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# Ethics

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Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

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## Ethics

Reference Number: CTAS-162

The issue of ethics in state and local government has dominated the news media in Tennessee over the past several years. A number of scandals involving elected officials inspired a new prohibition on "consulting fees" for government officials in 2005 and eventually led to an extraordinary session of the General Assembly at the beginning of 2006 to deal with the topic of ethics. During that session, the General Assembly passed the "Comprehensive Governmental Ethics Reform Act of 2006" (the Ethics Reform Act). This wide-ranging act created a new State Ethics Commission, established substantial new registration and reporting requirements for lobbyists and their employers, and enacted new provisions to set limits on gifts and require disclosure of conflicts of interest for certain state officials. The law also included a requirement for local governments to adopt ethics policies covering the disclosure of gifts accepted by officials and employees and the disclosure of conflicts of interest. In addition to the Ethics Reform Act, there are other state laws which address ethics and conflicts of interests in county government

## County Ethics Policies

Reference Number: CTAS-621

The "Comprehensive Governmental Ethics Reform Act of 2006" is codified in T.C.A. § 8-17-101 *et seq.* Pursuant to the Ethics Reform Act all counties were required to adopt local ethics policies by June 30, 2007. The law directed CTAS to develop a model policy.

These ethics policies are required to include rules and regulations regarding limits on, and/or reasonable and systematic disclosure of, gifts or other things of value received by officials and employees that impact or appear to impact their discretion, and rules and regulations regarding reasonable and systematic disclosure by officials and employees of their personal interests that impact or appear to impact their discretion. T.C.A. § 8-17-102(a)(3). It is important to note that the provisions of state law, to the extent that they are more restrictive, control. Additionally, the Ethics Reform Act expressly states that these policies cannot include personnel or employment policies, or policies or procedures related to operational aspects of governmental entities. T.C.A. § 8-17-102(a)(3).

The ethics policies adopted by a county commission apply broadly to all officials and employees in all offices, agencies, and departments of the county and to the members, officers, and employees of all boards, commissions, authorities, corporations, or other instrumentalities of a county. However, ethics policies adopted by the county commission do not apply to utility districts or schools which must adopt their own ethics policies. T.C.A. §§ 8-17-102(c) and 8-17-102(d).

If a board, commission, authority, corporation or other instrumentality is created by two or more local government entities, such creating entities are required, by amendment to the interlocal agreement or other agreement creating such joint instrumentality, to designate the ethical standards that govern the jointly created instrumentality. T.C.A. § 8-17-102(b).

Violations of ethics policies by officials or employees covered by the local ethics policy are enforced in accordance with the provisions of existing state law. T.C.A. § 8-17-106(b).

In 2023, the legislature amended T.C.A. § 8-17-104. By no later than January 1, 2024, each entity covered by this chapter shall notify the ethics commission, either in writing or electronically by email, of the primary person responsible for administering and enforcing the entity's ethical standards. The entity also shall provide the commission with the person's contact information, including the person's business address, phone number, and email address. The entity shall notify the commission of any change in such responsibility within thirty (30) calendar days of such change and shall provide the name and contact information for an interim official serving in this capacity until such time as a permanent successor can be identified.

## County Ethics Committees

Reference Number: CTAS-622

The ethics legislation that was passed in 2005 and 2006 does not require a county to have an ethics committee. Nevertheless, many counties have established county ethics committees to deal with potential ethics complaints. Bear in mind that a county ethics committee has very little, if any, authority to do anything other than to screen ethics complaints and direct the complaint to the proper county official or county or state agency that can take appropriate action on the complaint.

As previously stated, the county ethics policy is required to cover the acceptance of and disclosure of gifts accepted by officials and employees and the disclosure of conflicts of interest. Accordingly, an ethics complaint received by a county ethics committee that does not address either the acceptance and/or disclosure of a gift or a conflict of interest need not be pursued by the ethics committee.

Note that the County Purchasing Law of 1957, T.C.A. § 5-14-101 *et seq.*, and the 1981 Financial Management Act, T.C.A. § 5-21-101 *et seq.*, both contain conflict of interest provisions and prohibitions on the acceptance of gifts. It is important to note that in counties that have adopted either of these two Acts, the provisions of these state laws control to the extent that they are more restrictive than the county's ethics policy.

County officials who serve on a county ethics committee should review ethics complaints to make sure that the complaint first addresses either the acceptance/disclosure of a gift or a conflict of interest. If the ethics complaint does not address one of these two issues, the ethics committee should direct the complainant to the appropriate person or agency that may properly address the complaint and proceed no further.

If the complaint does address an issue covered by the county ethics policy, the committee should proceed to determine if the complaint bears further inquiry. If the complaint states a possible violation of the county ethics policy, the committee should turn the complaint over to the proper county official who actually has the authority to deal with the violation. Depending upon the stated complaint, that could be a county office holder, if the complaint is against an employee, or the county attorney if the complaint is against an elected county official. If the complaint states a possible criminal violation, the committee should turn the matter over to the district attorney's office. In addition, if the information contained in the complaint reasonably causes the committee members to believe that a theft, forgery, credit card fraud, or any other act of unlawful taking of public money, property, or services has occurred, the committee must report the information in a reasonable amount of time to the office of the Comptroller of the Treasury. T.C.A. § 8-4-503(a).

In order to do the job effectively, members of the ethics committee must be well versed in the state conflict of interest laws that apply to their particular county. A general understanding of criminal law would also be helpful.

## Conflicts of Interest

Reference Number: CTAS-623

Most county governments in Tennessee do not experience lobbying at the local level in the same way it happens at the General Assembly. Generally speaking, where there is a danger of a conflict of interest or undue influence of a county official, it relates not to the exercise of legislative authority but to the exercise of purchasing power, such as when the county commission votes on a county contract.

## General Conflict of Interest Law

Reference Number: CTAS-2463

In this area county officials and employees in all counties are subject to T.C.A. § 12-4-101. Under T.C.A. § 12-4-101(a)(1), it is unlawful for a public official, or other person, whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract with the county, to be directly interested in any such contract. "Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest.

In *Madison County v. Alexander*, 94 S.W. 604 (Tenn. 1906), the Tennessee Supreme Court noted that "[i]t is the policy of the law to prohibit members of the county court from making contracts with their own members (meaning the county court), for any purpose which calls for compensation out of the county treasury." The Court stated:

The underlying principle is that no man shall be allowed to make a contract with the county, whose duty it is to pay for such contract. In other words, he cannot make a contract to pay himself out of the public treasury for any purpose. That such a rule may operate harshly is no argument against it. It is based on a wise purpose and principle, that is, to prevent public officials from using their public functions and duties to subserve their private interests. It does not matter that the service is rendered faithfully and inures to the benefit of the county, or that the material may be necessary and cheaply furnished.

*Id.* See also *Cagle, for Use of Cagle v. Benton County*, 181 S.W.2d 1 (Tenn. 1944).

Because the making of a general appropriation out of which contractual funds are eventually expended

makes the appropriating body a superintending agency, a county commissioner may be said to be superintending county contracts. See Op. Tenn. Atty. Gen. 03-034 (April 1, 2003); Op. Tenn. Atty. Gen. 08-15 (January 30, 2008) (the Attorney General's office has taken the view that those who vote on budgets and appropriations superintend the contracts paid for by those budgets and appropriations). Accordingly, it would be unlawful for a county commissioner who owns a wrecker service to do business with the county even if he abstains from voting on the wrecker contract.

The Attorney General has opined that the term "directly interested" refers to a personal pecuniary interest (Op. Tenn. Atty. Gen. U96-043 (June 4, 1996)) and has concluded that T.C.A. § 12-4-101(a)(1) prohibits an officer from being directly interested in a contract, whether or not he or she abstains from voting on it. Op. Tenn. Atty. Gen. 04-016 (February 5, 2004).

The Attorney General has opined that a county commissioner has a direct interest in a contract for the sale of his land to the county and that such a contract is prohibited under T.C.A. § 12-4-101(a). Op. Tenn. Atty. Gen. 04-016 (February 5, 2004). A county commissioner whose duty it is to provide funds for construction contracts entered into by the county school board cannot enter into a construction contract with the county board of education without violating T.C.A. § 12-4-101(a). Op. Tenn. Atty. Gen. 91-31 (April 9, 1991). See also Op. Tenn. Atty. Gen. 83-336 (October 5, 1983) (a county commissioner cannot contract with the board of education of his county to provide school bus service); Op. Tenn. Atty. Gen. 83-229 (May 3, 1983) (a county commissioner cannot contract with his county hospital to provide computer services to the county hospital).

