected as special judges are subject to limitations. Specifically, an attorney may preside as a special judge “only if” the parties and counsel are notified that a practicing attorney will preside

¹It is noteworthy to mention that a different procedure is provided for counties having a population in excess of eight hundred thousand (800,000). Tenn. Code Ann. § 16-15-209(e) provides:

Upon approval by resolution adopted by a two-thirds (2/3) vote of the county legislative body, if a general sessions judge finds it necessary to be absent from holding court, another judge may sit by interchange for the absent judge upon entering an order finding it in the best interest of judicial efficiency. If a judge finds that interchange is not in the best interest of judicial efficiency, said judge may appoint an attorney as a special judge from a list of attorneys previously approved by all of the duly elected or appointed general sessions judges, as being constitutionally qualified, in good standing, and possessing sufficient experience and skill. The appointment of a special judge shall be by written order, identifying the absent judge and the special judge, and shall be kept on file in the office of the clerk of the court.

²*See* Tenn. Code Ann. § 17-2-208.

and the parties agree to proceed with the attorney presiding and not wait for the duly elected judge to return. *See* Tenn. Code Ann. § 16-15-209(a)(4)(A), (B). In addition, attorneys cannot approve the payment of attorney's fees unless the exact amount is set by statute. *See* Tenn. Code Ann. § 16-15-209(a)(4)(C).

2. Failure to comply strictly with Tenn. Code Ann. § 16-15-209 in selecting a special judge does not *per se* render invalid the judgments or actions of said judge. This Office has previously opined that if there is a deficiency in the appointment of a special judge and no objections are made contemporaneously by one or more of the parties to the case, the judgments rendered by the special judge are considered valid. *See* Op. Tenn. Att'y. Gen. 89-94 (July 6, 1989).

For instance, in *State v. Posey*, 99 S.W.3d 141 (Tenn. Crim. App. 2002), there was no evidence that the procedures set forth in Tenn. Code Ann. § 16-15-209(a) were followed before the Hamilton County Court Administrator selected an attorney to serve as special judge. 99 S.W.3d at 146-147. First, the court administrator — not the general sessions judge — found a practicing attorney to sit as a special judge in a criminal proceeding pursuant to local practice but contrary to statute. *Id.* Second, there was no indication that the court administrator exhausted the procedures outlined in Tenn. Code Ann. § 16-15-209(a)(1) - (3) before selecting the attorney. *Id.* Lastly, the defendant was neither informed that a special judge would be presiding over his case nor asked to consent to the special judge hearing his case. *Id.* at 147. Nevertheless, the Court of Criminal Appeals concluded that the special judge was a de facto judge whose authority has been recognized in Tennessee.

A judge de facto is one acting with the color of right and who is regarded as, and has the reputation of, exercising the judicial function he [or she] assumes. [A de facto judge] differs, . . . from a mere usurper of an office who undertakes to act without any color of right: . . . from an officer de jure who is in all respects legally appointed and qualified to exercise the office[.]

Id. (quoting 48A C.J.S. Judges § 2 (1981)).

Our Supreme Court has held:

[E]ven where there are constitutional infirmities in the manner in which a judge took office, that judge may still be deemed to be acting under color of authority as a de facto judge until the infirmity can be remedied.

State ex rel. Newsom v. Biggers, 911 S.W.2d 715, 718 (Tenn. 1995). In *Posey* and *Biggers*, the courts distinguished situations where the judgment of a de facto judge is challenged directly versus situations where a judgment is challenged collaterally. In both cases, the failure to object to the court's jurisdiction at trial resulted in an effective waiver of the issue collaterally. *See Posey*, 99 S.W.3d at 147; *Biggers*, 911 S.W.2d at 719. *Cf. United States v. Scott*, 260 F.3d 512, 515, n. 2 (6th Cir. 2001) (search warrant signed by retired judge lacking jurisdiction under Tenn. Code Ann. § 16-15-209 void *ab initio* where the defendant moved to suppress evidence seized pursuant to warrant

pretrial).

Since its decision in *Biggers*, our Supreme Court has indicated that “special judges should confirm that their authority to preside is contained in the record.” *In re Valentine*, 79 S.W.3d 539, 545 n. 5 (Tenn. 2002).

3. This Office has also opined that there is no known “right” on the part of a litigant to insist upon a hearing by the duly elected judge rather than an appointed special judge. *See Op. Tenn. Att’y. Gen.* 89-94. As stated elsewhere in this opinion, special judges are treated as de facto judges whose judgments are deemed valid. Affected parties are not, however, without some say in the matter. For instance, the statute provides that an attorney may preside as a special judge:

[o]nly if the parties and counsel are notified that the duly elected or appointed judge will be absent and that a practicing lawyer will serve as a special judge; [and]

[t]he parties choose to proceed and not to continue the case pending return of the duly elected or appointed judge[.]

Tenn. Code Ann. § 16-15-209(a)(4)(A) - (B) (emphasis added). Thus, whether or not a practicing attorney presides as a special judge is dependent on the parties’ decision to proceed or continue the case to a later date. More importantly, an appearance is necessary in order to preserve any challenge to the special judge’s authority. “Objections to the jurisdiction of the general sessions court, before which the warrant is returned, shall be made before the hearing, or they will be considered as waived.” Tenn. Code Ann. § 16-15-505. *See also Posey*, 99 S.W.3d at 147; *Biggers*, 911 S.W.2d at 719.

4. An attorney is not automatically disqualified from serving as a special judge on the basis of his or her legal practice. Title 17 of the Tennessee Code applies to all trial judges, including special judges, and sets forth specific situations where a judge is subject to disqualification due to conflicts of interest:

No judge or chancellor shall be competent, except by consent of all parties, to sit in the following cases:

- (1) Where the judge or chancellor is interested in the event of any cause;
- (2) Connected with either party, by affinity or consanguinity, within the sixth degree, computing by the civil law;
- (3) Has been of counsel in the cause;
- (4) Has presided on the trial in an inferior court; or

(5) In criminal cases for felony, where the person upon whom, or upon whose property, the felony has been committed, is connected with the judge or chancellor by affinity or consanguinity within the sixth degree, computing by the civil law.

Tenn. Code Ann. §§ 17-2-101, 17-2-107. Accordingly, a prohibited conflict of interest does not arise merely because a private attorney selected to act as a special General Sessions Judge is also actively engaged in criminal law matters in the same court in which he or she is asked to preside. *Cf. State v. Thornton*, 10 S.W.3d 229, 237 (Tenn. Crim. App. 1999) (sentencing judge was not required to recuse himself, despite his prior representation and personal knowledge of defendant; there was no indication that the trial judge used confidential or privileged information in sentencing defendant).

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