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JOHN K. VAN DE KAMP
Attorney General

OPINION	:	No. 84-506
of	:	AUGUST 16, 1984
JOHN K. VAN DE KAMP Attorney General	:	
CLAYTON P. ROCHE Deputy Attorney General	:	

THE HONORABLE De WITT W. CLINTON, COUNTY COUNSEL, LOS ANGELES COUNTY, has requested an opinion on the following question:

In view of the provisions of article VI, section 17 of the California Constitution, may a superior court judge accept the position of county law library trustee?

CONCLUSION

Article VI, section 17 of the California Constitution does not preclude a superior court judge from also being a county law library trustee.

ANALYSIS

Article VI, section 17 of the California Constitution, with limited exceptions not germane herein, makes judges of courts of record ineligible for any other public office

or public employment other than judicial office or employment during the entire term for which they have been selected.[1] The question presented for resolution herein is whether this constitutional provision precludes a superior court judge from simultaneously holding the *office* of county law library trustee established pursuant to the provisions of section 6300 et seq. of the Business and Professions Code.[2] We conclude that it does not.

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[1] Article VI, section 17 provides:

> "A judge of a court of record may not practice law and during the term for which the judge was selected is ineligible for public employment or public office other than judicial employment or judicial office. A judge of the superior or municipal court may, however, become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy. Acceptance of the public office is a resignation from the office of judge.
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> "A judicial officer may not receive fines or fees for personal use."
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> "Ineligible" means incapable of being chosen. Accordingly, this section constitutes a complete *bar* to election or appointment to the proscribed offices or employments. See 66 Ops.Cal.Atty.Gen. 440, 441 (1983).

In California, all courts other than justice courts are "courts of record." (Cal. Const. art. VI, § 1.)

[2] Since "[t]he office of trustee is honorary, without salary or other compensation" (Bus. & Prof. Code, § 6303) we underscore the term "office." This is so since in numerous opinions in the past we have concluded that article VI, section 17 and its predecessor provision, article VI, section 18, did not preclude judges from serving upon nonjudicial, non- compensated advisory boards and commissions. (See, e.g., 57 Ops.Cal.Atty.Gen. 583, 585 (1974) and 42 Ops.Cal.Atty.Gen. 93, 96-97 (1963).) We did so on the rationale that the advisory nature of the position involved precluded the position from rising to the dignity of a "public office" and that the lack of compensation precluded the position from even being "public employment" within the contemplation of the constitutional provisions.

Thus, since compensation is not essential to a "public *office*," we must initially determine whether the position of law library trustee is in fact an "office" as opposed to a mere employment. We conclude that it is, applying generally the requisite tests. (See e.g., 65 Ops.Cal.Atty.Gen. 316, 317-318 (1982).) The position of trustee has duties which are neither transient nor occasional. The board of law library trustees is a permanent board, which meets monthly to perform its duties. (Bus. & Prof. Code, §§ 6300-6307.) The position is described by the Legislature as an "office." And an examination of the duties of the board (see Bus. & Prof. Code, §§ 6340-6350), prescribed by statute, demonstrates that the board exercises part of the sovereign power of the state, the essential element to an "office." Accordingly, the position potentially falls within article VI, section 17.

Section 6300 et seq. of the Business and Professions Code both contemplates and in some instances requires that judges shall serve on county law library boards.[3] This has been the case *since 1891* when county law libraries were first established. (See Stats. 1891, ch. 225, pp.430-431.) Thus, in a county such as Los Angeles, three judges are to be elected to the library board. These judges in turn may thereafter designate a member of the bar to serve in their stead, *at their option*.[4] If the position of library board trustee is a nonjudicial office within the meaning of article VI, section 17, it is evident that the provisions of the Business and Professions Code conflict with the plain wording of that section.

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[3] The composition of county law library boards is generally set forth in section 6301 of the Business and Professions Code. It states:

"A board of law library trustees is constituted as follows:

"(a) In a county where there are no more than three judges of the superior court, each of such judges is ex officio a trustee; in a county where there are more than three judges of the superior court, the judges of the court shall elect three of their number to serve as trustees. However, where there are no more than three judges of the superior court, the judges may at their option select only one of their number to serve as a trustee, and in such event they shall appoint two additional trustees who are members of the bar of the county.