An official who violates the provisions of T.C.A. § 12-4-101 shall forfeit all pay and compensation under the contract and shall be dismissed from office and shall be ineligible for the same or a similar position for ten years. T.C.A. § 12-4-102. See *State v. Perkinson*, 19 S.W.2d 254 (Tenn. 1929) (contracts by officers with county subject officials to removal); *Madison County v. Alexander*, 94 S.W. 604 (Tenn. 1906) (member of county court was refused recovery for supplies sold to county workhouse in violation of the statute); *Hope v. Hamilton County*, 47 S.W. 487 (Tenn. 1898) (member of the county court was held not to be able to recover from the county for services performed for the county); *M. F. Parsley & Co., Inc., v. Cole & Miller*, 1926 WL 1963 (Tenn.Ct.App. 1926) (member of the county court who was the stockholder of a corporation owning a lumber yard could not lawfully contract with the county for building a school). See also Op. Tenn. Atty. Gen. 04-016 (February 5, 2004) (an officer who enters into a contract in violation of T.C.A. § 12-4-101 must forfeit compensation received under the contract, and a suit to enforce this provision is a quo warranto action ordinarily brought by the District Attorney General).

Besides prohibiting direct conflicts of interest, the statute also requires disclosure of any indirect financial interests. The statute states in pertinent part:

It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be indirectly interested in any such contract unless the officer publicly acknowledges such officer's interest. "Indirectly interested" means any contract in which the officer is interested but not directly so, but includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality or county.

T.C.A. § 12-4-101(b). See Op. Tenn. Atty. Gen. 09-48 (April 2, 2009) (the chairman of the county school board who is employed by an architectural firm that contracts with the school board has an indirect interest which must be disclosed); Op. Tenn. Atty. Gen. 09-109 (June 8, 2009) (purchase of building materials - sole supplier); Op. Tenn. Atty. Gen. 99-185 (September 17, 1999) (contract for services - sole supplier).

The question often arises whether it is proper for a county official to have authority over a matter that will have a direct financial benefit to a relative. This question arises most often when the person who will receive the direct financial benefit is the spouse of a county official. In opinions dealing with T.C.A. § 12-4-101, the Attorney General has opined that when spouses commingle assets, a person has an indirect interest in any contract directly affecting his or her spouse's employment. Op. Tenn. Atty. Gen. 05-017 (February 3, 2005); Op. Tenn. Atty. Gen. 00-181 (November 22, 2000); Op. Tenn. Atty. Gen. 88-122 (July 13, 1988); Op. Tenn. Atty. Gen. 84-030 (January 27, 1984). Accordingly, if a county commissioner and his wife commingle assets he is "indirectly interested" in any contract his wife's company may enter into with the county. Under T.C.A. § 12-4-101, the commissioner must disclose any indirect pecuniary interest in a contract with the county if he has the duty to vote for, let out, or superintend that contract. See also Op. Tenn. Atty. Gen. 05-017 (February 3, 2005) (official should abstain from voting or participating in official acts or proceedings that directly affect contracts with a relative).

The disclosure of indirect interests required by the statute calls for the "public acknowledgment" of such interests. What is necessary for public acknowledgment is unclear, especially in the context of an official

such as the register of deeds acting independently, as opposed to a member of the county legislative body announcing at a regular meeting that the member has an indirect interest prior to a vote. A county official should therefore be careful in indirect conflict of interest situations to provide public notice of these interests prior to taking any action. For example, if a county clerk purchases supplies from a corporation in which the clerk owns a small minority (not plurality) interest, this interest must be disclosed publicly. Because the county clerk has no natural public forum, some form of written public notice via bulletin boards in the courthouse or notice in a newspaper of general circulation in the county may be appropriate.

## Special Rules for County Commissioners who are County Employees

Reference Number: CTAS-625

Countywide officeholders, such as the county mayor, sheriff, trustee, register, county clerk, or assessor of property, are statutorily prohibited from being nominated for or elected to membership in the county legislative body. T.C.A. § 5-5-102. However, county employees may hold the office of county legislative body member. Any county employee who is otherwise qualified may serve as a member of the county legislative body, notwithstanding the fact that such person is a county employee. T.C.A. § 5-5-102.

In 2016, the Legislature enacted Public Chapter 1072, effective May 20, 2016. This new law changes the conflict of interest provisions for county commissioners who are county employees or whose spouses are county employees. Pursuant to the new law, no member of the county legislative body who is also an employee of the same county or whose spouse is an employee of the same county may vote on matters in which the member has a conflict of interest. The new law provides that a conflict of interest is created when a member is voting on a matter which, if approved by the legislative body, would increase the pay or benefits of that member or that member's spouse. However, the new law does not prohibit a member from voting on the budget, appropriation resolution, or tax rate resolution, or amendments thereto, unless the vote is on a specific amendment to the budget or a specific appropriation or resolution in which the member has a conflict of interest. If a member of a county governing body who is voting on a proposed budget, appropriation resolution, or tax rate resolution, or amendments thereto, has a conflict of interest, then the member must declare the conflict of interest at the meeting prior to casting the member's vote. A member who abstains from voting for cause on any issue coming to a vote before the body is not counted for the purpose of determining a majority vote. These new provisions have been codified as T.C.A. § 5-5-112.

## Other Statutory Conflict of Interest Provisions

Reference Number: CTAS-626

The County Purchasing Law of 1957, T.C.A. § 5-14-101 *et seq.*, and the 1981 Financial Management Act, T.C.A. § 5-21-101 *et seq.*, both contain conflict of interest provisions more stringent than the general conflict of interest statute. The 1957 Act and the 1981 Act are optional general laws which may or may not be in effect in a particular county.

## The County Purchasing Law of 1957-Conflict of Interest

Reference Number: CTAS-627

In 2022, the Legislature enacted Public Chapter 700, effective March 18, 2022. The County Purchasing Law of 1957 now contains a conflict of interest provision much like Tenn. Code Ann. § 12-4-101, the general conflict of interest statute.

Tenn. Code Ann. § 5-14-114 now provides in part:

(a) The county purchasing agent, members of the county purchasing commission, members of the county legislative body, and other officials of the county shall not:

(1) Have a direct interest in a contract or purchase order for supplies, materials, equipment, or contractual services used by or furnished to a department or agency of the county government. As used in this subdivision (a)(1), "direct interest" means a contract with such person personally or with a business in which such person is the proprietor, a partner, or the person having the controlling interest in the business; "controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by a single individual or corporation;

(2) Have an indirect interest in the purchase of supplies, materials, equipment, or contractual services for the county unless the person publicly acknowledges the interest. A person who is not a member of a governing body and who is required to publicly acknowledge an indirect interest must do so by reporting the interest to the office of the county mayor to be compiled into a list that must be maintained as a public record. As used in this subdivision (a)(2), "indirect interest" means a contract in which a person is interested, but not directly so, and includes contracts where the person is directly interested and is the sole supplier of goods or services in the county; or

(3) Accept or receive, directly or indirectly, from a person, firm, or corporation to which a contract or purchase order may be awarded, by rebate, gift, or otherwise, money or anything of value whatsoever, or a promise, obligation, or contract for future reward or compensation.

(b) If an official subject to subsection (a) violates subsection (a), the official shall forfeit all compensation earned by the official under the contract and is removed from office. An official removed from office pursuant to this section is ineligible for the same or similar position for a period of ten (10) years following the date of the violation.

See Op. Tenn. Atty. Gen. 94-073 (June 16, 1994) (in counties that have adopted the County Purchasing Law of 1957, there is a blanket prohibition against the acceptance of gifts of any value by county officials from any company to which a contract may be awarded; depending upon the circumstances, the acceptance of such gifts may constitute the criminal offense of official misconduct).

## County Financial Management System of 1981-Conflict of Interest

Reference Number: CTAS-628

In 2021, the Legislature enacted Public Chapter 472, effective May 18, 2021. The County Financial Management System of 1981 now contains a conflict of interest provision much like *Tenn. Code Ann.* § 12-4-101, the general conflict of interest statute.

*Tenn. Code Ann.* § 5-21-121 now provides in part:

(a) The director, purchasing agent, members of the committee, members of the county legislative body, other officials of the county, members of the board of education, members of the highway commission, and employees of the finance department and purchasing department shall not have a direct interest in the purchase of supplies, materials, equipment, or contractual services for the county.

(b) No firm, corporation, partnership, association or individual furnishing any such supplies, materials, equipment or contractual services, shall give or offer, nor shall the director or purchasing agent or any assistant or employee accept or receive directly or indirectly from any person, firm, corporation, partnership or association to whom any contract may be awarded, by rebate, gift or otherwise, any money or other things of value whatsoever, or any promise, obligation or contract for future reward or compensation.

"Direct interest" means a contract with a person personally or with a business in which the person is the proprietor, a partner, or the person having the controlling interest in the business. "Controlling interest" means sufficient ownership in a business or company to control policy and management, including the ownership or control of the largest number of outstanding shares owned by any single individual in a business or company.

In addition to direct interests, those individuals named in the statute can not have an indirect interest in the purchase of supplies, materials, equipment, or contractual services for the county unless the person publicly acknowledges the interest. A person who is not a member of a governing body and who is required to publicly acknowledge an indirect interest must do so by reporting the interest to the office of the county mayor to be compiled into a list that must be maintained as a public record. As used in this statute, "indirect interest" means a contract in which a person is interested, but not directly so, and includes contracts where the person is directly interested and is the sole supplier of goods or services in the county.

