STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

July 18, 2011

Opinion No. 11-58

Legality of Legislator Serving as a Dispute Resolution Neutral

QUESTION

Does Article II, § 26 of the Tennessee Constitution, which provides that no person shall hold more than one lucrative State office at the same time, prohibit a member of the General Assembly from serving as a Dispute Resolution Neutral, including serving as a Mediator, under Tennessee Supreme Court Rule 8, RPC 2.4, or Rule 31?

OPINION

No, because serving as a Dispute Resolution Neutral, including serving as a Mediator, under Tennessee Supreme Court Rule 8, RPC 2.4 or Rule 31 does not constitute holding a lucrative State office.

ANALYSIS

This opinion addresses whether Article II, § 26 of the Tennessee Constitution prohibits a member of the General Assembly from serving as a Dispute Resolution Neutral, including serving as a Mediator, under either Tennessee Supreme Court Rule 31[1] (regulating alternative dispute resolution in connection with civil judicial proceedings) or Rule 8, RPC 2.4 (regulating the conduct of attorneys serving as a Dispute Resolution Neutral). Article II, § 26 of the Tennessee Constitution provides:

> 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 the 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; provided, that no appointment in the Militia, or to the office of Justice of the Peace, shall be considered a lucrative office, or operative as a disqualification to a seat in either House of the General Assembly.

(emphasis added). This constitutional provision is aimed "against any person holding more than one lucrative office „in this state[,]' [t]hat is, in state

[1] A "„Neutral' is an impartial person who presides over the alternative dispute resolution proceedings." Tenn. Sup. Ct. Rule 31, § 2(k). A "„Mediator' is a neutral person who conducts discussions among the disputing parties designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute." Tenn. Sup. Ct. Rule 31, § 2(h).

> government." *Boswell v. Powell*, 43 S.W.2d 495 (Tenn. 1931) (quoted in *Phillips v. West*, 213 S.W.2d 3, 6 (Tenn. 1948)) (finding that the Article II, § 26 prohibition is not applicable to county or municipal offices); *see* Tenn. Att'y Gen. Op. No. 90-11 (Feb. 6, 1990) (opining that Article II, § 26 does not prohibit a member of the General Assembly from holding an elected position with his or her county or city government, except for expressly listed offices).

While serving as a member of the General Assembly clearly is holding a "lucrative State office," an examination of the relevant provisions of Rule 31 reveals that serving as a Rule 31 Neutral is not holding a lucrative State office under Article II, § 26 of the Tennessee Constitution. *See also* Tenn. Att'y Gen. Op. No. 99-211 (Oct. 20, 1999) (opining that a deputy sheriff, an office which at that time was considered as being a State rather than county office, may be appointed and paid on a case-by-case basis to be an interpreter in general sessions court, since an interpreter is not an office in State government).

Initially, although Rule 31 specifies the qualifications, duties, and responsibilities for a person serving in the position of a Neutral on a case-by-case basis, [2] it does not create a State office. *See* Tenn. Sup. Ct. Rule 31, § 9 and Rule 31's Appendix A (setting forth the Standards of Professional Conduct for Rule 31 Neutrals); *see also* Tenn. Sup. Court Rule 8, RCP 2.4 (setting forth standards for a lawyer who serves as a Neutral). A Neutral under Rule 31 is thus appointed by the court and/or agreed to the parties for a limited purpose; indeed a Rule 31 Neutral does not even have a term of office or employment.[3] A person is not elected or appointed in order to be qualified to serve as a Rule 31 Neutral. Pursuant to Section 4 of Rule 31, in a particular civil case in which an alternative dispute resolution proceeding will occur, either (a) the parties agree to the selection of the Neutral or (b) the court follows a prescribed procedure for the nomination and selection of the Neutral from available qualified Neutrals, based upon the input of the parties.[4] In certain alternative dispute resolution proceedings, the parties and the court may select any lawyer in good standing to act on a case-by-case basis as an arbitrator in a non-binding arbitration, to act as a neutral in a mini-trial, or to serve as an evaluator in a general civil or family case. Tenn. Sup. Ct. Rule 31, §§ 14 - 16. Moreover, a Rule 31 Mediator may serve in that capacity on a case-by-case basis as long as that applicant meets the qualifications for being listed as a Mediator by the Alternative Dispute Resolution

---

[2] Section 3 of Rule 31 provides that the parties may request, and the court may order, that alternative dispute resolution occur in a particular civil judicial proceeding.