"Any judge who is an ex officio or elected member may at his option designate a member of the bar of the county to act for him as trustee.

"(b) In a county with no more than two municipal and justice courts the judges of such court or courts shall elect one of their number to serve as trustee. In a county with three or more municipal and justice courts the judges of such courts may elect two of their number to serve as trustees.

"(c) The chairman of the board of supervisors is ex officio a trustee, but the board of supervisors at the request of the chairman may appoint a member of the bar of the county or any other member of the board of supervisors of the county to serve as trustee in place of said chairman. The appointment of the person selected in lieu of the chairman of the board of supervisors shall expire when a new chairman of the board of supervisors is selected, and such appointment shall not be subject to the provisions of Section 6302.

"(d) The board of supervisors shall appoint as many additional trustees, who are members of the bar of the county, as may be necessary to constitute a board of six members in any county where the municipal and justice courts have elected one member, or of seven members in any county where the municipal and justice courts have elected two members to serve as trustees."

[4] Interestingly and significantly, when county law libraries were first established in 1891, all judges designated to serve, either ex-officio or as elected board members, were *required* to serve. No options were made available to any of them.

In the recent opinion of this office, 66 Ops.Cal.Atty.Gen. 440, *supra*, we traced the history and evolution of article VI, section 17, previously article VI, section 18 of the Constitution of 1879 and article VI, section 16 of the Constitution of 1849. In that opinion we concluded that a superior court judge who resigned from office would still be ineligible for appointment to a public teaching position until the expiration of the term for which he was originally selected. In 67 Ops.Cal.Atty.Gen. 149 (1984) we reached the same conclusion as to a supreme court justice, based upon the reasoning of our 1983 opinion.[5] Finally, in 67 Ops.Cal.Atty.Gen. 41 (1984) we concluded that article VI, section 17 does not prevent a judge from resigning to become a *federal* officer or to run for a federal office. This is so since the state cannot set eligibility requirements for such offices. Reference is made to those opinions for a complete discussion of article VI, section 17, and its predecessors, and the few California cases which have construed it.

As will be seen from an examination of these opinions, *Abbot* v. *McNutt* (1933) 218 Cal. 225 constitutes the sole pronouncement by the California Supreme Court as to the intent and purpose of article VI, section 17, then article VI, section 18. In that case the issue was whether a sitting judge was eligible to serve on a qualifications board established by county charter to choose candidates for the position of county executive. Having found no prior case construing then article VI, section 18,[6] the court borrowed from the New York case *In re Richardson* (N.Y. 1928) 160 N.E. 655 in setting forth the purpose of the provision and in holding the judge ineligible for service. The essence of our Supreme Court's holding is as follows:

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[5] See also Judicial Council of California, Annual Report (1967) page 85:

> "Comment. Section 17 continues the constitutional prohibition against judges of courts of record practicing law. It also makes a judge of a court of record ineligible for public office or employment other than judicial office or employment as a general matter. This ineligibility continues during the entire term for which the judge is selected. Hence, a judge may not be appointed to other public office or accept other public employment after resigning from his judicial office in midterm."

Cf. *Clements* v. *Fashing* (1982) 457 U.S. 957 in which the United States Supreme Court upheld a Texas constitutional provision which provides that "No judge . . . shall during the term for which he is elected or appointed, be eligible to the Legislature." "That provision *entirely disables* an officeholder from becoming a candidate for the legislature until he completes his present term of office." (*Id.*, at p. 962, emphasis added.) "[It] . . . prohibits officeholders from cutting short their current term in order to serve in the Legislature." (*Id.*, at p. 966.) ". . . A campaigning Justice of the Peace might be tempted to render decisions and take actions that might serve

[6] But see *People* v. *Sanderson* (1866) 30 Cal. 160, 168, overruled on other grounds in *People* v. *Provines* (1868) 34 Cal. 520, 532, and discussed by us in 66 Ops.Cal.Atty.Gen. 440, 446, *supra*, in which the Court discussed the purpose of the similar provision, article VI, section 16 of the 1849 Constitution. See also text, post.