## Schools-Conflict of Interest

Reference Number: CTAS-629

Like other county officials, school board members are subject to the general conflict of interest statute,

T.C.A. § 12-4-101.

Conflict of interest problems generally arise when a school board member has pecuniary interests that would interfere with that member's ability to vote objectively on matters before the board. Tenn. Code Ann. §§ 12-4-101(a)(1) and (b) provide that it is unlawful for any official whose duty it is to vote for any contract in which the county is concerned to be directly or indirectly financially interested in any such contract.

Op. Tenn. Atty. Gen. 01-144 (September 4, 2001).

#### Employment

Tenn. Code Ann. § 49-2-203(a)(1)(D) provides as follows:

(D) No member of any local board of education shall be eligible for election as a teacher, or any other position under the board carrying with it any salary or compensation;

The Attorney General has opined that this provision prohibits a school board member from serving as a substitute school teacher in the same school system, notwithstanding the fact that the school board contracts with a third party employment agency to obtain substitute teacher services, rather than employing substitute teachers directly. Op. Tenn. Atty. Gen. 08-180 (December 1, 2008).

"Nothing in the statute, however, prohibits the spouse of a school board member from working for the school board." Op. Tenn. Atty. Gen. 08-102 (May 6, 2008). In this situation the school board member would have an indirect conflict of interest under T.C.A. § 12-4-101(b) if the school board member and his spouse commingle their assets. Op. Tenn. Atty. Gen. 05-017 (February 3, 2005) (an official is indirectly interested in a contract between a governmental agency and the official's spouse if the official and spouse commingle assets); Op. Tenn. Atty. Gen. 00-181 (November 22, 2000).

The Attorney General has opined that "a non-instructional employee of a school system may run for election to the school board without leaving his job, but if elected to the board this individual must quit his job for the school system in order to serve as a school board member." Op. Tenn. Atty. Gen. 02-070 (May 23, 2002). See also Op. Tenn. Atty. Gen. U90-124 (August 29, 1990) (school bus driver prohibited from continuing employment by the school system after he was elected to school board).

No member of the county legislative body nor any other county official shall be eligible for election as a member of the county board of education. T.C.A. § 49-2-202(a)(2). This statute prevents one person from holding an elected county office and being a member of the school board. Op. Tenn. Atty. Gen. 01-144 (September 4, 2001). Note also that pursuant to T.C.A. § 5-5-102(c)(2) a director of schools is not qualified to serve as a member of the county legislative body.

#### Purchasing

School officials are prohibited from having a direct or indirect pecuniary interest in providing tangible personal property to public schools. The statute applicable to school systems provides:

It is unlawful for any teacher, supervisor, commissioner, director of schools, member of a board of education or other school officer in the public schools to have any pecuniary interest, directly or indirectly, in supplying books, maps, school furniture or apparatus to the public schools of the state, or to act as agent for any author, publisher, bookseller or dealer in such school furniture or apparatus on promise of reward for the person's influence in recommending or procuring the use of any book, map, school apparatus or furniture of any kind, in any public school; provided, that nothing in this section shall be construed to include authors of books.

T.C.A. § 49-6-2003(a).

The statute does not define the term "apparatus." Addressing the statute, the Attorney General opined that "a court would conclude that the term 'apparatus,' as used in Tenn. Code Ann. § 49-6-2003(a), includes school equipment and other tangible personal property, but does not apply to a contract for services." Op. Tenn. Atty. Gen. 09-48 (April 2, 2009).

The statute further provides that a spouse or family member of a principal, teacher or other school administrative employee is not precluded from participating in business transactions with the school system where a sealed competitive bid system is used, as long as the principal, teacher or other school administrative employee does not have discretion in the selection of bids or specifications. T.C.A. § 49-6-2003(b).

## Highway Departments-Conflict of Interest

Reference Number: CTAS-630

In those counties under the County Uniform Highway Law, a very strict conflict of interest statute applies.



The statute, T.C.A. § 54-7-203(a), provides:

Neither the chief administrative officer, county highway commissioner, member of the county governing body nor any employee of the county road department shall be financially interested in or have any personal interest, either directly or indirectly, in the purchase of any supplies, machinery, materials, equipment or contractual services for the department or system of roads for the county, nor in any firm, corporation, partnership, association or individual selling or furnishing such machinery, equipment, supplies and materials.

Note that this prohibition is so broad as to preclude all employees of the highway department, whether or not they have any discretion or control over the purchase, from having a direct or indirect interest in these purchases. A violation of this statute constitutes official misconduct and is a Class C misdemeanor and is grounds for removal from office. T.C.A. § 54-7-203(b).

## Additional Purchasing Conflicts of Interest

Reference Number: CTAS-2471

Pursuant to T.C.A. § 12-4-114, no public officer or employee who is involved in making or administering a contract on behalf of a public agency may derive a direct benefit from the contract except as provided in this section, or as otherwise allowed by law.

Furthermore, no public employee having official responsibility for a procurement transaction is allowed to participate in that transaction on behalf of the public body when the employee knows that:

- A. The employee is contemporaneously employed by a respondent to a solicitation or contractor involved in the procurement transaction;
- B. The employee, the employee's spouse, or any member of the employee's immediate family holds a position with a respondent to a solicitation, a contractor involved in the procurement transaction, such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent (5%);
- C. The employee, the employee's spouse, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or
- D. The employee, the employee's spouse, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a respondent to a solicitation or contractor involved in the procurement transaction.

A public officer or employee who will derive a direct benefit from a contract with the public agency the officer or employee serves, but who is not involved in making or administering the contract, cannot attempt to influence any other person who is involved in making or administering the contract.

No public officer or employee may solicit or receive any gift, reward, or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract by the public agency the officer or employee serves.

As used in this section, "immediate family" means spouse, dependent children or stepchildren, or relatives related by blood or marriage.

## Prohibition on Consulting Fees

Reference Number: CTAS-631

In 2005, the General Assembly passed a law to prohibit state and local government elected officials from receiving a fee, commission or any other form of compensation for consulting services from any person or entity, other than compensation paid by the state, a county or municipality. T.C.A. §§ 2-10-123(a) and 2-10-124(a). A violation of this statutory prohibition is a Class A misdemeanor unless the conduct giving rise to the violation would also constitute the offense of bribery in which case the offense is a Class C felony. A person convicted of any violation under this statute is forever afterwards disqualified from holding any office under state law or the Tennessee Constitution. T.C.A. §§ 2-10-123(c) and 2-10-124(c). See *also* T.C.A. §§ 39-16-103 and 40-20-114.

As defined with respect to local officials, including a member-elect of a municipal or county legislative body, the term "consulting services" means services to advise or assist a person or entity in influencing municipal or county legislative or administrative action, including, but not limited to, services to advise or assist in maintaining, applying for, soliciting or entering into a contract with the local government represented by such official. T.C.A. § 2-10-122(2).

There are certain types of gifts and benefits listed in T.C.A. § 3-6-305(b) which are not prohibited. The

list follows:

- Benefits resulting from business, employment, or other outside activities of a candidate or official or the immediate family of a candidate or official, if such benefits are customarily provided to others in similar circumstances and are not enhanced due to the status of the candidate or official. T.C.A. § 3-6-305(b)(1).
- Informational materials in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication. T.C.A. § 3-6-305(b)(2).
- Gifts that are given for a non-business purpose and motivated by close personal friendship, but only to the extent such gifts are specifically defined and authorized by the rules of the ethics commission. T.C.A. § 3-6-305(b)(3).
- Sample merchandise, promotional items, and appreciation tokens, if such merchandise, items and tokens are routinely given to customers, suppliers or potential customers or suppliers in the ordinary course of business. T.C.A. § 3-6-305(b)(4).
- Unsolicited tokens or awards of appreciation, honorary degrees, or bona fide awards in recognition of public service in the form of a plaque, trophy, desk item, wall memento and similar items; provided, that any such item shall not be in a form which can be readily converted to cash. T.C.A. § 3-6-305(b)(5).
- Opportunities and benefits made available to all members of an appropriate class of the general public, including but not limited to:
  - Discounts afforded to the general public or specified groups or occupations under normal business conditions, except that such discounts may not be based on the status of the candidate or official; and
  - Prizes and awards given in public contests.
 T.C.A. § 3-6-305(b)(6).

Still, most anything of value provided by a vendor to a county official for advice or assistance in influencing county legislative or administrative action, such as getting a contract with the county, is prohibited under the law.

## Prohibition on Honorariums

Reference Number: CTAS-632

The acceptance of an honorarium by a public official in such person's capacity as a public official is prohibited. "Honorarium" means a payment of money or any thing of value for an appearance, speech or article, but does not include actual and necessary travel expenses, meals and lodging associated with such appearance, speech or article. T.C.A. § 2-10-116(a). The acceptance of an honorarium for an appearance, speech or article by a public official in such person's capacity as a private business person, professional or tradesperson is not prohibited. T.C.A. § 2-10-116(b). See Op. Tenn. Atty. Gen. 08-11 (January 25, 2008).

