

Ethics and Conflict of Interest for County and District Officials

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This article will cover a variety of provisions of the Arkansas Code setting forth ethics and conflicts of interest laws for county officials, district officials and employees. These laws are based upon avoiding breach of the public trust and reduction of the temptation to breach. These laws come into play when an officeholder or his immediate family member conducts business with the county and when a person files to run or hold office or to fulfill board appointment. Additionally, there are prohibited activities addressed under ACA 21-8-304 that apply to all public officers and employees. A prudent county official should learn these provisions of code and the information and resources in this article.

BREACH OF PUBLIC TRUST: INTEREST OF THE PUBLIC SERVED? OR WAS THE CONDUCT FOR PERSONAL GAIN?

ACA 14-14-1202(a) prohibits an officer or employee from using his office or position for personal gain or the benefit of an immediate family member/associate. The Attorney General recently expounded on the scope of county ethics provisions under ACA 14-14-1202 and indicated that provisions prohibiting procurement of special privileges or exemptions for “immediate family” likely means person within the first degree of relationship. The AG also explained that a county officer or employee is in a position of public trust and is prohibited from being interested in a contract in furtherance of his personal economic and individual interests. He noted that such contracts are generally unenforceable.

ACA 14-14-1202(A)(i), states, “No officer shall either directly, in any contract or transaction made, authorized or entered into on behalf of the county or an entity created by the county, or accept or receive any property, money, or other valuable thing for his or her use or benefit on account of, connected with, or growing out of any contract or transaction of a community.” Additionally, all purchases for the county will be for “the benefit of the county” only; it is unlawful for any officer or employee to accept or retain for his or her own use or benefit. See ACA 14-14-1202(A)(ii)(b).

The law allows for the quorum court to address “unusual circumstances” by virtue of a transparent ordinance finding unusual circumstances obtained by a two-thirds supermajority vote of the quorum court. See ACA 14-14-1202(c). It is best to bring these matters to the quorum court so it can approve, ratify or reject any issues and make a determination of whether a circumstance is in the best interest of the county and truly unusual.

An example of a contractual relationship that was enough to create a conflict of interest can be found in AG Opinion 2002-327. The question presented was whether a justice of the peace who owned a company could perform dirt work for a new county library building. The AG concluded that it was a clear conflict of interest for a quorum court member to perform contractual services for the county, even if the service was indirectly performed as a subcontractor. The AG even said that if the justice of the peace resigns, he or she still would be unable to complete the work because the resignation “would not cure the impropriety” and the official “would continue to benefit from an improperly negotiated contract.”

An example of a personal benefit not sufficient to create a conflict of interest can be found in AG Opinion 2000-302. The question in the opinion was whether a justice of the peace who was also a practicing attorney could sponsor ordinances benefiting the court system in which he practiced. The AG concluded that unless it could be proven that the benefit conferred was substantial and narrowly focused on his personal economic interest, there would be no conflict of interest. The AG also stated that benefits affecting a class or profession are not sufficient to constitute a violation of ACA 14-14-1202.

RIGHT TO RUN AND HOLD OFFICE

The AG recently explained that a county personnel policy may not require county employees to vacate their position before filing for elective office. See AG Opinion 2013-142. The AG explained that in 1997 the General Assembly enacted ACA 21-1-207, which explicitly provides, “No employee of the state, municipality, a school district, or any other political subdivision of this state shall be deprived of his or her right to run as a candidate for an elective office or to express his or her opinion on political subjects, unless necessary to meet the requirements of federal law.” AG Opinions 99-155 and 98-084 likewise cite ACA 21-1-207 and support the same conclusion. Arkansas law generally protects the right to run for office. See, e.g., ACA 21-1-207 (permitting state and local employees to run for public office); *MacBride v. Exon*, 558 F.2d 443, 448 (8th Cir. 1997) (state’s restriction of one’s ability to become a candidate for public office is “severely circumscribed by the Constitution.”); *Fisher v. Taylor*, 210 Ark. 380, 196 S.W.2d 217 (1946) (right to be a candidate for public office is fundamental and should not be curtailed without good cause). But it is important to note that just because a person is eligible to run for office, it does not necessarily mean that they can hold dual offices. See, e.g., AG Opinion 2007-218 (sets forth the general test for determining eligibility for office).

In the context of dual office holding, there are three categories of unlawful conflicts of interest: constitutional conflicts, statutory conflicts and conflicts created by offices having incompatible duties and common law conflicts [*Byrd v. State*, 240 Ark. 743, 402 S.W.2d 121

(1966)]. In the context of dual office running, an act was recently enacted to prevent candidates from running for more than one office under certain circumstances. Act 1471 of 2013, codified as ACA 7-5-111 states, “A person shall not run for election for more than one (1) state, county, or municipal office if the elections are to be held on the same date.”

