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OVERVIEW

- FUNDAMENTALS OF DUAL OFFICE HOLDING
- INCOMPATIBILITY VS. CONFLICT OF INTEREST
- COMMON-LAW INCOMPATIBILITY

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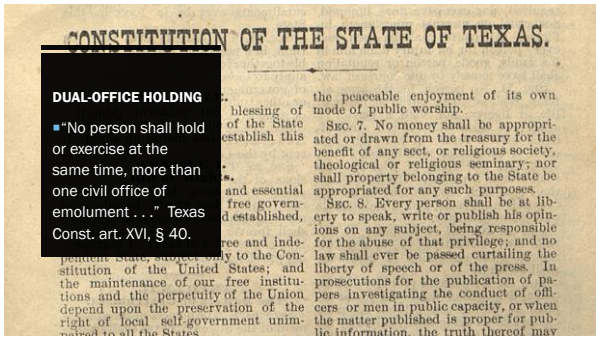

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DUAL-OFFICE HOLDING – TWO-PART TEST

- Civil Office, also referred to as a public office, is determined by a two-prong test.
- Office of Emolument is generally defined as receiving a pay or benefit for holding the office.

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CIVIL OFFICE TEST

1. whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public; and
2. largely independent of the control of others."

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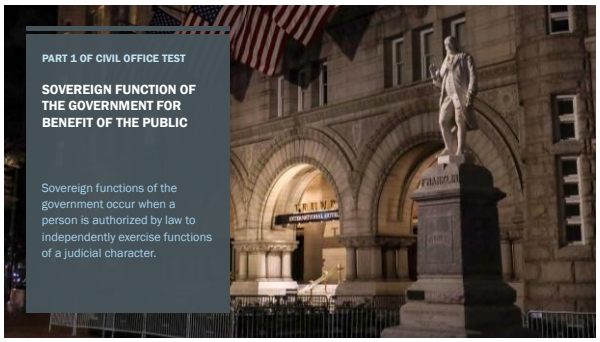

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PART 2 OF CIVIL OFFICE TEST

LARGELY INDEPENDENT OF THE CONTROL OF OTHERS

The test to determine whether a worker operates independent of the control of others focuses on the employer's right to control the "means and manner" of the worker's duties.

7

SO, YOU HOLD A CIVIL OFFICE! WHAT'S NEXT . . .

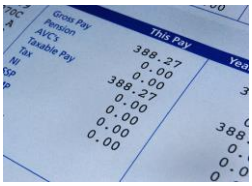
After it is determined that a person holds a civil office, the next step (for purposes of dual-office holding) is to determine whether the office constitutes an office of civil emolument.



8

OFFICE OF EMOLUMENT IS GENERALLY DEFINED AS RECEIVING A PAY OR BENEFIT FOR HOLDING THE OFFICE.

Pursuant Article XVI, Section 40 of the Texas Constitution, emolument refers to any pecuniary profit, gain, or advantage paid to a public official. However, it does not include the legitimate reimbursement of expenses.



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OTHER CONSIDERATIONS

Generally, the following listed officers are not subject to the constitutional provision of dual office holding (but are still subject to the doctrine of incompatibility):

- Justice of the Peace,
- County Commissioner,
- Notary Public and Postmaster, and
- certain military members.

(for a more complete list, see: the Tex. Const. Art. XVI, § 40.)

10



EXCEPTIONS TO DUAL-OFFICE HOLDING FOR MUNICIPAL JUDGES

- Tex. Gov't Code § 574.001(b).
- Tex. Gov't Code § 29.004(c).

