
Coates' Canons Blog: City and County Attorneys as Public Officers – Possible Downsides

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Last week I discussed a possible advantage of considering city or county attorneys as public officers – the governing board's ability to hold a closed session to consider an attorney's qualifications, character, performance, and so on. This week I want to discuss a couple of possible disadvantages – to having a *firm* designated as county or city attorney, and to avoiding the rules against multiple office-holding.

The first may in fact not be a problem. As most county and city attorneys know, the I.R.S. has suggested that a contract county or city attorney might be considered an employee for withholding and reporting purposes. One strategy for avoiding that outcome is to have the board appoint a law firm as county or city attorney, rather than a specific lawyer. It seems to me strange, though, to characterize an entity as a public officer, and that strangeness might be an argument against being able to name a firm as attorney. My theoretical hang-up, however, is not shared by the Court of Appeals. In *Womack Newspapers, Inc. v. Town of Kitty Hawk*, the court concluded that "Vandeventer Black LLP was a public officer in that it was duly appointed and acted as the Town Attorney."

The second is a much more serious concern. Under the state constitution and the implementing statutes, a person can concurrently hold one elective and one appointive office or two appointive offices. A decent number of city attorneys represent more than two cities or towns, and I know one attorney who represents three different counties. Even if an attorney only represents two local governments, he or she may hold one or more other elective or appointive offices. If being county or city attorney counts as a public office, a significant number of attorneys may be in violation of the constitutional and statutory restrictions. Perhaps, should a case arise, the appellate courts could be persuaded that the term "public office" means something different in different contexts, and that the meaning in the multiple office-holding context should be narrower than it is in the tort immunity context.

In the first case to characterize a city attorney as a public officer, *City of Winston-Salem v. Yarbrough*, the court gave two reasons for concluding that a "city attorney is a public officer." First, the statutes create the position of city attorney. Second, "his job, the rendering of legal opinions, involves the exercise of personal deliberation, decision and judgment." Although the court used the word "decision," city attorneys really don't have decision-making power; rather, they advise individuals and entities who or that do have such power. One of the characteristics usually accorded a public office for multiple-office holding purposes is that the person has the power to make important decisions. (I say "usually" because the courts have not been consistent in their definitions nor, in fact, particularly helpful.) It is by emphasizing that they are advisers, not deciders, that city or county attorneys may be able to escape the implications, for multiple office-holding, of these other decisions that declare them to be public officers. (It also seems strange to apply the multiple-office holding rules to a firm, rather than an individual, and so the court's willingness to characterize the firm as an officer in the public records context might be an argument for a different meaning for public officer in the multiple-office holding context.)

I should note, though, that it may be slightly more difficult for a county than a city attorney to claim to be nothing more than an adviser. G.S. 128-16 permits a court to remove from office a sheriff found unfit. Under G.S. 128-17, such a proceeding gets before the court either by a petition from five electors, "upon the approval of the county attorney of such county" (or the D.A.), or by the county attorney (or D.A.) on his own motion. This one statute seems to make the county attorney a potential decider, as opposed to adviser, no matter how fast any county attorney might run from the opportunities presented by the statute.

David Lawrence is retired from the faculty of the School of Government. For questions about the subject of this blog post, please refer to our **list of faculty expertise** to identify the appropriate faculty member to contact.



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