



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 19, 1996

The Honorable Senfronia Thompson  
Chair  
Committee on Judicial Affairs  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910

Letter Opinion No. 96-145

Re: Whether a former district judge who accepts judicial assignments pursuant to chapter 74 of the Government Code may simultaneously serve as a part-time municipal judge (ID# 33874)

Dear Representative Thompson:

You have requested our opinion as to whether a former district judge serving as an assigned judge under chapter 74, Government Code, may also serve as a part-time municipal judge. Article XVI, section 40, Texas Constitution, provides, in part: "No person shall hold or exercise at the same time, more than one civil office of emolument. . . ." If both positions constitute an "office of emolument," then no individual may simultaneously hold both positions.

We first consider whether a former district judge sitting by assignment thereby holds an "office." Section 74.052, Government Code, provides that "[j]udges may be assigned in the manner provided by this chapter to hold court when necessary to dispose of accumulated business in the region." Among the judges who "may be assigned . . . by the presiding judge of the administrative region in which the assigned judge resides" are: "a former district or appellate judge . . . who certifies to the presiding judge a willingness to serve and who is on the list maintained by the presiding judge. . . ." Gov't Code § 74.054(a)(3). In order "[t]o be eligible to be named on the list, a retired or former judge must," among other things, "have served as a judge for at least 48 months," "annually demonstrate" the completion of the educational requirements mandated for active judges, and "certify to the presiding judge a willingness not to appear and plead as an attorney in any court in this state for a period of two years." Gov't Code § 74.055(c)(1), (5), (6). The certification "not to appear and plead" may be terminated only by written revocation. "If a revocation is not filed, recertification for subsequent two-year periods takes effect by operation of law." *Id.* § 74.0551.

A judicial assignment under chapter 74 is a directive "to hold special or regular terms of court in any county of the administrative region to try cases and dispose of accumulated business." *Id.* § 74.056(a). Unless he is relieved of the assignment by the presiding judge "on presentation of good cause in writing," an assigned judge is required to "serve in the court or administrative region to which he is assigned." *Id.* § 74.058. While sitting on assignment, an assigned judge "has all the powers of the judge of the

court to which he is assigned.” *Id.* § 74.059(a). Regular or special terms of court may be extended as necessary. *Id.* § 74.059(b). Furthermore, an assigned judge is directed by statute to:

- (1) diligently discharge the administrative responsibilities of the office; [and]
- (2) rule on a case within 90 days after the case is taken under advisement.

*Id.* § 74.059(c). Finally, a former district judge sitting by assignment is paid, in addition to ordinary and special expenses provided by statute, “an amount equal to the compensation received from state and county sources of the judge of the court to which he is assigned.” *Id.* § 74.061(c).

In Attorney General Opinion JM-847 (1988), this office considered whether a legislator was barred by article XVI, section 40, from serving as a compensated special commissioner in an eminent domain proceeding. The opinion noted that prior judicial decisions and attorney general opinions “state as an essential element of an office that its duties are continuing in nature and not intermittent.” The opinion quoted the Supreme Court’s language in *Kimrough v. Barnett*, 55 S.W. 120, 122 (Tex. 1900), defining “public office” as:

the right, authority, and duty created and conferred by law, by which, for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.

Attorney General Opinion JM-847 concluded that a special commissioner in an eminent domain proceeding, who is appointed to serve for one case only, and does not serve a fixed term, does not thereby hold an office. As a result, a legislator is not barred by article XVI, section 40, from simultaneously holding the position of “special commissioner.”

In the situation you present, the facts are quite different. The appointed judge is appointed for a “term of court” rather than for one case only, and he may be reappointed to any subsequent term as often as the presiding judge is willing to continue assigning him. His appointment is contingent upon filing a written certification not to “appear and plead as an attorney” in any court for a period of two years. While sitting on assignment, he has all the powers of a regular judge of the court to which he is assigned. His judicial duties extend beyond the courtroom, since he is required to rule on any case within 90 days after taking it under advisement. Furthermore, his duties are not *merely* judicial, but include as well the “administrative responsibilities” required of a judge. Finally, he must be compensated in an amount equal to the compensation provided for the judge of the court to which he is assigned. In our opinion, these circumstances compel the conclusion that a former district judge available for assignment as provided in chapter 74, Government

Code, does not hold a position that is merely *intermittent* but rather, occupies a *public office* during the entirety of the period in which he is thus available.

In an opinion issued today, we hold that a compensated municipal judge, whether full- or part-time, holds an "office of emolument" for purposes of article XVI, section 40. Attorney General Opinion DM-428 (1996).<sup>1</sup> Accordingly, a former district judge serving as an assigned judge under chapter 74, Government Code, is barred by article XVI, section 40, from simultaneously serving as a compensated part-time municipal judge.

### S U M M A R Y

A district judge serving as an assigned judge under chapter 74, Government Code, is prohibited by article XVI, section 40, Texas Constitution, from simultaneously serving as a compensated part-time municipal judge.

Yours very truly,



Rick Gilpin  
Deputy Chief  
Opinion Committee

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<sup>1</sup>Opinion DM-428 (1996) also considers a proviso to article XVI, section 40, which declares:

It is further provided that a nonelective State officer may hold other nonelective offices under the State or the United States, if the other office is of benefit to the State of Texas or is required by State or Federal law, and there is no conflict with the original office for which he receives salary or compensation.

While the district judge of whom you inquire is, in actual practice, *appointed* to that position, he nevertheless holds an *elective office*. As a result, we do not believe that this proviso is applicable to the situation you pose.