

**STATE OF TENNESSEE  
OFFICE OF THE ATTORNEY GENERAL**

**February 10, 2016**

**Opinion No. 16-06**

**Role of District Attorney General and Public Defender in Proceedings Related to an Order of Protection**

---

**Question 1**

May a district attorney general represent a petitioner at a hearing on a petition for an order of protection made pursuant to Tenn. Code Ann. § 36-3-601 *et seq.*, or would such representation be beyond the duties set forth in Tenn. Code Ann. § 8-7-103 and thus constitute the unauthorized practice of law?

**Opinion 1**

No. A district attorney general has no authority to represent a petitioner seeking a protective order. A district attorney general represents the public interest, and representation of an individual victim is inconsistent with his constitutional and statutory duties and is prohibited by Tenn. Code Ann. § 8-7-104. In addition, representation of a victim in a civil action related to a criminal prosecution creates a conflict of interest for a district attorney general.

**Question 2**

May a public defender provide representation at the hearing for a person against whom an order of protection is sought pursuant to Tenn. Code Ann. § 36-3-601 *et seq.*?

**Opinion 2**

No, with one exception. State statutes and local ordinances do not authorize a public defender to represent an individual defending against a petition for an order of protection; however, the ordinances governing the Shelby County's Public Defender's Office do not prohibit the Shelby County Public Defender from doing so.

**Question 3**

Public Chapter 1080 of the Public Acts of 1998 deleted the phrase "or in anywise interested" from Tenn. Code Ann. § 8-7-103 after Tennessee Attorney General Opinion No. 92-25 was issued. Would that statutory amendment alter Opinion No. 92-25, particularly with respect to the ability of district attorneys to prosecute criminal contempt "if they so desire?"

### **Opinion 3**

No. The 1998 amendment to Tenn. Code Ann. § 8-7-103(1) is not relevant to the conclusion reached on the question of criminal contempt prosecution in Opinion No. 92-25 and so does not change that opinion.

### **ANALYSIS**

#### **1. Representation of a Petitioner Seeking a Protective Order**

A district attorney general is an elected constitutional officer whose authority to act derives solely from the Tennessee Constitution<sup>1</sup> and various statutes, in particular Tenn. Code Ann. §§ 8-7-101 through -112. A district attorney general represents the State of Tennessee and its people when performing his constitutional and statutory duties and is not authorized to represent individual petitioners seeking protective orders. *See, e.g., State v. Superior Oil, Inc.*, 875 S.W.2d 658, 660-61 (Tenn. 1994) (“He is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other . . . and . . . to combine the public welfare and the safety of the citizens, preserving both, and not impairing either,” quoting *Foute v. State*, 4 Tenn. (3 Hayw.) 98, 99 (1816)).

The specific statutory duties and responsibilities of a district attorney general are to (1) prosecute violations of state criminal statutes; (2) prosecute criminal cases that have been removed from state court to any inferior federal court; (3) cooperate and assist the attorney general and reporter in cases in circuit and chancery courts in which the attorney general is required to appear to protect the state or public interest; (4) give an opinion to any county officer in his district on a question of criminal law relating to the duties of that county officer; and (5) submit certain enumerated written reports to the district attorneys general conference annually. *See* Tenn. Code Ann. § 8-7-103(1)-(5)(A)-(C). The district attorney general also has discretion to allocate available resources in performing his duties and responsibilities and to delegate his duties and responsibilities to assistant district attorneys general. Tenn. Code Ann. § 8-7-103(6)-(7). All of these duties are related to the district attorney general’s role as the State’s representative in criminal prosecutions.