## Dual Office Holders - Incompatible Offices

Reference Number: CTAS-633

Several state statutes prohibit a person from holding more than one county office. Pursuant to T.C.A. § 5-5-102(c)(2), no person elected or appointed to fill the office of county mayor, sheriff, trustee, register, county clerk, assessor of property, or any other county-wide office filled by vote of the people or the county legislative body, shall also be nominated for or elected to membership in the county legislative body.

No member of the county legislative body nor any other county official shall be eligible for election as a member of the county board of education. T.C.A. § 49-2-202(a)(2). This statute prevents one person from holding an elected county office and being a member of the school board. Op. Tenn. Atty. Gen. 01-144 (September 4, 2001). Note also that pursuant to T.C.A. § 5-5-102(c)(2) a director of schools cannot serve as a member of the county legislative body. Pursuant to T.C.A. § 7-53-301, a county commissioner cannot serve on the board of a county industrial development board. Pursuant to T.C.A. § 67-1-401, a county commissioner cannot serve on the county board of equalization. See also Op. Tenn. Atty. Gen. 90-106 (December 27, 1990) (it is an inherent and unlawful conflict of interest for a county trustee or municipal tax collector or employee thereof to sit on a county board of equalization).

## INCOMPATIBLE OFFICES

In addition to statutory provisions regarding dual office-holding, there is a well recognized common law prohibition against a public officer holding two incompatible offices at the same time. *State ex rel. Little v. Slagle*, 89 S.W. 316, 326-327 (Tenn. 1905). Moreover, another aspect of the same common law principle dictates that the acceptance of a second office which is incompatible with one already held automatically terminates the first office “without judicial proceedings of any kind.” *State v. Thompson*, 193 Tenn. 395, 399, 246 S.W.2d 59, 61 (1952), citing, *State ex rel. Little v. Slagle*, supra.

The question of incompatibility depends on the circumstances of each individual case, and the issue is whether the occupancy of both offices by the same person is detrimental to the public interest, or whether the performance of the duties of one interferes with the performance of those of the other. 67 C.J.S. Officers § 38 (2008). Tennessee courts have recognized that an inherent inconsistency exists where one office is subject to the supervision or control of the other. *State ex rel. v. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952). In *Thompson*, the Tennessee Supreme Court concluded that the offices of city manager and member of the city council were incompatible because the council had the authority to appoint, remove, and supervise the city manager, and no statute then in effect permitted the same individual to hold these offices. The Court found, therefore, that the common law principle of incompatible offices prohibited the same individual from acting as city manager and city council member.

The question often arises whether a county commissioner can simultaneously hold the office of city alderman or city councilman. Conceivably, circumstances could develop such as would make the offices so incompatible that one could not continue to hold them simultaneously. A court could conclude that it is a conflict of interest under the common law prohibition against a public officer holding two incompatible offices at the same time because the occupancy of both offices by the same person is detrimental to the public interest.

Counties and cities can, and often do, enter into contracts and other agreements with one another with respect to many subjects. Accordingly, the offices of county commissioner and city alderman/councilman can quickly become incompatible.

The Attorney General has noted that:

In all of these matters the terms upon which the project is to be pursued are left to the agreement of the public bodies. In the negotiations the county board is bound to consider the interests of all of its citizens while the local governing body has a like obligation to the citizenry of the municipality alone. No man, much less a public fiduciary, can sit on both sides of a bargaining table. He cannot in one capacity pass with undivided loyalty upon proposals he advances in his other role.

*McDonough v. Roach*, 35 N.J. 153, 171 A.2d 307, 309 (N.J. 1961).

Op. Tenn. Atty. Gen. 08-129 (August 8, 2008).

See also Op. Tenn. Atty. Gen. 08-177 (November 20, 2008) (constable and county commissioner); Op. Tenn. Atty. Gen. 08-107 (May 9, 2008) (county board of education member also serving as city council member and city board of education member); Op. Tenn. Atty. Gen. 07-159 (December 6, 2007) (deputy sheriff and county bus driver); Op. Tenn. Atty. Gen. 02-109 (October 2, 2002) (constable and judicial commissioner); Op. Tenn. Atty. Gen. 02-012 (January 18, 2002) (offices of sheriff and constable incompatible under the common law); Op. Tenn. Atty. Gen. 00-050 (March 20, 2000) (constable serving as a full-time or part-time deputy sheriff); Op. Tenn. Atty. Gen. 99-160 (August 19, 1999) (constable serving as deputy sheriff); Op. Tenn. Atty. Gen. U86-77 (April 30, 1986) (city commissioner and county commissioner); Op. Tenn. Atty. Gen. 84-209 (June 27, 1984) (county commissioner and city alderman).

Notably, Public Chapter 763, effective 2024, enacts a new subdivision at 5-5-102(c) and a new section at Title 6, Chapter 54, Part 1, to provide that a member of a county governing body shall not simultaneously serve as a member of the governing body of a municipality within the county for whom the member is a commissioner during the member's term of office if the member's county adopts this subdivision by a 2/3

vote of the county legislative body. Only counties with a population of more than 200,000, according to the 2020 or a subsequent federal census, may vote to adopt this subdivision. Provides that a member of a county governing body simultaneously serving on the governing body of a municipality on the effective date of this act may serve out the remainder of the member's term of office.

#### **POWER TO APPOINT**

Courts in this state have indicated that it is contrary to public policy to permit an officer having an appointing power to use such powers and means of conferring an office upon himself or to permit an appointing body to appoint one of its own members to an office. *State ex rel. v. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952). Based on that opinion, the Attorney General has concluded that a local legislative body cannot elect or appoint one of its own members to an office over which it has the power of election or appointment. *Op. Tenn. Att'y Gen.* 98-004 (January 5, 1998); *Op. Tenn. Att'y Gen.* U92-129 (December 14, 1992); *Op. Tenn. Att'y Gen.* 88-166 (September 9, 1986).

A county commissioner cannot serve on the board of workhouse commissioners because the board of workhouse commissioners are elected locally by the county legislative body. See *State ex rel. v. Thompson*, 395, 246 S.W.2d 59 (Tenn. 1952) (Under the common law it is a violation of public policy for an appointing body to confer office upon one of its own members.).

A county commissioner cannot hold the office of judicial commissioner. *Op. Tenn. Att'y Gen.* 78-435 (December 28, 1978) (An individual cannot hold the office and perform the duties of county commissioner while simultaneously holding the office and performing the duties of judicial commissioner.).

A county commissioner cannot hold the office of county service officer. *Op. Tenn. Att'y Gen.* 86-042 (February 24, 1986) (a county commissioner may not legally be appointed county service officer and serve in both capacities).

A county commissioner cannot serve as a county jail inspector. *Op. Tenn. Att'y Gen.* 04-070 (April 21, 2004) (the county commission may not appoint commission members as jail inspectors).

A county commissioner cannot hold the office of county coroner. *Op. Tenn. Att'y Gen.* 11-74 (October 17, 2011) (A medical examiner carrying out the duties of the county coroner may not serve as a county commissioner.).

A county commissioner cannot serve on the county board of zoning appeals created under T.C.A. § 13-7-106. See *State ex rel. v. Thompson*, 395, 246 S.W.2d 59 (Tenn. 1952) (Under the common law it is a violation of public policy for an appointing body to confer office upon one of its own members.).

## **Crimes Involving Public Officials**

Reference Number: CTAS-634

### **Felonies in Office-Forfeiture of Retirement Benefits**

Reference Number: CTAS-635

Under the 2006 Ethics Act, each time a person is elected to a public office, that person, as a condition of their election, is deemed to consent and agree to the forfeiture of that person's retirement benefits from the Tennessee Consolidated Retirement System, any superseded retirement system or any other public pension system if that person is convicted in any state or federal court of a felony arising out of that person's official capacity, constituting malfeasance in office. This new law applies regardless of the date the person became a member of the public pension system. T.C.A. § 8-35-124(a)(3).

### **Bribery of Public Servant**

Reference Number: CTAS-636

It is a criminal offense for an elected official to accept a bribe. T.C.A. § 39-16-102. See *State v. Frost*, 2003 WL 21339225 (Tenn.Crim.App. 2003) (constable convicted of soliciting a bribe).

The statute provides:

A person commits an offense who:

- (1) Offers, confers, or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion or other action in the public servant's official capacity; or
- (2) While a public servant, solicits, accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that the public servant's vote, opinion, judgment, exercise of discretion or other action as a public servant will thereby be influenced.

T.C.A. § 39-16-102(a)(1) & (2).

It is no defense to a prosecution for bribery that the person sought to be influenced was not qualified to act in the desired way because the person had not yet assumed office, lacked jurisdiction, or for any other reason. T.C.A. § 39-16-102(b).