"The phrase 'any other office or public employment' necessarily has application to any other *public* office or *public* employment, as distinguished from a purely private office or private employment. The only constitutional inhibition against the private employment of judicial officers has to do with the practice of law. Research fails to disclose any case construing or applying that portion of the constitutional provision above quoted. However, the purpose and policy underlying such a provision is cogently stated by Justice Cardoza in *In re Richardson*, 247 N.Y. 401 [160 N.E. 655, 661], wherein the following appears: 'The policy is to conserve the time of the judges for the performance of their work, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.' In other words, it is intended to exclude judicial officers from such extrajudicial activities as may tend to militate against the free, disinterested and impartial exercise of their judicial functions.

"In our opinion service upon the 'qualification board' by the respondent judges would be in contravention of the purpose and policy underlying the constitutional inhibition. As already stated, the charter provision requires that the qualification board continue to solicit and select and submit to the board of supervisors lists of qualified candidates for the office of county executive until such time as the board of supervisors determines upon an appointee for that office.

"It is conceivable that this duty may so consume the time of the respondent judges as to seriously embarrass, if not in fact impede, the orderly and proper discharge of their judicial functions. What may reasonably be done under a statute, is the test of its validity.

"Moreover, service upon said qualification board may tend to involve the respondent judges in those 'entanglements' and subject them to those 'partisan suspicions' of which the constitutional inhibition, in its wisdom, seeks to free them. To illustrate: If the respondent judges are permitted to serve upon the qualification board, it is not at all unlikely that at some time in the future they may be called upon, as judicial officers, to pass upon the propriety or validity of the official acts of the county executive whom they recommended and indorsed as qualified for appointment to that office. Or, in the event of misfeasance in office of the county executive, the respondents as superior court judges may, under sections 758-769 of the Penal Code, be required to preside at a trial having for its purpose the removal from office of an incumbent theretofore recommended by them as qualified for the

position. Either or both of these situations pointedly indicate the impropriety of service by the respondent judges on the qualification board.

> "Having definitely in mind the public policy underlying the constitutional inhibition, we are satisfied that membership on the 'qualification board' constitutes an 'office or public employment' within the purpose and intent of section 18 of article VI of the Constitution. . . ." (Emphasis in original.)

Significantly, the Court did not have to decide, *nor did it decide*, whether, if the appointment had not conflicted with the stated policies, it could have been made despite the fact that the position appears to have been a *non*judicial position.[7] Thus, we find nothing in *Abbot* v. *McNutt* which would lead us to conclude that it is possible to depart from the requirement that the second position to be assumed must be a *judicial* office or a *judicial* employment as clearly stated in article VI, section 17 even if the position would not violate the various policy considerations set forth in *Abbot* v. *McNutt*.[8]

In view of the fact that the Legislature has prescribed since 1891 that judges serve upon law library boards, *and they have so served since that time*, we need give little consideration to whether holding that office would violate the policies set forth in *Abbot* v. *McNutt* relating to time constraints, entanglements and possible partisan suspicions. We see the issue as resolving itself into the question whether the office of law library trustee may be said to be a "*judicial* office" or "*judicial* employment" within the meaning of article VI, section 17.

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[7] In fact, the case *In re Richardson* is instructive on this point. That case concluded that a judge could not be required to investigate possible misconduct on the part of a public officer at the behest of the Governor. The purpose of such an investigation was to inform the Chief Executive of the facts necessary to decide whether *he* should remove the officer from office.

The decision of the New York court was two-pronged. It *first* held that the statute permitting such delegation of investigative duties to a judge by the Governor violated the concept of separation of powers and constituted "an [improper] attempt . . . to charge a justice of the Supreme Court with the mandate or performance of duties *nonjudicial*." (160 N.E. at p. 657.)

Alternatively, it also held that the position would violate the policy considerations it set forth in answer to the contention that the judge could be asked to serve in such position *in his private capacity*.

Thus, *In re Richardson* in no way indicates a judge may assume a nonjudicial office or employment.