Other statutes interspersed throughout the Code allow a district attorney general to participate in certain types of civil actions, such as *quo warranto*, ouster, or forfeiture actions. But his role in such civil actions is limited to protecting a public interest rather than a private one. *See, e.g., Jones v. Talley*, 230 S.W.2d 968, 970 (Tenn. 1950) (discussing the requirement that *quo warranto* actions be brought by the district attorney general to promote the public interest); *State ex rel. Carney v. Crosby*, 255 S.W.3d 593, 596 (Tenn. Ct. App. 2008) (discussing district attorney general’s duties to institute ouster proceedings on behalf of the State under Tenn. Code Ann. § 8-

---

<sup>1</sup> Article VI, § 5 of the Constitution creates the office of the district attorney general by providing that

[a]n Attorney for the State for any circuit or district, for which a Judge having criminal jurisdiction shall be provided by law, shall be elected by the qualified voters of such circuit or district. . . [and] [i]n all cases where the Attorney for any district fails or refuses to attend and prosecute according to law, the Court shall have the power to appoint an Attorney pro tempore.

47-101 *et seq.*); *Jones v. Greene*, 946 S.W.2d 817, 822 (Tenn. Ct. App. 1996) (noting that a judicial forfeiture under Tenn. Code Ann. § 53-11-452 is initiated by the district attorney general's filing of a civil forfeiture lawsuit).

Nothing in the Tennessee Constitution or statutes allows a district attorney general or his assistants to represent a particular victim or any other individual. To the contrary, district attorneys general are statutorily prohibited from doing so. They may not in any private capacity represent individuals, because while they are serving as district attorneys general they may not practice law in any other capacity. *See* Tenn. Code Ann. § 8-7-104 (“District attorneys general are prohibited from engaging in the practice of law.”). Even victims in criminal cases are not the district attorney general's clients and must hire their own private attorneys if they wish to be personally represented in the prosecution. *See* Tenn. Code Ann. § 8-7-401; *State v. Parks*, No. E2010-02557-CCA-R3-CD, 2012 WL 525500, at \*6 (Tenn. Crim. App. Feb. 17, 2012) (no perm. app. filed). Indeed, representing a victim in a civil proceeding related to a criminal case, such as a victim seeking an order of protection in a domestic case, would create a conflict of interest for a district attorney. *See, e.g., Parks*, 2012 WL 525500, at \*6. A district attorney cannot zealously represent a client, as is a private attorney's ethical obligation, when he must “advocate for justice, make decisions that affect the public interest, and make timely disclosures of exculpatory materials.” *See id.*

Nor do the statutes governing protective orders entitle a petitioner to have the district attorney general represent him or her in obtaining a protective order in a domestic abuse or sexual assault case. Rather, the statutes contemplate that a victim will either appear *pro se* or be represented by private counsel, and the district attorney general is not involved. *See* Tenn. Code Ann. §§ 36-3-604(a)(2), -609. Thus, the district attorney cannot represent victims in protective order proceedings.<sup>2</sup>

## **2. Representation of a Person Defending Against a Petition for a Protective Order**

The office of the district public defender is created wholly by statute. *See* Tenn. Code Ann. § 8-14-202. The duties of the public defender include (1) representing indigent persons through court appointments in the trial court in any criminal prosecution, juvenile delinquency proceeding involving a possible deprivation of liberty, or any habeas corpus or other post-conviction proceeding, (2) advising such persons of their rights to appellate review and perfecting any appeal, including filing motions for a new trial and all essential transcripts and records with the clerk of the appellate court, and (3) handling all appeals by indigent persons represented in the trial court. Tenn. Code Ann. §§ 8-14-201(1)-(2), -204(a)-(c). Representing an individual at a hearing to defend against a petition for a protective order that is being sought pursuant to Tenn. Code Ann. § 36-3-601 *et seq.* is not within the statutory duties of the public defender.

---

<sup>2</sup> Assuming the district attorney must be a licensed attorney in Tennessee to hold that office, actions outside the scope of his or her authority would not constitute the “unauthorized practice of law.” Unauthorized practice of law involves an unlicensed person who is rendering services in Tennessee using the professional judgment of a lawyer. *See* Tenn. Code Ann. §§ 23-3-101, -103; *Tennessee Environmental Council, Inc. v. Tennessee Water Quality Control Bd.*, 254 S.W.3d 396, 403 (Tenn. Ct. App. 2007). However, a district attorney acting in an unauthorized manner risks other types of civil, criminal, or ethical liability.