[3] As this Office noted in Tenn. Att'y Gen. Op. No. 99-211, *3:

> The term "office" carries a sense of permanence [and a continuing duty to perform following election or appointment]: "A right, and correspondent duty, to exercise a public trust. Public charge or employment. An employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental." Black's Law Dictionary 976 (5th ed. 1979).

[4] *See also* Tenn. Sup. Ct. Rule 31, § 4(b)(4) ("The court's nomination of Rule 31 Neutrals shall be random unless the matter requires particular expertise not possessed by all Rule 31 Neutrals").

Commission ("ADRC"). *See* Tenn. Sup. Ct. Rule 31, § 17 (setting forth the qualifications for being a Rule 31 Mediator). [5]

Moreover, since a Rule 31 Neutral is not compensated by the State to hold a State office, a Neutral does not hold a "lucrative State office". [6] *Cf. Durham v. Dismukes*, 333 S.W.2d 935, 938 (Tenn. 1960) (finding that a general sessions court is a county office by noting "[t]he primary badge of a State officer is that the Legislature provide that the State pay the salary of the office"). The parties to the alternative dispute resolution proceeding pay the Rule 31 Neutral's fees and expenses. [7] Although a Rule 31 Neutral may request that the costs of his services be charged as court costs, the court costs are ultimately paid by a party to that particular litigation. [8] Even if the State were a party to the litigation, the State is no different from a private party paying for the services rendered by the Rule 31 Neutral.

Accordingly, it is the opinion of this Office that serving as a Rule 31 Neutral is not holding a lucrative State office. [9] The Tennessee Constitution, Article II, § 26, does not prohibit a member of the General Assembly from serving as a Dispute Resolution Neutral, including as a Mediator, under either Tennessee Supreme Court Rule 31 or Rule 8, RPC 2.4. [10]

---

[5] To remain listed by the ADRC as a Rule 31 Mediator, a person must comply with continuing obligations set forth in Tenn. Sup. Ct. Rule 31, § 18, and not be subject to suspension or disqualification sanctions under Tenn. Sup. Ct. Rule 31, § 11.

[6] "A lucrative office is one whose pay is affixed to the performance of its duties; and when the duties of the office are affixed by the statute, it is immaterial that the compensation of the officer is fixed by some other board or officer." *State ex rel. Little v. Slagle*, 115 Tenn. 336, 341, 89 S.W. 326, 327 (1905)(citations omitted).

[7] Except for participation in pro bono proceedings, a Rule 31 Neutral is "entitled to be compensated at a reasonable rate for participation in court-ordered alternative dispute resolution proceedings." Tenn. Sup. Ct. Rule 31, § 13. Section 9 of Appendix A to Rule 31 sets forth standards and requirements regarding the charging of reasonable fees for services and expenses by a Rule 31 Neutral.

[8] *See* Tenn. Sup. Ct. Rule 31, § 8. *But cf. id.* ("The court may, in its sound discretion, waive or reduce the costs of a Rule 31 ADR Proceeding.").

[9] The common law prohibits a public officer holding two incompatible offices at the same time. *See State ex rel. Little v. Slagle*, 115 Tenn. at 341, 89 S.W. at 327 ("The rule at common law is that, where one accepts a second office incompatible with one already held by him, the office first held is thereby *ipso facto* terminated without judicial proceedings of any kind"). While the question of incompatibility necessarily depends on the "character and relation" of the offices in the individual case, the common law usually looks to "the rights, duties, or obligations connected with or flowing from the offices." 67 C.J.S. *Officers* 38 (Westlaw 2011). The offices are incompatible if their "functions . . . are inherently inconsistent and repugnant to each other." *Id*. Further, "the permanency of the position, the power granted, and the functions actually performed should be considered." *Id*. This Office has no reason to suspect that being a member of the General Assembly and serving as a Rule 31 Neutral implicates these concerns.

[10] Section 10 of Rule 31 does require the Neutral to disclose, prior to the commencement of any alternative dispute proceeding, "any known relationships with the parties . . . which may affect or give the appearance of affecting the Neutral's neutrality." Accordingly, in a dispute resolution proceeding involving the State in any way, appropriate disclosure of the Neutral serving as a member of the General Assembly should be made to the parties and the court.

ROBERT E. COOPER, JR.
Attorney General and Reporter

STEVEN A. HART
Special Counsel

Requested by:

The Honorable Mike Faulk
State Senator
11A Legislative Plaza
Nashville, TN 37243