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INCOMPATIBILITY V. CONFLICTS OF INTEREST

- The office passes constitutional muster? Still not in the clear yet,...
- Common-law compatibility
- Conflicts of Interest

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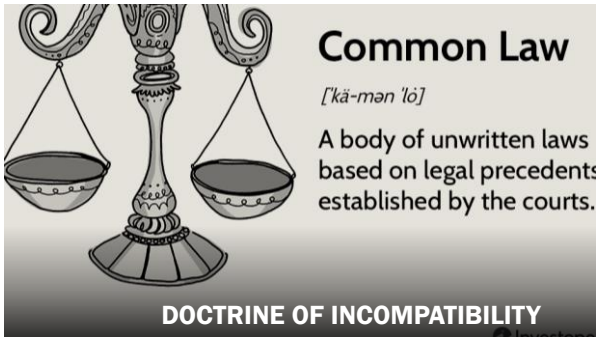


13



SELF APPOINTMENT PROHIBITION

Prevents a local governing body from appointing one of its own member to a public office or position.

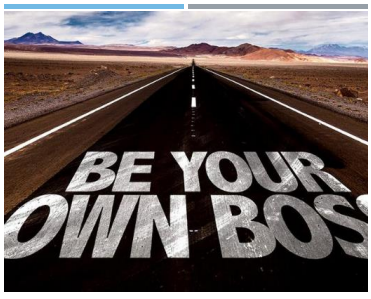
Ehlinger v. Clark, 8 S.W.2d 666 (Tex. 1928).

14

SELF-EMPLOYMENT PROHIBITION

A person of a local governing body may not simultaneously serve as an employee of his or her entity because the government body exercises control over the employee.

Tex. Att'y Gen. LO-97-34.



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CONFLICTING LOYALTIES PROHIBITION

Prevents a person from holding two public offices when the interests of the two entities may conflict and when voting on behalf of one public entity would possibly compromise the interests of the other public entity. In other words, the official would have to choose between the conflicting interests of the two public entities.

Thomas v. Abernathy Cty. Line Indep. Sch. Dist., 290 S.W. 152, 153 (Tex. 1927).



16

OTHER CONSIDERATIONS

- Overcoming Incompatibility
- Resignation of former office (if a valid appointment)

17



18

STATE COMMISSION ON JUDICIAL CONDUCT

The State Commission on Judicial Conduct is an independent Texas state agency created by an amendment to the Texas Constitution in 1965, that is responsible for investigating allegations of judicial misconduct or judicial disability, and for disciplining judges.

19

COMMISSION'S MISSION

1. To protect the public
2. To promote public confidents in the integrity, independence and impartiality of the judiciary
3. To encourage judges to maintain high standards of conduct, on and off the bench

20

THE COMMISSION

13 Commissioners

- Six Judges (Supreme Ct.)
- Five Public Members (Governor)
- Two Attorney Members (State Bar)

Service: 6-year staggered terms

Judicial Branch of Government



21



COMMISSION STAFF

14 Employees

- Executive Director
- General Counsel
- Chief Investigator
- 4 Staff Attorneys
- 4 Investigators
- 2 Administrative Assistants
- Staff Serves Officers

22

COMMISSION AUTHORITY

- Article V, Section 1-a of Texas Constitution
- Texas Code of Judicial Conduct ("Canons")
- Chapter 33 of the Texas Government Code
- Texas Procedural Rules for the Removal or Retirement of Judges



23

CODE OF JUDICIAL CONDUCT

The **Code** is designed to provide standards of ethical conduct for judges and judicial candidates and provides a structure for regulating said **conduct** through the State Commission on Judicial Conduct. ...

- Written by the Texas Supreme Court
- Not intended as a basis for civil or criminal liability

24

"CANONS"

The Code of Judicial Conduct contain "canons" i.e., principles of judicial conduct that all judges must observe:

- **Aspirational** means "having/showing high level of success…"
  - Aspirational Term *"Should"*
- **Mandatory** means "required by law or rule."
  - Mandatory Term *"Shall"*

25

CANON 2B: RELATIONSHIP/PRESTIGE

A judge **shall not** allow any relationship to influence judicial conduct or judgments

A judge **shall not** lend the prestige of judicial office to advance the private interests of the judge **or others**

nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.