CONSTITUTIONAL CONFLICTS: Article 19, Section 6 of the Arkansas Constitution states, “No person shall hold or perform the duties of more than one office in the same department of the government at the same time, except as expressly directed or permitted by this Constitution.” The act of holding concurrent elected or even deputy positions is clearly prohibited by the Arkansas Constitution, if the position is considered an “office.” The Arkansas Constitution does not, however, explicitly address the legitimacy of holding an elected or deputized position concurrently with a non-office role. See AG Opinion 2010-045. Article 4, Section 1 divides the powers of government of the state of Arkansas into legislative, executive and judicial departments. Article 4, Section 2 provides, “No person or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.”

STATUTORY CONFLICTS: To determine whether there is a statutory conflict, there must be a significant understanding of the facts surrounding the inquiry. Necessary information includes, but is not limited to: the duties of the offices, where funding originates, background information on the candidate, membership of committees and origin of compensation. Some statutes have been around for many years, but new statutes are constantly implemented, it is important to check with an attorney to see if any apply.¹

COMMON LAW CONFLICTS: At common law, there is the possibility of a conflict under the “doctrine of incompatibility.” If there is a situation in which, “the discharge of the duties of the one [position] conflict[s] with the duties of the other, to the detriment of the public

¹ 5 U.S.C.A. § 1501; A.C.A. § 7-4-109; A.C.A. § 7-5-111; A.C.A. § 7-6-102; A.C.A. § 14-14-502; A.C.A. § 14-14-1202; A.C.A. § 14-14-1205; A.C.A. § 14-49-202; A.C.A. § 14-50-202; A.C.A. § 14-51-202; A.C.A. § 14-201-105; A.C.A. § 21-8-304.

² Op. Att’y Gen. 2012-018 (mayor, county judge), Op. Att’y Gen. 2010-045 (coroner, sheriff), Op. Att’y Gen. 2007-218 (employee of county, employee of contractor), Op. Att’y Gen. 2005-126 (board member, justice of the peace), Op. Att’y Gen. 2004-342 (county clerk, election coordinator), Op. Att’y Gen. 2004-160 (legislator, director of drug task force), Op. Att’y Gen. 2004-106 (chairman/ board member, candidate), Op. Att’y Gen. 2002-327 (justice of peace, business owner), Op. Att’y Gen. 2002-133 (coroner, justice of the peace), Op. Att’y Gen. 2002-074 (deputy sheriff, justice of the peace), Op. Att’y Gen. 2002-097 (deputy sheriff, justice of the peace), Op. Att’y Gen. 2001-042 (county judge, director of district), Op. Att’y Gen. 2000-302 (justice of the peace, sponsoring ordinances), Op. Att’y Gen. 2000-291 (justice of the peace, prosecutor) Op. Att’y Gen. 1999-449 (law enforcement, married to bonding company employee), Op. Att’y Gen. 1999-249 (school board, justice of the peace), Op. Att’y Gen. 1998-275 (assistant fire chief, county judge), Op. Att’y Gen. 1998-226 (justice of the peace, county planning board), Op. Att’y Gen. 1997-143 (board member, justice of the peace), Op. Att’y Gen. 1997-066 (justice of the peace, law practice), Op. Att’y Gen. 1996-077 (library employee, justice of the peace), Op. Att’y Gen. 1996-334 (elected officer, central committee), Op. Att’y Gen. 1994-372 (municipal

good”, then the doctrine applies [State ex rel *Murphy v. Townsend*, 72 Ark. 180 (1904)]. The Supreme Court of Arkansas more recently stated that:

One commentator has explained, "Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where the antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both." [Eugene McQuillin, 3 The Law of Municipal Corporations § 12.67 (3d ed. 1990)].

The common law “doctrine of incompatibility” usually applies to dual-office situations, but the AG has stated that it can apply to the concurrent holding of an office and a public employment [AG Opinion 2006-219 at footnote 4, citing *Thompson v. Roberts*, 333 Ark. 544, 970 S.W.2d 239 (1998) and AG Opinion 2006-066].

