



**STATE OF ARKANSAS**  
**THE ATTORNEY GENERAL**  
**DUSTIN MCDANIEL**

Opinion No. 2014-076

August 11, 2014

The Honorable Tommy Thompson  
State Representative  
15 Ashley Drive  
Morrilton, Arkansas 72110-2287

Dear Representative Thompson:

You have requested my opinion on the following questions:

1. Is there any constitutional or statutory authority that would prohibit an elected Judge on the Court of Appeals from also serving as an elected judge in a part-time position for a District Court?
2. If the District Court position is funded fully by the City and the County and no state funds are used for the Judge's salary, would this violate any constitutional or statutory rules?
3. If yes to the above, is there a distinction between an elected Judge that teaches law school and college courses as an adjunct professor and paid with state funds?

**RESPONSE**

In response to your first question, Section 16(F) of Amendment 80 to the Arkansas Constitution prohibits circuit, district, and appellate court judges and justices from holding "any other office of trust of profit under this state...." In my opinion, this constitutional provision bars a court of appeals judge from serving as a district court judge, whether on a full or part-time basis.<sup>1</sup> It is my opinion in response to

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<sup>1</sup> I assume that by "part-time," you mean the district judge is not prohibited from engaging in the private practice of law. District judges are excluded from Amendment 80's general prohibition against the practice of law by justices and judges. Ark. Const. amend. 80, § 14. The General Assembly may nevertheless

your second question that this dual office-holding prohibition is unaffected by the source of funding for the position. With regard to your third question, there is a distinction because in my opinion even if the professor's compensation is fixed by law, the position of professor does not constitute an office.

***Question 1 - Is there any constitutional or statutory authority that would prohibit an elected Judge on the Court of Appeals from also serving as an elected judge in a part-time position for a District Court?***

The answer to this question is found in Section 16 of Amendment 80 to the Arkansas Constitution, which addresses the qualifications of justices and judges and provides in relevant part:

Circuit, District, and Appellate Court Judges and Justices shall not be allowed any fees or perquisites of office, ***nor hold any other office of trust or profit under this state*** or the United States, except as authorized by law.<sup>2</sup>

This provision by its very terms identifies both a court of appeals judgeship and a district court judgeship as "office[s] of trust or profit under this state," and it prohibits the respective justices and judges from holding another such office, "except as authorized by law." Having found no authority in law for an appellate judge to serve as a district judge, it is my opinion in response to your specific question that this general constitutional proscription against dual service bars a court of appeals judge from serving as a district court judge, whether on a full or part-time basis.

***Question 2 - If the District Court position is funded fully by the City and the County and no state funds are used for the Judge's salary, would this violate any constitutional or statutory rules?***

I interpret this question as suggesting that the prohibition under Ark. Const. amend. 80, § 16(F) might not apply if the state does not fund the district judge's salary. I have found no support for that suggestion. On the face of Amendment 80, it is evident that district court judges are identified as holding an office under

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impose such a prohibition. *Id.* But currently, the only prohibition to this effect applies to the full-time position of "state district court judge." *See* A.C.A. § 6-17-1102(6) (Supp. 2013).

<sup>2</sup> Ark. Const. amend. 80, § 16(F) (emphasis added).

the state: they “shall not ... hold any *other office* of trust or profit under this state.” In my opinion, a district judge is subject to this dual office-holding proscription regardless of how he or she is paid. The General Assembly determines the “amount and method” by which district judges are paid: “The General Assembly shall by law determine the amount and method of payment of Justices and Judges.”<sup>3</sup> But this funding determination is in no way connected to the proscription against holding another office under the state – a proscription that on its face generally precludes an appellate justice from serving as district judge.<sup>4</sup>

***Question 3 - If yes to the above, is there a distinction between an elected Judge that teaches law school and college courses as an adjunct professor and paid with state funds?***