26

CANON 3B(1)

A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

27

CANON 4A

A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- cast reasonable doubt on the judge's capacity to act impartially as a judge; or
- interfere with the proper performance of judicial duties.

28

CANON 4D(1)

A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or officeholder expenses as permitted by state law.

29

TEX. CONST. ART. V, §1-A(6)A

"willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice."

30



PRIOR DISCIPLINARY ACTIONS

31

DUAL OFFICE HOLDING/INCOMPATIBILITY

CJC No. 16-0155-MU

Municipal Judge resigned from Judicial Office in Lieu of Disciplinary Action for improperly engaging in dual office holding for simultaneously holding both the office of Mayor and Municipal Judge of Little River Academy. Also dismissed citations without a motion from the State, changed charged offenses to warnings, negotiated case dispositions directly with defendants without a prosecutor present and without requesting or obtaining a plea, and various demeanor issues.

32



PRIVATE REPRIMAND OF A JUSTICE OF THE PEACE

The judge presided over an eviction case in which his law partner represented the defendant. The judge knew or should have known that, because he and defense counsel were law partners, a conflict of interest existed that should have prevented him from presiding over the case and deciding in favor of his law partner's client.

Violation of Canon 3B(1)

33

PRIVATE ADMONITION OF A MUNICIPAL COURT JUDGE

The judge failed to notify the parties of a conflict of interest when she found her neighbor guilty of a city ordinance and assessed a fine. The case was filed in her court as a result of the judge's inquiry to a city code enforcement officer regarding her neighbor's property being in violation of a city ordinance. The judge further engaged in improper *ex parte* communication with an alleged victim in a case, and then failed to accord the defendant the right to be heard when she instructed her clerk not to provide notice to the defendant's attorney in the pending criminal matter.

Violation of Canons 2B, 3B(1), 3B(8) and 6C(2)



34

APPEARANCE OF IMPROPRIETY:

PRIVATE ADMONITION OF A COUNTY COURT AT LAW JUDGE

The judge allowed an attorney who regularly practices in his court to office in his building and perform legal work for his company, conveying the impression that the attorney was in a special position to influence the judge. The judge's business relationship with the attorney also reflected adversely on the judge's impartiality and involved the judge in frequent transactions with a lawyer who regularly appeared in his court. Finally, the judge's failure to voluntarily recuse himself from a case involving the attorney or, in the alternative, to disclose the nature of his business relationship with the attorney to opposing counsel and the litigants, led to an appearance of impropriety of such nature and degree as to ultimately require that the judge be ordered removed from the case.

Violation of Canons 2B, 3B(1) and 4D(1)

35

The judge's actions placed the judge, a motorist and other motorists in danger, and created an appearance that the judge was acting as an arm of the police which is inconsistent with his duties as a neutral and detached judicial officer. The judge's conduct and the perception of bias and impropriety that flowed from it occurred on more than one occasion and result of negative media attention, cast public discredit upon the judiciary and/or the administration of justice.

Violation of Tex. Const. Art. V, §1-a(6)A

APPEARANCE OF IMPROPRIETY:

PRIVATE ADMONITION AND ORDER OF ADDITIONAL EDUCATION OF A JUSTICE OF THE PEACE

36

APPEARANCE OF IMPROPRIETY:

Public Warning and Order of Additional Education

District Judge was publicly warned and order to obtain additional education for (1) attending a luncheon hosted and paid for by one of the law firms involved in a highly contested civil case while the case was still pending before her court and set for post-judgment matters the following day; and (2) failing to disclose that event to all parties involved in the litigation.

Violation of Canons 2B, 4A(1) and 4A(2)

37



38

HOW TO CONTACT THE COMMISSION ON JUDICIAL CONDUCT

Toll-Free: (877) 228-5750

In Austin: (512) 463-5533

Executive Director: Jacqueline Habersham

Website: www.scjc.texas.gov

(includes Canons, Annual Reports, Sanction Summaries and Complaint Portal)

39



40