With a limited exception,<sup>3</sup> public defenders and assistant public defenders, like district attorneys and assistant district attorneys, are prohibited from practicing law outside the scope of their authorized duties. *See* Tenn. Code Ann. § 8-14-202(c). Thus, a public defender is prohibited from defending individuals against protective orders in a civil proceeding.

Davidson and Shelby Counties are specifically exempted from the state statutes governing public defenders, and the public defenders' offices in those jurisdictions are created by local ordinances rather than state statutes. *See* Tenn. Code Ann. § 8-14-202(a); Metro. Gov't of Nashville and Davidson County, Tenn., Code of Ordinances ch. 2.16; Shelby County, Tenn., Code of Ordinances art. XI. Like the state statutes governing public defenders in the non-exempt counties, Davidson and Shelby County ordinances require the public defender to defend indigent persons in criminal cases and to handle certain related criminal appeals and habeas corpus proceedings. *See* Metro. Gov't of Nashville and Davidson County, Tenn., Code of Ordinances §§ 2.16.010, 2.16.040, 14.10; Shelby County, Tenn., Code of Ordinances art. XI, § 10-731(a), (f). There is one notable difference between Davidson County's ordinances and those of Shelby County, namely, that the Metro Public Defender, along with his assistants, is specifically prohibited from engaging in the private practice of law during his tenure, while Shelby County's ordinances do not contain similar limiting language. *Cf.* Metro. Gov't of Nashville and Davidson County, Tenn., Code of Ordinances §§ 2.16.040, 2.16.050(A)-(B), 14.10, 14.11 *with* Shelby County, Tenn., Code of Ordinances art. XI, § 10-731. Thus, while nothing in either of the local ordinances or in the statutes governing protective orders authorizes a public defender to represent an indigent person in a civil proceeding for a protective order, Shelby County public defenders are not specifically prohibited from doing so.

### **3. Effect of the 1998 Amendment to Tenn. Code Ann. § 8-7-103(1) on Tenn. Att'y Gen. Op. 92-25**

In 1992, this Office opined that, while Tenn. Code Ann. § 8-7-103(1) did not impose an affirmative duty on district attorneys general to prosecute criminal contempt of a protective order, nothing prohibited them from doing so. Tenn. Att'y Gen. Op. 92-25 (Mar. 9, 1992). The version of subsection 103(1) in effect at that time provided that a district attorney general had a duty “[t]o attend the circuit courts in his district, and every other court therein having criminal jurisdiction, and prosecute on behalf of the state in every case in which the state is a party, *or in anywise interested.*” *Id.* (quoting Tenn. Code Ann. § 8-7-103(1)) (emphasis added). The statute was subsequently amended in 1998, which removed the “or in anywise interested” language. 1998 Tenn. Laws Pub. Ch. 1080, § 3. The current version of the statute provides in pertinent part that “[e]ach district attorney general: (1) Shall prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto.” Tenn. Code Ann. § 8-7-103(1).

---

<sup>3</sup> The statute allows newly-employed lawyers in the public defender's office with pending cases from private practice a reasonable amount of time to conclude those matters or transfer them to another attorney. *See* Tenn. Code Ann. § 8-14-202(c).

The opinion we rendered in Att’y Gen. Op. 92-25 did not depend on the phrase “or in anywise interested” that was subsequently deleted from the statute. Accordingly, the deletion of that language does not change our previous analysis or opinion.

HERBERT H. SLATERY III  
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN  
Solicitor General

LINDA D. KIRKLEN  
Assistant Attorney General

Requested by:

The Honorable Glenn R. Funk,  
District Attorney, 20th Judicial District  
Washington Square, Suite 500  
222 2nd Avenue North  
Nashville, Tennessee 37201-1649