Bribery is a Class B felony. T.C.A. § 39-16-102(c). A county official convicted under this statute may be punished by imprisonment of not less than eight (8) years nor more than thirty (30) years. In addition, the jury may assess a fine not to exceed twenty-five thousand dollars (\$25,000). T.C.A. § 40-35-111. Persons convicted of bribing a public official are subject to the same punishment. An elected official who is convicted of bribery under state or federal law is forever afterwards disqualified from holding any office under the laws or constitution of this state. T.C.A. § 39-16-103. The same is true even if citizenship status is later restored. T.C.A. § 40-20-114(b).

## Soliciting Unlawful Compensation

Reference Number: CTAS-637

A public servant who requests a pecuniary benefit for the performance of an official action knowing that he or she was required to perform that action without compensation or at a level of compensation lower than that requested has committed the offense of solicitation of unlawful compensation, a Class E felony. T.C.A. § 39-16-104.

In addition, pursuant to T.C.A. § 8-21-101, a county official is not allowed to demand or receive fees or other compensation for any service further than is expressly provided by law. If any officer demands or receives any other or higher fees than are prescribed by law, such officer is liable to the party aggrieved in the penalty of \$50.00, to be recovered before any judge of the court of general sessions, and the officer also commits a Class C misdemeanor. T.C.A. § 8-21-103. See *State v. Dixie Portland Cement Co.*, 267 S.W. 595 (Tenn. 1925) (public officers can receive no fees or costs, except as expressly authorized by law). See also Op. Tenn. Atty. Gen. 95-118 (November 28, 1995) (As previously opined by this office, under *Bayless v. Knox County*, 199 Tenn. 268, 286 S.W.2d 579 (1955), and Tenn. Code Ann. § 8-21-101, a county or a county's chief law enforcement officer may only require or accept payment or other compensation if expressly authorized by statute. Op. Tenn. Atty. Gen. 91-76 (August 20, 1991). Op. Tenn. Atty. Gen. U91-76 (May 22, 1991). Op. Tenn. Atty. Gen. 88-199 (November 10, 1988). Op. Tenn. Atty. Gen. 88-93 (April 20, 1988)).

## Buying and Selling in Regard to Offices

Reference Number: CTAS-638

This offense is committed when any person holding any office, or having been elected to any office, enters into any bargain and sale for any valuable consideration whatever in regard to the office, or sells, resigns, or vacates the office or refuses to qualify and enter upon the discharge of the duties of the office for pecuniary consideration. This offense is also committed when any person offers to buy any office by inducing the incumbent thereof to resign, to vacate, or not to qualify, or when a person directly or indirectly engages in corruptly procuring the resignation of any officer for any pecuniary or other valuable consideration. This offense is a Class C felony. T.C.A. § 39-16-105.

## Exceptions and Defenses

Reference Number: CTAS-639

It is an exception to the offenses of bribery, solicitation, and buying and selling public office that the benefit involved is a fee prescribed by law to be received by a public servant or any other benefit to which the public servant was lawfully entitled. Additionally, it is a defense that the benefit was a trivial benefit incidental to personal, professional, or business contacts, which involves no substantial risk of undermining official impartiality, or a lawful contribution made for the political campaign of an elective public servant when the public servant is a candidate for nomination or election to public office. T.C.A. § 39-16-106.

# Misconduct Involving Public Officials and Employees

Reference Number: CTAS-640

The criminal statutes relating to misconduct of public officials and employees are found in T.C.A. §§ 39-16-401 *et seq.* "Public servant" is broadly defined for these purposes as a person elected, selected, appointed, employed or otherwise designated as one of the following:

1. An officer, employee or agent of government;
2. A juror or grand juror;
3. An arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;
4. An attorney at law or notary public when participating or performing a governmental function;
5. A candidate for nomination or election to public office; or
6. A person who is performing a governmental function under claim of right although not legally qualified to do so.

T.C.A. § 39-16-401.

## Official Misconduct

Reference Number: CTAS-641

"Tennessee's official misconduct statute only applies to public officials who have an affirmative duty to act and refuse to do so or who misuse their official authority for private gain." Op. Tenn. Atty. Gen. 09-72 (May 6, 2009). Pursuant to T.C.A. § 39-16-402(a), a public servant commits an offense who, with intent to obtain a benefit, or to harm another, intentionally or knowingly:

1. Commits an act relating to the servant's office or employment that constitutes an unauthorized exercise of official power;
2. Commits an act under color of office or employment (acting or purporting to act in an official capacity or take advantage of such actual or purported capacity) that exceeds the servant's power;
3. Refrains from performing a duty that is imposed by law or that is clearly inherent in the nature of the office or employment;
4. Violates a law relating to the servant's office or employment, or
5. Receives any benefit not otherwise provided by law.

In 2012, the legislature amended this statute to make it an offense to purchase real property or otherwise obtain an option to purchase real property with intent to make a profit if the public servant knows that such real property may be purchased by a governmental entity and such information is not public knowledge. It is also an offense to acquire nonpublic information derived from such person's position as a public servant or gained from the performance of such person's official duties as a public servant and knowingly act on such nonpublic information to acquire, or obtain an option to acquire, or liquidate, tangible or intangible personal property with intent to make a profit. T.C.A. § 39-16-402(c).

It is a defense to prosecution for this offense that the benefit involved was a trivial benefit incidental to personal, professional or business contact, and involved no substantial risk of undermining official impartiality. T.C.A. § 39-16-402(d). The offense of official misconduct is a Class E felony. T.C.A. § 39-16-402(e). See *State v. Szczepanowski*, 2002 WL 1358681 (Tenn.Crim.App. 2002) (upholding the constitutionality of the statute); *State v. Chumbley*, 2007 WL 1774250 (Tenn.Crim.App. 2007) (jail administrator convicted of official misconduct and theft). See also Op. Tenn. Atty. Gen. 94-073 (June 16, 1994) (the acceptance of a gift by a county official or employee from a company that does business with the county may, depending upon the circumstances, constitute the criminal offense of official misconduct); Op. Tenn. Atty. Gen. U93-48 (April 6, 1993) (a school superintendent requiring vocational students to provide repair work to his personal residence may constitute official misconduct); Op. Tenn. Atty. Gen. 91-76 (August 20, 1991) (a deputy sheriff is not entitled to a reward given for a service performed within the duties of his office; the acceptance of such a reward might be considered official misconduct). Under T.C.A. § 8-47-103, county attorneys are directed to investigate any complaint alleging that a county officer within their jurisdiction is guilty of any of the acts constituting official misconduct as set forth in T.C.A. § 8-47-101, and upon determination of reasonable cause, to institute a proceeding in the appropriate court to oust such official. Op. Tenn. Atty. Gen. 07-169 (December 21, 2007); Op. Tenn. Atty. Gen. 00-126 (August 7, 2000).

## Official Oppression

Reference Number: CTAS-642

A public servant acting under color of office or employment (acting or purporting to act in an official capacity or taking advantage of actual or purported capacity) commits an offense who:

1. Intentionally subjects another to mistreatment or to arrest, detention, stop, frisk, halt, search, seizure, dispossession, assessment or lien when the public servant knows the conduct is unlawful; or
2. Intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity, when the public servant knows the conduct is unlawful.

T.C.A. § 39-16-403(a).

An offense under this section is a Class E felony. T.C.A. § 39-16-403(c).

See *Coffey v. State*, 339 S.W.2d 1 (Tenn. 1960) (upholding constable's conviction for official oppression and removal from office).

## Misuse of Official Information

Reference Number: CTAS-643

A public servant commits an offense who, by reason of information to which the public servant has access in the public servant's official capacity and that has not been made public, attains or aids another to attain a benefit. An offense under this section is a Class B misdemeanor. T.C.A. § 39-16-404.

## Suspension, Removal and Discharge from Office

Reference Number: CTAS-644

A public servant convicted of official misconduct, official oppression or misuse of official information shall be removed from office or discharged from the position. A public servant elected or appointed for a specified term shall be suspended without pay immediately upon conviction in the trial court and continuing through the final disposition of the case, removed from office for the remainder of the term during which the conviction occurred if the conviction becomes final, and barred from holding any appointed or elected office for ten years from the date the conviction becomes final. A public servant who serves at will shall be discharged upon conviction in the trial court. Subsequent public service shall rest upon the hiring or appointing authority provided that such authority has been fully informed of the conviction. T.C.A. § 39-16-406. See *State v. Keck*, 1997 WL 254228 (Tenn.Crim.App. 1997).

## Purchasing Property Sold Through Court or Sheriff's Sale

Reference Number: CTAS-645

A judge, sheriff, court clerk, court officer, or employee of any court commits an offense who bids on or purchases, directly or indirectly, for personal reasons or for any other person, any kind of property sold through the court for which the judge, sheriff, court clerk, court officer, or employee discharges official duties. A bid or purchase in violation of this provision is voidable at the option of the person aggrieved. This offense is a Class C misdemeanor, with no incarceration. T.C.A. § 39-16-405. See *Op. Tenn. Atty. Gen. 99-105* (May 10, 1999) (purchase of confiscated items by law enforcement officers, city or county employees at public auction).