[8] We also note parenthetically that *Abbot* v. *McNutt* was not required to, nor did it, decide whether a judge could resign and then be appointed to another nonjudicial public office or public employment. (See discussion at 66 Ops.Cal.Atty.Gen. 440, 448 (1983); see also fn. 5, *supra*.)

County law libraries and their boards of trustees are not provided for in article VI of the California Constitution which establishes our court system and specifically creates certain judicial offices. Accordingly, the office of law library trustee is not specifically provided for in the Constitution as a "judicial office." However, the operation of a county law library and the selection of *its contents*, which "shall be free to the judiciary, to State and county officials, to members of the State Bar, and to all residents of the county, for the examination of books and other publications," (Bus. & Prof. Code, § 6360) certainly is of great interest and concern to the judicial branch of government. It is in the nature of an adjunct to the courts, since both judges and their staffs as well as attorneys will use it in the course of their work. As such, insofar as a judge may serve upon the board, his service can certainly be characterized as quasi-judicial or judicial in character.

The delegation by the Legislature of this type of duty to judges has long been recognized, and has been held not to contravene the separation of powers doctrine. As stated in *Frazier* v. *Moffatt* (1951) 108 Cal.App.2d 379, 386-387:

> "In consonance with the spirit and intent of the foregoing constitutional provision, the courts of this state have uniformly held that the Legislature is without power to confer upon courts jurisdiction that is not given or authorized to be given them by the Constitution, and that the Legislature can impose no duties on the judiciary but such as are of a judicial character (*People* v. *Sanderson*, 30 Cal. 160, 166; *People* v. *McKamy* 168 Cal. 531, 532 [143 P. 752]; *Burgoyne* v. *Board of Supervisors*, 5 Cal.9; *Wulzen* v. *Board of Supervisors*, 101 Cal. 15 [35 P. 353, 40 Am.St.Rep. 17]; *Phelan* v. *San Francisco*, 20 Cal.39; *Epperson* v. *Jordan*, 12 Cal.2d 61 [82 P.2d 445].)"

But, as further stated by the court in that case:

> ". . . If a power or duty imposed by the Legislature upon the judiciary partakes of a judicial or quasi judicial character it is not subject to constitutional infirmity. For instance, it has been held that the power of appointment of probation officers vested in the superior court in the exercise of its jurisdiction as a juvenile court is not unconstitutional as vesting an executive function in judicial officers (*Nicholl* v. *Koster*, 157 Cal. 416, 423 [108 P. 302]). . . ." (*Id.*, at p. 387.)

Or as cogently stated by the court in the Wisconsin case, *In re Appointment of Revisor* (Wis. 1910) 124 N.W. 670, where the court held that a judge *could* serve as a law library trustee in the face of their constitutional provision that judges "shall hold no office or public trust except a 'judicial office' during their term":

". . . Each department [of government] has exclusive functions which no other department can perform, but this does not mean that there may not be functions common to all departments . . . ." (*Id.*, at p. 672.)

Reiterating the fact that since 1891 the Legislature has decreed that judges shall serve as trustees of county law libraries, we see in such decree a recognition by the Legislature of the foregoing principles. Furthermore, this fact taken in conjunction with the requirements of article VI, section 17, previously article VI, section 18, that judges shall serve only in judicial offices or judicial employments amounts to a legislative interpretation of the constitutional provision that offices which are quasi-judicial in nature fall within the purview of the section as "judicial offices" and hence are not proscribed. With respect to legislative interpretations of a constitutional provision, the court stated, inter alia, in *Methodist Hosp. of Sacramento* v. *Saylor* (1971) 5 Cal.3d 685, 693, discussing its prior opinions:

"In *Pacific Indemnity Co.* v. *Indus. Acc. Com.* (1932) 215 Cal. 461, 464 [11 P.2d 1, 82 A.L.R. 1170], the same reasoning led us to the statement that 'For the purpose of determining constitutionality, we cannot construe a section of the Constitution as if it were a statute, and adopt our own interpretation without regard to the legislative construction. Where more than one reasonable meaning exists, it is our duty to accept that chosen by the legislature.' (Accord, *Lundberg* v. *County of Alameda* (1956) 46 Cal.2d 644, 652 [298 P.2d 1].) Again, in *Delaney* v. *Lowery* (1944) 25 Cal.2d 561, 569 [154 P.2d 674], we referred to the presumption of constitutionality and the rule of strict construction of constitutional limitations on the Legislature, and concluded, 'Those principles indicate the latitude and effect to be given a legislative construction or interpretation of the Constitution. When the Constitution has a doubtful or obscure meaning or is capable of various interpretations, the construction placed thereon by the Legislature is of very persuasive significance." The rule, moreover, remains viable today. (See, e.g., *County of Madera* v. *Gendron* (1963) 59 Cal.2d 798, 802 [31 Cal.Rptr. 302, 382 P.2d 342, 6 A.L.R.3d 555]; *Miro* v. *Superior Court* (1970) 5 Cal.App.3d 87, 99 [84 Cal.Rptr. 874]; *Dept. of Alcoholic Bev. Control* v. *Superior Court* (1968) 168 Cal.App.2d 67, 74 [73 Cal.Rptr. 780].)"

(See also, e.g., *Brown* v. *Superior Court* (1982) 33 Cal.3d 242, 251; *Armstrong* v. *County of San Mateo* (1983) 146 Cal. App.3d 597, 624-625.)

The possibility that article VI, section 17 may encompass quasi-judicial offices or employments is also indicated by the court in *Abbot* v. *McNutt*, *supra*, 218 Cal. 225, 232:

". . . Likewise, the performance of administrative duties as to matters incidental to the exercise of the judicial power or which have some reasonable connection with a judicial purpose have been sanctioned. (*In re Richardson*, *supra*, at page 660 of 160 N.E.)"

Finally, support for the conclusion that a judge may simultaneously act as a county law library trustee may be found in the subsequent history of *People* v. *Sanderson*, *supra*, 30 Cal. 160 which construed the provision similar to article VI, section 17 which was found in the Constitution of 1849 as article VI, section 16. That section provided that "the Justices of the Supreme Court, and the District Judges, and the County Judges shall be ineligible to any other office than a judicial office during the term for which they shall have been elected."

The court held that by reason of article III (separation of powers) and that provision, the Legislature could not by statute impose upon the Chief Justice the duty of being a trustee of the State Library, since the court held it to "properly fall within the sphere of the executive department of Government." (30 Cal. at p. 168.)[9]

This conclusion was criticized, and essentially overruled, a few short years later in the case of *People* v. *Provines* (1868) 34 Cal. 520, 532 as follows:

"The decision in *Sanderson's Case* was founded upon the rule in *Burgoyne's Case*, and is, therefore, equally erroneous. As we now understand the question, there is no constitutional reason why the Chief Justice of this Court cannot also hold the office of Trustee of the State Library and exercise its functions - the latter office not pertaining, as will appear hereafter, to either the Legislative or Executive Departments, in the sense of the Third Article of the Constitution."

For the foregoing reasons, we conclude that a superior court judge, or any judge of a court of record, may serve as a county law library trustee without violating article VI, section 17 of the California Constitution.[10] *****

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[9] The State Library was then, as it is now, a multisubject library - not merely a law library. (See Stats. 1850, ch. 69.)

[10] We note finally that some courts have taken the approach that where a judge is required to exercise the duties of a second position ex-officio which relates to the administration of the court system, the second position is not considered a separate office, but is merely considered as a proper imposition of additional duties on the judge, *qua* judge. (See, e.g., *Ogden City* v. *Patterson* (Utah 1952) 250 P.2d 570, 576, citing numerous cases.)

We do not take such approach for two reasons. First of all, the case law in California is not uniform as to whether an ex-officio position constitutes a second office. (Compare *Los Angeles* v. *Superior Court* (1941) 17 Cal.2d 707, 715 and 50 Ops.Cal.Atty.Gen. 87 (1967) with *City of Oakland* v. *Snow* (1904) 145 Cal. 419 and 44 Ops.Cal.Atty.Gen. 170 (1964).)

More importantly, however, the separate character of the positions of judge and law library trustee is evident from the fact that in counties such as Los Angeles such position may be delegated to a member of the bar.