

STATE OF TENNESSE
OFFICE OF THE
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Opinion No. 08-137

Assistant District Attorney Serving as a Municipal Judge

QUESTION

Would an Assistant District Attorney General violate the prohibition set forth in Tenn. Code Ann. § 8-7-104 against engaging in the private “practice of law” by serving as a Municipal Judge?

OPINION

No. The definitions of “practice of law” in Tenn. Code Ann. § 23-3-101(2) and “the practice of law” in Tenn. S. Ct. R. 9, § 20.2(3), both contemplate action in a representative capacity, either as an advocate for the interests of another or as a counselor concerning a client’s rights, obligations, or affairs. By contrast, under the Tennessee Code of Judicial Conduct, a municipal judge must act as a neutral decisionmaker and is required, under Rule 10 Canon 2.A of the Rules of the Supreme Court, to “conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Because a municipal judge does not perform the duties of the office in a representative capacity, the judge does not engage in the “practice of law”.

ANALYSIS

This opinion addresses whether an Assistant District Attorney would violate the prohibition set forth in Tenn. Code Ann. § 8-7-104 against engaging in the private “practice of law” by serving as a Municipal Court Judge. As explained more fully below, the municipal court in question does not exercise concurrent jurisdiction with general sessions courts or otherwise exercise any state law criminal jurisdiction.

The practice of law is defined twice in Tennessee Law, and both definitions contain an element of representation or advocacy. Under Tennessee’s unauthorized practice of law statutes, the “practice of law” means:

the appearance *as an advocate in a representative capacity* or the drawing of papers, pleadings or documents or the performance of any act *in such capacity* in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.

Tenn. Code Ann. § 23-3-101(2) (emphasis added). Additionally, the Tennessee Supreme Court Rules define the practice of law for purposes of determining who must pay certain assessments. This definition states:

[t]he term, “the practice of law” shall be defined as any service rendered involving legal knowledge or legal advice, *whether of representation, counsel or advocacy*, in or out of court, rendered in respect to the rights, duties, regulations, liabilities or business relations of one requiring the services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document, or law.

Tenn. Sup. Ct. R. 9, § 20.2(e) (emphasis added). The plain language of both definitions contemplates action in a representative capacity, either as an advocate for the interests of another or as a counselor concerning a client’s rights, obligations, or affairs.

By contrast, a municipal judge must act as a neutral decisionmaker. This requirement is clearly set forth throughout the Tennessee Code of Judicial Conduct. *See, e.g.*, Rules of the 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 an individual sitting as a municipal judge could be required “to examine the law or pass upon the legal effect of any act, document or law,” performing such functions would not constitute the “practice of law” as defined in Tenn. Code Ann. § 23-3-101(2), because they are not undertaken in a representative capacity.

Tennessee Code Annotated section 8-7-104 states, “district attorneys general are prohibited from engaging in the practice of law.” We interpret this prohibition as intended to forbid District Attorneys General and their Assistants from performing legal services for clients outside the scope of their official duties as representatives of the State of Tennessee. Because, as discussed above, a municipal judge does not engage in the practice of law but is rather a neutral decision maker, an Assistant District Attorney General would not violate Tenn. Code Ann. § 8-7-104 by serving as a Municipal Court Judge.

In addition, serving in both positions does not appear to be prohibited under the Tennessee Constitution.¹ 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,

¹We note that this Office concluded in 1998 that a Collegedale City Judge could not serve as an assistant public defender in the Hamilton County Public Defender’s Office under Article VI, Section 7 of the Tennessee Constitution. *Op. Tenn. Atty. Gen.* 98-114 (July 17, 1998). That opinion is not applicable to the reasoning in this opinion because the statute that created the Collegedale City Judge vested the judge with concurrent jurisdiction with general sessions courts.

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 other office of trust or profit under this State or the United States.*

Tenn. Const. Art. VI, § 7 (emphasis added). The Tennessee Supreme Court has concluded that municipal judges exercising concurrent jurisdiction with the general sessions court must be elected in compliance with Article VI, Section 4 of the Tennessee Constitution. *State ex rel. Town of South Carthage v. Barrett*, 840 S.W.2d 895 (Tenn. 1992). The Court reasoned that a municipal judge with this jurisdiction is exercising the jurisdiction of an “inferior court” for purposes of that constitutional provision. Based on the request, we assume that the municipal court in which the Assistant District Attorney would sit as Municipal Court Judge is a court without concurrent general sessions court jurisdiction. The judge of a court of such limited jurisdiction is not considered the judge of an “inferior court” within the meaning of Article VI, Section 1 of the Tennessee Constitution. *Summers v. Thompson*, 764 S.W. 2d 182 (Tenn. 1988). Based on this, Article VI, Section 7 of the Tennessee Constitution does not appear to apply to a Municipal Court Judge lacking concurrent jurisdiction with the general sessions court.

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