In addition, no sheriff, deputy sheriff, or constable may purchase, either directly or indirectly, any property sold through their own judicial sale no matter which court is involved. T.C.A. §§ 8-8-206 and 8-10-116. See *also Op. Tenn. Atty. Gen. 99-105* (May 10, 1999) (purchase of confiscated items by law enforcement officers, city or county employees at public auction).

## Purchasing Surplus County Property

Reference Number: CTAS-646

It is also unlawful for any county official or employee to purchase from the county any property declared to be surplus by the county except by bid at public auction or competitive sealed bid during the tenure of such person's office or employment, or for six months thereafter. T.C.A. § 5-1-125. A violation of this statute is a Class A misdemeanor. See *Op. Tenn. Atty. Gen. 03-131* (October 3, 2003).

## Misrepresentation of Information to Auditor

Reference Number: CTAS-647

A public servant commits an offense who, with intent to deceive, knowingly misrepresents material information related to an audit conducted by a state auditor in the department of audit. This offense is a Class C misdemeanor. T.C.A. § 39-16-407.

## Sexual Contact with Inmates

Reference Number: CTAS-648

It is an offense for a law enforcement officer, correctional employee, vendor or volunteer to engage in sexual contact with a prisoner or inmate who is in custody at a penal institution whether the conduct occurs on or off the grounds of the institution. This offense is a Class E felony. T.C.A. § 39-16-408.

## Destruction of and Tampering with Governmental Records

Reference Number: CTAS-649

Pursuant to T.C.A. § 39-16-504, it is unlawful for any person to:

1. Knowingly make a false entry in, or false alteration of, a governmental record;
2. Make, present, or use any record, document or thing with knowledge of its falsity and with intent that it will be taken as a genuine governmental record; or
3. Intentionally and unlawfully destroy, conceal, remove or otherwise impair the verity, legibility or availability of a governmental record.

A violation of this section is a Class E felony. T.C.A. § 39-16-504(b). *See State v. Chumbley*, 2007 WL 1774250 (Tenn.Crim.App. 2007) (jail administrator convicted of official misconduct and destruction of and tampering with governmental records). *See also* Op. Tenn. Atty. Gen. 03-057 (May 1, 2003) (if a register of deeds determines that a recorded deed was not entitled to registration, the register is not authorized to remove the recorded deed but may record an instrument stating that the deed in question was not entitled to registration).

## Private Use of County Road Equipment and Materials Prohibited

Reference Number: CTAS-650

The chief administrative officer shall not authorize or knowingly permit the trucks or road equipment, the rock, crushed stone or any other road materials to be used for any private use or for the use of any individual for private purposes. Any employee of the county road department who uses any truck or any other road equipment or any rock, crushed stone or other road material for that employee's personal use, or sells or gives those things away, shall be immediately discharged. No truck or other road equipment or any rock, crushed stone or any road material shall be used to work private roads or for private purposes of owners of the roads. T.C.A. § 54-7-202(a) - (c). A violation of this statute is a Class C misdemeanor. Each separate use of the same for other than authorized purposes constitutes a separate offense and is subject to a separate punishment. T.C.A. § 54-7-202(e). *See State ex rel. Leech v. Wright*, 622 S.W.2d 807, 817 (Tenn. 1981) ("The statute prohibits private use unequivocally, without mention of compensation and it follows that such use violates the statute, with or without compensation."); *State v. Keck*, 1997 WL 254228, \*21 (Tenn.Crim.App. 1997) ("We note that regardless of the Defendant's good intentions, the statute clearly states that county equipment and materials shall not be authorized for private use. Whether the Defendant received any personal compensation or benefit is irrelevant."). *See also* Op. Tenn. Atty. Gen. 03-088 (July 15, 2003) (under the County Uniform Highway Act, the chief administrative officer of the county is specifically prohibited from authorizing or knowingly permitting the use of trucks, road equipment, rock, crushed stone or any other road material for private uses).

## Misuse of County Time and Property

Reference Number: CTAS-651

A county official has a duty not to neglect the duties of the office. *State ex rel. Thompson v. Reichman*, 188 S.W. 225 (Tenn. 1916) (sheriff removed from office for neglect of office). Therefore, while outside activities may be permissible, they can cause problems if taken to extremes. For example, a county official could sell computers during non-working hours, but if a contract called for the county official to personally train the purchaser's employees to use the new equipment during regular working hours over the first month of operation, a serious question of neglect of duty could arise.



As the Attorney General has noted,

conflicts of interest exist whenever a legislator or other public official has placed himself in a position where, for some advantage gained or to be gained for himself, he finds it difficult if not impossible to devote himself with complete energy, loyalty and singleness of purpose to the general public interest. The advantage that he seeks is something over and above the salary, the experience, the chance to serve the people, and the public esteem that he gains from public office.

Op. Tenn. Atty. Gen. 85-036 (February 14, 1985), quoting 1959 Minnesota Governor's Committee on Ethics and Government Report 17, quoted in Note; Conflict of Interests: State Government Employees, 47 Va. L. Rev. 1034 (1961) (footnote 1).

The occasional use of the office telephone for personal business should not cause a problem. But if a county official was also, for example, a real estate broker, the official could not use their county office in a dual capacity, official and private, without violating various duties and violating the prohibition against the use of public property for private purposes, which would be a form of official misconduct. T.C.A. § 39-16-402. See Op. Tenn. Atty. Gen. 81-587 (November 3, 1981) (the offices in a county courthouse may be used only for a public purpose); Op. Tenn. Atty. Gen. 82-391 (a county official can not use county property to conduct an insurance business or any other business in his private capacity).

In *Azbill v. Lexington Mfg. Co.*, 188 Tenn. 477, 483, 221 S.W.2d 522 (1949), the Tennessee Supreme Court noted that public funds provided by taxation may be used only for public, not private, purposes. The Attorney General has opined that, consistent with the foregoing principle, public equipment and other property paid for, and public officers and employees compensated, by public funds appropriated for public purposes from revenues derived by counties from taxes authorized by law cannot properly be donated or applied by a county officer to a private use. Op. Tenn. Atty. Gen. 84-166 (May 17, 1984); Op. Tenn. Atty. Gen. 03-088 (July 15, 2003). See Op. Tenn. Atty. Gen. No. U93-48 (April 6, 1993) (it is improper for a county official to use publicly owned equipment for private gain); Op. Tenn. Atty. Gen. 97-043 (April 7, 1997) (a law enforcement officer should not perform services that are not part of his or her official responsibilities while wearing his/her uniform or driving a patrol car in a way that might convey that any services performed for a private individual are, in fact, being carried out as part of the officer's official duties). See also *State ex rel. Leech v. Wright*, 622 S.W.2d 807 (Tenn. 1981) ("It is patently intolerable and clearly unlawful and an inexcusable dereliction of duty for a public official to allow public employees to work for private employers while being paid from the public treasury.").

## Theft of Services

Reference Number: CTAS-652

Another offense closely related to the misuse of county time and property is "theft of services." In addition to other conduct, a person commits "theft of services" who:

Having control over the disposition of services to others, knowingly diverts those services to the person's own benefit or to the benefit of another not entitled thereto.

T.C.A. § 39-14-104(2).

As used in the statute, the term "services" is defined to include labor, skill, professional service, transportation, telephone, mail, gas, electricity, steam, water, cable television or other public services, accommodations in hotels, restaurants or elsewhere, admissions to exhibitions, use of vehicles or other movable property. T.C.A. § 39-11-106(a)(35). See *State v. Gardner*, 1990 WL 169233 (Tenn.Crim.App. 1990) (county sheriff who used deputy sheriffs to build his personal residence was convicted of misuse of public funds in violation of T.C.A. § 39-5-408, the statute replaced by T.C.A. § 39-14-104(2)).

## Inmate Labor for Private Purposes Prohibited

Reference Number: CTAS-653

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail may employ, require or otherwise use any such inmate housed therein to perform labor that will or may result directly or indirectly in such sheriff's, jailer's or other person's personal gain, profit or benefit or in gain, profit or benefit to a business partially or wholly owned by such sheriff, jailer or other person. This prohibition shall apply regardless of whether the inmate is or is not compensated for any such labor. T.C.A. § 41-2-148(a). See also Op. Tenn. Atty. Gen. 03-075 (June 18, 2003).

No sheriff, jailer or other person responsible for the care and custody of inmates housed in a county jail may permit any such inmate housed therein to perform any labor for the gain, profit or benefit of a private citizen, or for-profit corporation, partnership or other business unless such labor is part of a

court-approved work release program or unless the work release program operates under a commission established pursuant to T.C.A. § 41-2-134. T.C.A. § 41-2-148(b)(1). See *a/so* Op. Tenn. Atty. Gen. 03-125 (September 29, 2003).