ATTORNEY GENERAL OPINIONS:

The Arkansas Attorney General’s office provides guidance for questions regarding conflicts of interest. Most opinions essentially apply the conflict of interest test. Below is a list of AG opinions concerning various situations. ²

One example of a dual office situation that is likely allowable can be found in AG Opinion 1999-249. This opinion addresses whether service on both a local school board and the quorum court is compatible if the quorum court is responsible for filling vacancies on local school boards. The AG eventually stated that as long as the quorum court does not fill a vacancy with one of its own members, the dual service is likely permissible. However, in AG

² Op. Att’y Gen. 2012-018 (mayor, county judge), Op. Att’y Gen. 2010-045 (coroner, sheriff), Op. Att’y Gen. 2007-218 (employee of county, employee of contractor), Op. Att’y Gen. 2005-126 (board member, justice of the peace), Op. Att’y Gen. 2004-342 (county clerk, election coordinator), Op. Att’y Gen. 2004-160 (legislator, director of drug task force), Op. Att’y Gen. 2004-106 (chairman/ board member, candidate), Op. Att’y Gen. 2002-327 (justice of peace, business owner), Op. Att’y Gen. 2002-133 (coroner, justice of the peace), Op. Att’y Gen. 2002-074 (deputy sheriff, justice of the peace), Op. Att’y Gen. 2002-097 (deputy sheriff, justice of the peace), Op. Att’y Gen. 2001-042 (county judge, director of district), Op. Att’y Gen. 2000-302 (justice of the peace, sponsoring ordinances), Op. Att’y Gen. 2000-291 (justice of the peace, prosecutor) Op. Att’y Gen. 1999-449 (law enforcement, married to bonding company employee), Op. Att’y Gen. 1999-249 (school board, justice of the peace), Op. Att’y Gen. 1998-275 (assistant fire chief, county judge), Op. Att’y Gen. 1998-226 (justice of the peace, county planning board), Op. Att’y Gen. 1997-143 (board member, justice of the peace), Op. Att’y Gen. 1997-066 (justice of the peace, law practice), Op. Att’y Gen. 1996-077 (library employee, justice of the peace), Op. Att’y Gen. 1996-334 (elected officer, central committee), Op. Att’y Gen. 1994-372 (municipal alderman, justice of the peace), Op. Att’y Gen. 1994-065 (board member, justice of the peace), Op. Att’y Gen. 92-020 (sheriff, justice of the peace), Op. Att’y Gen. 91341 (justice of the peace, city treasurer).

Opinion 2002-133, the attorney general opined that the dual service as a county coroner and a quorum court is not permissible because it would give rise to unlawful conflicts of interest.

Generally, the AG believes that most dual offices are likely prohibited. There are only a few instances where the AG has definitively ruled a combination of roles allowable.² The one common thread that all cases share is the application of the three-test process to determine whether a combination of services is allowable. To answer the question of whether any combination of offices is allowable, there must be a thorough analysis of the facts.

It is important to remember that any question regarding a conflict of interest or dual office holding is a factually intensive inquiry that is best handled by the judiciary.

REMOVAL OF OFFICE:

If, at any time, someone realizes that there is a conflict of interest or problem with eligibility, there can be serious consequences. This type of situation can yield many outcomes, one of which is removal of office. One recent incident involved Searcy County Sheriff and Collector Kenny Webster Cassell. In October 1979, Cassell, who was a deputy sheriff at the time, pled guilty to unlawfully possessing less than \$100 worth of Cornish hens, with knowledge they were stolen, a misdemeanor violation of 18 USC 659, Embezzlement or Theft of Interstate or Foreign Shipments by carrier [*State v. Cassell*, 427 S.W.3d 663, 664 (Ark. 2013)]. Article 5, Section 9 of the Arkansas Constitution states, “No person hereafter convicted of embezzlement of public money, bribery, forgery or other infamous crime, shall be eligible to the General Assembly or capable of holding any public office of trust or profit in this State.” An infamous crime is one that involves elements of deceit and dishonesty, and since theft is a crime that involves dishonesty, someone who commits theft is constitutionally barred from serving as an elected public official [*State v. Cassell*, 427 S.W.3d 663, 666 (Ark. 2013)]. Even though the crime of possessing less than \$100 worth of stolen goods seems like a petty crime, it is enough that there is dishonesty involved to preclude an individual from holding public office.

ARKANSAS ETHICS COMMISSION

When running as a candidate, there must be certain disclosures made to be eligible for office. These disclosures can be found on the Arkansas Ethics Commission’s web site. The list of disclosures includes a candidate’s name, location, reason for filing, source of income, business or holdings, office or directorship, creditors, past-due amounts owed to government, guarantor or company-maker, gifts, awards, non-governmental sources of

payment, direct regulation of business and sales to governmental body. For additional information, refer to the Ethics Commission web site.