STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

February 26, 2014

Opinion No. 14-23

County Commissioner Serving as Clerk and Master

QUESTIONS

1. May a county commissioner serve as clerk and master for the chancery court in the same county?

2. May a person serving as clerk and master engage in the private practice of law?

OPINIONS

1. Yes. A county commissioner may serve as clerk and master unless holding both offices is prohibited by a private act or where circumstances arise that render the two offices incompatible.

2. Yes. A clerk and master is not precluded by statute from engaging in the private practice of law except in the chancery court where he or she serves as clerk and master, "in any cause commenced, brought to or carried from" that court, or in any cause "commenced in any court from which an appeal lies" to that court. However, a common-law conflict of interest could arise where the clerk and master is acting or appearing to act inconsistently with the best interest of the public.

ANALYSIS

1. The Tennessee Constitution, Article II, Section 26, prohibits a person from "hold[ing] more than one lucrative office at the same time." The term "office" has been construed by Tennessee courts to mean "state office." *Phillips v. West*, 187 Tenn. 57, 65-66, 213 S.W.2d 3 (1948); *Boswell v. Powell*, 163 Tenn. 445, 447, 43 S.W. 495 (1931). The offices of county commissioner and clerk and master are local offices, not state offices. *See* Tenn. Att'y Gen. Op. 00-159 (Oct. 17, 2000) (stating that office of county commissioner is local office, not state office); Tenn. Att'y Gen. Op. 92-06 (Jan. 24, 1992) (stating that office of clerk and master is county rather than state office). Therefore, holding those offices simultaneously is not prohibited by Article II, Section 26.

No other constitutional provision prohibits a person from simultaneously holding both offices. Likewise, Tenn. Code Ann. § 5-5-102(c)(2),[1] which bars certain officers from nomination for or election to membership in the county legislative body, does not prohibit a person from simultaneously holding office as a county commissioner and clerk and master, nor does any other statute do so.

Holding those two offices might, however, be prohibited by private act. *See, e.g.*, Tenn. Att'y Gen. Op. 99-044 (Mar. 1, 1999) (concluding that individuals were prohibited from serving on both county board of highway commissioners and county commission by private act creating board). Moreover, 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, 341, 89 S.W. 316 (1905). "[T]he 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 and Public Employees* § 38 (2002). Although there is no apparent inconsistency, incompatibility, or conflict between the offices of county commissioner and clerk and master that would, as a matter of common law, prohibit the same person from holding them concurrently, conceivably circumstances could develop during a dual tenure that would make the offices so incompatible that one could not continue to hold them simultaneously.

2. "No clerk of any court can practice law in any of the courts of this state, except as provided in [Tenn. Code Ann.] § 23-3-102." Tenn. Code Ann. § 18-1-110. Section 23-3-102 provides, in pertinent part: "The clerks of the several courts and their deputies are also prohibited from practicing in their own courts, or in any causes commenced, brought to or carried from their courts, or commenced in any court from which an appeal lies to their court." Thus, assuming that the clerk and master is a licensed attorney authorized to engage in the practice of law, he or she is not precluded by statute from practicing law except in the chancery court where he or she serves as clerk and master, in any cause commenced, brought to, or carried from that court, or in any cause commenced in any court from which an appeal lies to that chancery court.

Nevertheless, the potential for a conflict of interest is great when a public officer engages in the private practice of law. Although the state's conflict-of-interest statute, Tenn. Code Ann. § 12-4-101, is not applicable unless the official is

---

[1] Section 5-5-102(c)(2) provides:

> No person elected or appointed to fill the office of county mayor, sheriff, trustee, register, county clerk, assessor of property, or any other county-wide office filled by vote of the people or the county legislative body, shall also be nominated for or elected to membership in the county legislative body. After June 18, 2005, a director of schools shall not be qualified to serve as a member of the county legislative body.

superintending, voting for, letting, or otherwise overseeing a contract in which the official has an interest, a common-law conflict of interest can arise whenever personal interests conflict with public duty. As this Office has recognized:

> At common law, "the essence of the offense [of having a conflict of interest] was acting or appearing to act inconsistently with the best interest of the public . . . ." Note: *Conflicts of Interests: State Government Employees*, 47 Va. L. R[ev]. [1034,] at 1048 [(1961)]. In *Anderson v. City of Parsons*, 209 Kan. 337, 496 P.2d 1333 (1972), the common law principle was described as not permitting the public officer "to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public." *Id*. at 1337. This policy is not limited to a single category of officers, but applies to all public officials. *Low v. Madison*, 135 Conn. 1, 60 A.2d 744 (1948); *Housing Authority of the City of New Haven v. Dorsey*, 164 Conn. 247, 320 A.2d 820 (1973), *cert. denied* 414 U.S. 1043.

Tenn. Att'y Gen. Op. 85-36, at 2 (Feb. 14, 1985) (quoted with approval in Tenn. Att'y Gen. Op. 13-89, at 6 (Nov. 12, 2013)).

Furthermore, the office of clerk and master carries a heightened risk of conflicts of interest, given the special duties of a master in chancery court. "There is a wide difference between the Clerk of Court and a Master in Chancery. The duties of a Clerk are almost exclusively clerical. . . . The Master, on the contrary, is a judicial officer, and is clothed with many of the powers of the Chancellor himself." William H. Inman, *Gibson's Suits in Chancery* 693 (7th ed. 1988). Therefore, a clerk and master must exercise particular care to keep the conduct of his or her law practice separate from the functions of the office so that conflicts of interest may be avoided.

ROBERT E. COOPER, JR.
Attorney General and Reporter

JOSEPH F. WHALEN
Acting Solicitor General

GORDON W. SMITH
Associate Solicitor General

Requested by:

The Honorable Mike Bell
State Senator
309 War Memorial Building
Nashville, Tennessee 37243