## Penalties

Reference Number: CTAS-654

Any sheriff, jailer or other person responsible for the custody of an inmate housed in a local facility who violates the provisions of T.C.A. § 41-2-148 regarding inmate labor for private purposes commits a misdemeanor and shall be punished upon a first conviction by a fine equal to the value of the services received from the inmate or inmates and imprisonment for not less than 30 days nor more than 11 months and 29 days. Upon a second or subsequent conviction for a violation of T.C.A. § 41-2-148, the sheriff, jailer or other person is guilty of a felony and is subject to a fine of not less than the value of the services received from the inmate or inmates nor more than \$5,000 and imprisonment for not less than one nor more than five years. If the person violating T.C.A. § 41-2-148 for the second or subsequent time is a public official, in addition to the punishment set out above such person shall immediately forfeit his office and shall be forever barred from holding public office in this state. T.C.A. § 41-2-148(d)(1).

Any private citizen, corporation, partnership or other business knowingly and willfully using inmate labor in violation of T.C.A. § 41-2-148(b) commits a Class A misdemeanor and, upon conviction, shall be punished by a fine of \$1,000 and by imprisonment for not more than 11 months and 29 days. Each day inmate labor is used in violation of T.C.A. § 41-2-148(b) constitutes a separate offense. T.C.A. § 41-2-148(d)(2).

In the case of *In re Williams*, 987 S.W.2d 837 (Tenn. 1998), the Tennessee Supreme Court heard the appeal of Judge Billy Wayne Williams from the Court of the Judiciary's judgment recommending that he be removed from the office of general sessions court judge of Lauderdale County. Judge Williams had, among other things, used an inmate from the county jail to help build a house for his son. "Judge Williams asserted that he was unaware that the practice of using prison labor for personal work was illegal. He believed that he had committed no impropriety because other county officials had also used prison labor as an 'informal work release program.' Although several other witnesses testified that private individuals in Lauderdale County had a long standing practice of using inmate labor for personal work, it was undisputed that Lauderdale County did not have a formal, approved work release program." *Id.* at 838-839.

Noting that the use of an inmate for a private purpose is a criminal offense, the court found that neither assertion constituted a defense to the disciplinary charges and held that the judge's use of an inmate from the county jail to help build a house for his son violated several canons of the Code of Judicial Conduct. *Id.* at 841-842. The Supreme Court affirmed the Court of the Judiciary's recommendation that Judge Williams be removed from office. *Id.* at 844. See also *Jordan v. State ex rel. Williams*, 397 S.W.2d 383 (Tenn. 1965) (approving the ouster from office of a county commissioner for utilizing for his own benefit equipment and supplies of the county penal farm and labor of its inmates).

## Reporting Fraud

Reference Number: CTAS-655

In 2007, the General Assembly passed the "Local Government Instances of Fraud Reporting Act," codified at T.C.A. § 8-4-501 *et seq.* The act requires public officials to report the unlawful taking of public money, property, or services to the comptroller of the treasury. The act states:

A public official with knowledge based upon available information that reasonably causes the public official to believe that a theft, forgery, credit card fraud, or any other act of unlawful taking of public money, property, or services has occurred shall report the information in a reasonable amount of time to the office of the comptroller of the treasury.

T.C.A. § 8-4-503(a).

"Unlawful conduct" means theft, forgery, credit or debit card fraud, or any other act of unlawful taking, waste, or abuse of, or official misconduct, as defined in T.C.A. § 39-16-402, involving public money, property, or services. T.C.A. § 8-4-502(4). "Reasonable amount of time" means any amount of time that is reasonable under the particular circumstances, but shall not under any circumstances exceed five working days. T.C.A. § 8-4-502(3).

An official who, acting in good faith, makes a report shall not be held liable in any civil or criminal action that is based solely upon (1) the person's decision to report what the person believed to be unlawful conduct; (2) the person's belief that reporting the unlawful conduct was required by law; or (3) the fact

that a report of unlawful conduct was made. T.C.A. § 8-4-504(a). However, no immunity is conferred if the person reporting the unlawful conduct participated in or benefitted from the conduct. T.C.A. § 8-4-504(b).

Additionally, the comptroller is required to maintain a hotline whereby government employees and citizens can report alleged fraud, abuse, or wrongdoing by local governments and private corporations that contract with a local government to receive one or more community grants. The comptroller is required to investigate the information received through the calls to the hotline or refer such information to the appropriate program or investigative agency. Upon receiving the information relating to a call, a local government or community grant agency must undertake investigatory and remedial measures. T.C.A. §§ 8-4-402, -404 and -406.

## Bribery for Votes

Reference Number: CTAS-656

The Tennessee Constitution and statutes also prohibit offering bribes for votes. *Clariday v. State of Tennessee*, 552 S.W.2d 759 (Tenn. 1976); *State v. Prybil*, 211 N.W.2d 308 (Iowa 1973). It is unlawful for any candidate for a county office to expend, pay, promise, loan or become pecuniarily liable in any way for money or any other thing of value, either directly or indirectly, or to agree to enter into any contract with any person to vote for or support any particular policy or measure, in consideration of the vote or support, moral or financial, of that person. T.C.A. § 2-19-121. See Op. Tenn. Atty. Gen. 07-113 (July 30, 2007) (paying a fee to a group or individual in exchange for their endorsement would violate T.C.A. § 2-19-121, which bars a candidate from bargaining for support).

A violation of this statute, known as bargaining for votes, is a Class C misdemeanor. T.C.A. § 2-19-123. It is not illegal under this statute to make expenditures to employ clerks or stenographers in a campaign, for printing and advertising, actual travel expenses, or certain other allowed expenditures. T.C.A. § 2-19-124.

A stronger prohibition against bribing voters is found in the statute which makes it illegal for a person, whether directly or indirectly, either personally or through another person, to pay or give anything of value to a voter to influence the person's vote (or failure to vote) in any election, primary or convention. T.C.A. § 2-19-126. See Op. Tenn. Atty. Gen. 02-073 (June 10, 2002) (awarding a prize to individuals who voted in an election violates the prohibitions of T.C.A. § 2-19-126 against offers of something of value in return for voting and direct payments given on account of voting). A violation of this statute is a Class C felony. T.C.A. § 2-19-128. Voters are also prohibited from accepting bribes, and the same penalty applies. Betting on elections is also prohibited. T.C.A. §§ 2-19-129 through 2-19-131.

In *State ex rel. Anderson v. Fulton*, 712 S.W.2d 90 (Tenn. 1986), a case involving the matter of whether the district attorney abused his or her discretion in refusing to bring a quo warranto proceeding against the Mayor of Nashville-Davidson County as requested by an unsuccessful candidate for that office, the Tennessee Supreme Court considered the question of bribery in violation of the bribery statutes and Article 10, Section 3 of the Tennessee Constitution, which states:

Any elector who shall receive any gift or reward for his vote, in meat, drink, money or otherwise, shall suffer such punishment as the law shall direct. And any person who shall directly or indirectly give, promise or bestow any such reward to be elected, shall thereby be rendered incapable, for six years, to serve in the office for which he was elected, and be subject to such further punishment as the Legislature shall direct.

The allegations of wrongdoing on the part of the Mayor involved distribution of free cheese and butter to low income groups through the Metropolitan Development and Housing Agency, and a barbecue and watermelon feast sponsored by the Mayor's re-election committee.

In finding no bribery under these circumstances, the Supreme Court explained the bribery prohibition as follows:

The prohibition of the Constitution and the statute involved here is directed to the giving or promising of rewards such as meat, drink, money or things of value for a vote to be elected to public office. Ms. Anderson and her attorney did not provide the District Attorney with a single instance wherein it was factually asserted that Mayor Fulton had given anything of value in exchange for a promise to vote for him in the Mayoral election. Implicit in the District Attorney General's letter of May 17 was the observation that the serving of food at a traditional political rally promoting a candidate for election to public office, to which the general public is invited, lacks the essential element of bribery, to-wit: that a voter is given food in exchange for his vote, which element was also not present in the distribution of butter and cheese.

*Fulton*, at 93 - 94.

# Removal From Office-Ouster

Reference Number: CTAS-657

Article 7, Section 1 of the Tennessee Constitution provides that county officers shall be removed from office for malfeasance or neglect of duty. "The terms 'malfeasance' and 'neglect of duty' are comprehensive terms and include any wrongful conduct that affects, interrupts, or interferes with the performance of official duty." *State ex rel. Complainant v. Ward*, 43 S.W.2d 217, 219 (Tenn. 1931).

Pursuant to T.C.A. § 8-47-101, county officials may be ousted from office for:

1. Knowing or willful misconduct in office;
2. Knowing or willful neglect of duties required by law;
3. Voluntary intoxication in a public place;
4. Engaging in illegal gambling; or
5. Committing any act violating any penal statute involving moral turpitude.

Participating in the Tennessee lottery is not considered gambling. T.C.A. § 8-47-127.