This question requires a determination whether the position of adjunct professor constitutes an “office” within the meaning of Amendment 80’s dual office-holding prohibition which, as discussed above, applies to an “office of trust or profit under this state.” One of my predecessors had occasion to address this question under virtually identical previous constitutional language. Prior to its repeal by Amendment 80,<sup>5</sup> Article 7, section 10 of the Arkansas Constitution stated in relevant part that Arkansas Supreme Court judges “shall not ... hold any office of trust or profit under the State or the United States.”<sup>6</sup> After noting that there were no cases construing this language, my predecessor observed that our court has construed the term “office” in other dual office-holding contexts and has applied the same analysis in each – an analysis that focuses on certain characteristics:

[T]he Arkansas Supreme Court has taken the position that an “office” is indicated by the following characteristics:

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<sup>3</sup> Ark. Const. amend. 80, § 16(E).

<sup>4</sup> *Accord* Op. Att’y Gen. 2001-264 (noting that “[t]o date, the legislature has not elected to authorize a district court judge permanently to serve in that capacity in more than one district.”).

Amendment 80 expressly authorizes one exception to the dual office-holding proscription wherein it authorizes a district judge to serve in a county contiguous to the county of his residence if no qualified candidate resides in the contiguous county. Ark. Const. amend. 80, § 16(d). For an explanation of this exception, see Op. Att’y Gen. Nos. 2003-341 and 2001-264.

<sup>5</sup> Ark. Const. amend. 80, § 22(A).

<sup>6</sup> Ark. Const. art. 7, § 10 (1987).

- (1) The holder of the position exercises some part of the State's sovereign power;
- (2) The tenure, compensation, and duties are usually fixed by law;
- (3) The holder of the position takes an oath of office;
- (4) The holder of the position receives a formal commission;
- (5) The holder of the position gives a bond.

*See, e.g., Maddox v. State*, 220 Ark. 762, 249 S.W.2d 972 (1952). By contrast, in a position that is not an "office," some or all of the characteristics listed above are lacking. *Id.*<sup>7</sup>

My predecessor concluded based on this analysis that a law professor does not hold an office:

The only one of the listed characteristics that could even be considered indirectly descriptive of the position of law professor is part of the second one: Compensation fixed by law. The compensation of law professors, as a group, is determined by legislative appropriation. However, it is my understanding that the individual professors' compensation is determined by contract. Therefore even the second listed characteristic may not be considered applicable to law professors. Clearly the remaining four are not: Law professors do not exercise the State's sovereign power (see Op. Att'y Gen. No. 92-050); they do not take an oath of office; they do not receive a formal commission; and they do not give a bond.

I therefore conclude that the position of law professor does not constitute an "office" within the meaning of that term as discussed by the Arkansas Supreme Court.<sup>8</sup>

I fully concur with this analysis and conclusion, which in my opinion apply equally to the dual office-holding prohibition under Ark. Const. amend. 80, § 16(F). Even if the adjunct professor's compensation is established by state

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<sup>7</sup> Op. Att'y Gen. 95-210.

<sup>8</sup> *Id.*

appropriation, the position is not an “office” within the meaning of this constitutional prohibition, in my opinion.

I believe this conclusion is also determinative of any separation of powers issue that might arise out of the question you have presented regarding an elected judge teaching as an adjunct professor paid with state funds. Article 4, Section 1 divides the powers of the state’s government into three distinct branches. Article 4, Section 2 then states:

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.<sup>9</sup>

Having determined that a law professor is not an “officer,” I conclude that the separation of powers doctrine does not operate to prohibit an elected judge from teaching as an adjunct professor.<sup>10</sup>

In sum, with regard to your specific question, there is a distinction because the position of professor does not constitute an office, in my opinion.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,



DUSTIN MCDANIEL  
ATTORNEY GENERAL

DM/EAW:cyh

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<sup>9</sup> Ark. Const., art. 4, § 2.

<sup>10</sup> *Accord Op. Att’y Gen. 95-210.*