"Proceedings under the Ouster Act should never be brought unless there is a clear case of official dereliction. This is a very drastic statute and should not be invoked except in plain cases that can be certainly proved." *State ex rel. Wilson v. Bush*, 208 S.W. 607, 609 (Tenn. 1919). *See, e.g., McDonald v. Brooks*, 387 S.W.2d 803, 806 (Tenn. 1965) (ouster suits should be brought only where the evidence of official dereliction is clear and convincing). As has been noted by the Tennessee Supreme Court:

The Ouster statute is a salutary one, but those administering it should guard against its overencroachment. Shreds of human imperfections gathered together to mold charges of official dereliction should be carefully scanned before a reputable officer is removed from office. These derelictions should amount to knowing misconduct or failure on the part of the officer if his office is to be forfeited; mere mistakes in judgment will not suffice.

*Vandergriff v. State ex rel. Davis*, 206 S.W.2d 395, 397 (Tenn. 1937) (emphasis added).

"Misconduct that would sustain an indictment under the common law would support a proceeding under the Ouster Law." *State ex rel. Carney v. Crosby*, 255 S.W.3d 593, 597 (Tenn.Ct.App. 2008).

Nevertheless, a plaintiff in an ouster suit shoulders a heightened burden of proof. *Id.* The Tennessee Court of Appeals has noted:

As used in reference to the ouster statute, the terms "knowingly" and "willfully" have been defined as encompassing "a mental attitude of indifference to consequences or failure to take advantage of means of knowledge of the rights, duties or powers of a public office holder." *Tennessee ex rel. Leech v. Wright*, 622 S.W.2d 807, 817 (Tenn.1981) (citing *Jordan v. State*, 217 Tenn. 307, 397 S.W.2d 383, 398 (1965)). The *Jordan* court also noted that the terms "knowingly" and "willfully" as used in ouster proceedings are "not confined to a studied or deliberate intent to go beyond the bounds of the law." *Jordan*, 397 S.W.2d at 399. However, it requires more than "simple negligence" to constitute willful or knowing misconduct. *Id.* (holding "simple negligence in discharging the duties of an officer does not constitute or amount to an officer acting knowingly or willfully").

*Id.* at 598.

Ouster is purely a civil proceeding and the rights granted to defendants in criminal cases are not applicable under the ouster statutes. *State ex rel. Leech v. Wright*, 622 S.W.2d 807 (Tenn. 1981). Ouster proceedings may be instituted by the attorney general, district attorney general, or county attorney, either on their own initiative or after a complaint has been made. T.C.A. § 8-47-102. County attorneys, within their respective jurisdictions, are required to investigate any complaint made in writing alleging that a county officer is guilty of any of the acts, omissions, or offenses set out in T.C.A. § 8-47-101, and upon determination of reasonable cause, to institute a proceeding in the appropriate court to oust such official. T.C.A. § 8-47-103. *See Op. Tenn. Atty. Gen. 07-169* (December 21, 2007); *Op. Tenn. Atty. Gen. 00-126* (August 7, 2000). Note that the county commission is not authorized by statute to bring ouster proceedings against county officials. "Nor, is the county executive authorized under the ouster statutes to bring such a suit." *Duncan v. Cherokee Ins. Co.*, 1987 WL 11329 (Tenn.Ct.App. 1987).

County attorneys have the power and are directed, whenever a complaint has been made, and the names of the witnesses have been furnished to them, or whenever they deem necessary, to issue subpoenas for witnesses and other persons they believe have knowledge of the complaint, to appear before them at a time and place designated in the subpoena and testify concerning the subject matter set out in the complaint. T.C.A. § 8-47-104. Each witness must be sworn and the testimony of each witness must be reduced to writing and signed by the witness. County attorneys may administer the necessary oaths and

affirmations to the witnesses. T.C.A. § 8-47-105. Disobedience of a subpoena, or refusal to answer proper questions propounded by the county attorney at the inquiry, is a Class C misdemeanor. T.C.A. § 8-47-106.

The privilege against self incrimination does not apply in ouster proceedings. No person will be excused from testifying under the ouster statutes on the ground that the person's testimony may incriminate him or her. However, no person may be prosecuted or punished on account of any transaction, matter, or thing concerning which the person was compelled to testify, and the testimony cannot be used against the person in prosecutions for any crime or misdemeanor under the laws of this state. T.C.A. § 8-47-107. Citizens may also file ouster proceedings. Ten citizens and freeholders are required to institute the proceedings and they must post security for the costs of the lawsuit. T.C.A. § 8-47-110. *State ex rel. Wolfenbarger v. Moore*, 2010 WL 520995 (Tenn.Ct.App. 2010). It is the duty of the county attorney, upon request of relator citizens and freeholders, to aid and assist in the prosecution of the proceedings against county officers. T.C.A. § 8-47-111.

When an ouster petition or complaint is filed the court may suspend the accused officer from performing any of the duties of their office, pending a final hearing and determination of the matter. The vacancy should be filled as the law provides for the filling of vacancies in that office. The person filling the vacancy carries on the duties of the office until the hearing is concluded or until a successor is elected. T.C.A. § 8-47-116. The officer temporarily filling the office receives the same salary and fees as paid to the suspended officer. T.C.A. § 8-47-121.

At least five days before an official is suspended, the official must receive a notice setting forth the time and place of the hearing on the suspension application. The officer has the right to appear and make any defense that the officer may have, and shall be entitled to a full hearing upon the application for the order of suspension. No order of suspension shall be made, except upon finding of good cause. T.C.A. § 8-47-117.

Ouster proceedings have precedence over civil and criminal actions, and must be tried at the first term after the filing of the complaint or petition, provided that the answer of the accused officer has been on file at least ten days before the day of trial. The accused officer is entitled to demand and have a trial by jury as to any issue of fact. T.C.A. § 8-47-119. Likewise, plaintiffs in an ouster suit are entitled to a trial by jury as to any issue of material fact. *State ex rel. Wolfenbarger v. Moore*, 2010 WL 520995 (Tenn.Ct.App. 2010). If the officer is found guilty, the officer shall be ousted from office and must pay the full costs adjudged in the case. T.C.A. §§ 8-47-120 and 8-47-122.

If, after the final hearing the officer is not removed from office, the officer shall, if the officer has been suspended, be immediately restored to office and be allowed the officer's full costs and the salary and fees of the officer's office during the time of the officer's suspension. After the final hearing, any officer not removed from office may be reimbursed reasonable attorney fees. However, if either party appeals no such reimbursement shall be made until a final judgment is rendered. T.C.A. § 8-47-121. *See State ex rel. Carney v. Crosby*, 255 S.W.3d 593, 602 (Tenn.Ct.App. 2008) (denying attorney fees). *See also Marshall v. Sevier County*, 639 S.W.2d 440 (Tenn.Ct.App. 1982).

Either party to an ouster proceeding may appeal, but the appeal does not operate to suspend or to vacate the trial court's judgment or decree, which remains in full force until vacated, revised or modified. T.C.A. § 8-47-123. An ouster suit has priority on appeal and will be heard at the first term after such appeal is perfected and filed. T.C.A. § 8-47-125.

## Ouster Cases

Reference Number: CTAS-658

*State ex rel. Wolfenbarger v. Moore*, 2010 WL 520995 (Tenn.Ct.App. 2010) (county commissioner ousted for committing perjury).

*State, ex rel. Estep v. Peters*, 815 S.W.2d 161 (Tenn. 1991) (school superintendent ousted for knowingly or willingly misapplying public funds and failing to make required financial reports to the county commission).

*Tennessee ex rel. Leech v. Wright*, 622 S.W.2d 807, 817 (Tenn.1981) (road superintendent ousted for knowingly and wilfully permitting county equipment to be used by private company, knowingly and wilfully permitting a county employee to work for a private company at the same time that he was being paid by the county, and failing to comply with competitive bidding procedures).

*Jordan v. State ex rel. Williams*, 397 S.W.2d 383 (Tenn. 1965) (county commissioner ousted for utilizing for his own benefit equipment and supplies of the Shelby County Penal Farm and labor of its inmates).

*Edwards v. State ex rel. Kimbrough*, 250 S.W.2d 19 (Tenn. 1952) (sheriff ousted for knowingly and

willfully neglecting his duty to “suppress affrays, riots, routs, unlawful assemblies, insurrections, or other breaches of the peace”).

*State ex rel. Ten Citizens of Campbell County v. Smith*, 11 S.W.2d 897 (Tenn. 1928) (chairman of the county board of education ousted upon finding that he failed to countersign thousands of warrants authorized by the board of education, as required by law, but instead provided his secretary a rubber stamp with which to sign the chairman's name to the warrants).

*State ex rel. Milligan v. Jones*, 224 S.W. 1041 (Tenn. 1920) (director of school district ousted where there had been no meeting of the board of directors after the director had been elected, and he had repeatedly signed the names of all the directors to school warrants, he had failed and neglected to take care of the school property, and he had hauled coal from the school grounds).

*State ex rel. Thompson v. Reichman*, 188 S.W. 225 (Tenn. 1916) (sheriff removed from office for neglect of office).

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