

OPINION NO. 91-010**Syllabus:**

An individual elected under R.C. 1907.13 as a judge of a county court may be employed, pursuant to R.C. 309.09(A), as a township solicitor in an area of jurisdiction not under his control as county court judge, provided the individual, as township solicitor, does not engage in the practice of law in matters pending or originating in that county court during his term of office, and further provided that he is not in violation of any local departmental regulations, charter provisions or ordinances, or statutory provisions, rules, or canons subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08 or the Board of Commissioners on Grievances and Discipline of the Supreme Court pursuant to Ohio Gov. Bar R. V(2)(b).

**To: Stephen M. Stern, Jefferson County Prosecuting Attorney, Steubenville,
Ohio**

By: Lee Fisher, Attorney General, March 11, 1991

I have before me your request for an opinion from my predecessor as to whether a county court judge may hold simultaneously the position of solicitor of a

township. Information provided indicates that both the township and the county court are located within Jefferson County.

The provisions concerning the creation and administration of county courts are found in R.C. Chapter 1907. Under this chapter, a county court is created whenever the territorial jurisdiction of a municipal court or municipal courts located within a county is not coextensive with the boundaries of that county. R.C. 1907.01. A county court has jurisdiction throughout a county court district that consists of all the territory within a county not subject to the territorial jurisdiction of any municipal court. *Id.* In addition, R.C. 1907.15 provides, in relevant part:

In counties having more than one county court judge, the court of common pleas of that county may divide the county court district into areas of separate jurisdiction and may designate the area in which each judge shall have jurisdiction to the exclusion of any other judge of that district, except as provided in sections 1907.08 and 1907.14 of the Revised Code,¹ and the location where each judge shall hold court. (Footnote added.)

Thus, a court of common pleas may divide, whenever there is more than one county court judge, the county court district into areas of separate jurisdiction and assign a judge to each such area created. Each judge so assigned, however, remains a judge of the county court. *See* 1958 Op. Att'y Gen. No. 2143, p. 317, at 318 ("[a]ll judges are judges of the county court despite their individual assignment to an 'area of jurisdiction' under the provisions of Section 1907.071, Revised Code" (now R.C. 1907.15)²).

Judges of a county court are elected by the electors of a county court district. R.C. 1907.13. Further, county court judges are vested with those powers traditionally granted to judges. *See* R.C. 1907.18. These powers include, but are not limited to, the administering of oaths; the taking of acknowledgments of instruments of writing; the performance of marriage ceremonies; the issuing of subpoenas for various purposes; the punishment of contempts; and the exercise of those powers necessary to give effect to the jurisdiction of the court and to enforce its judgments, orders, and decrees. *Id.*

The position of township solicitor, the other position about which you ask, is not provided for expressly in the Revised Code, since the primary duty to advise townships is delegated to the county prosecuting attorney. R.C. 309.09(A). However,

[w]hen the board of township trustees deems it advisable or necessary to have additional legal counsel it may employ an attorney other than the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers in their official capacities and to advise them on legal matters. No such counsel or attorney may be employed, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund.

Id.

¹ R.C. 1907.08 provides that "[i]n civil actions founded upon a bond or undertaking, a judge of a county court has jurisdiction coextensive with his county," while R.C. 1907.14 sets forth the provisions concerning the oath and bond of a judge of a county court, and the appointment of an acting judge when a judge of a county court is temporarily absent or incapacitated. *See also* R.C. 1907.48 ("[a]ny county court judge may issue executions on judgments on the docket of a judge of the same district, who is unable to issue them in consequence of sickness, absence, or other cause").

² R.C. 1907.071 was amended and renumbered R.C. 1907.15 in 1985-1986 Ohio Laws, Part I, 1532 (Am. Sub. H.B. 158, eff. March 1, 1987).

Pursuant to a telephone conversation between yourself and a member of my staff, you have indicated that the township in question has employed an attorney on an annual basis to provide the township with legal counsel. Hence, for purposes of this opinion, the phrase "township solicitor" denotes an attorney employed, pursuant to R.C. 309.09(A), by a township on an annual basis to represent the township and its officers in their official capacities and to advise them on legal matters.

In 1979 Op. Att'y Gen. No. 79-111, one of my predecessors set forth seven questions for determining whether an individual may hold simultaneously two public positions. The seven questions set forth therein are:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment permissible?
3. Is one office subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

Op. No. 79-111, at 2-367 and 2-368; *see also Esler v. Summit County*, 39 Ohio Misc. 2d 8, 9, 530 N.E.2d 973, 974-75 (C.P. Summit County 1985). Before two public positions can be determined to be compatible, all seven questions must yield an answer in favor of compatibility.

Question number one addresses whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits employees or officers in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships from partaking in partisan political activity other than to vote and express their political views. *See* 1978 Op. Att'y Gen. No. 78-022. A county court judge, as an elected officer, holds an unclassified civil service position. *See* R.C. 124.11(A)(1); R.C. 1907.13. In a telephone conversation with a member of my staff, you indicated that the position of township solicitor in question is also an unclassified position within the civil service. I find, accordingly, that the prohibition set out in R.C. 124.57 does not apply to the positions of county court judge and township solicitor.

Question number two addresses whether the empowering statutes of either position limit outside employment. As stated above, township solicitors are employed by townships pursuant to R.C. 309.09(A). I find nothing in R.C. 309.09(A) or any other section that prohibits or limits the outside employment of township solicitors.

The provisions addressing the selection and the qualifications of county court judges are set forth in R.C. 1907.13. Although nothing contained therein places restrictions on the outside employment of county court judges, a limitation on such employment is found in Ohio Const. art. IV, §6(B) and R.C. 1907.16(B). More specifically, Ohio Const. art. IV, §6(B) provides, in pertinent part, that "[l]judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States." Previous opinions of the Attorney General have determined that the prohibition set forth in Ohio Const. art. IV, §6(B) applies to all judges, including county court judges. 1973 Op. Att'y Gen. No. 73-081

(syllabus); 1969 Op. Att'y Gen. No. 69-131, at 2-286;³ see also 1990 Op. Att'y Gen. No. 90-089. Similarly, R.C. 1907.16(B) states, in part, "[n]o county court judge shall hold any other office of trust or profit under the authority of this state or the United States." In light of the foregoing, it is clear that a county court judge is prohibited by Ohio Const. art. IV, §6(B) and R.C. 1907.16(B) from holding another office of profit or trust under the authority of this state. A resolution of your question, therefore, requires a determination as to whether the position of township solicitor is an office of profit or trust under the authority of this state.

In *State ex rel. Bricker v. Gessner*, 129 Ohio St. 290, 293-94, 195 N.E. 63, 65 (1935), the Ohio Supreme Court set forth the following definition of the term "public office" for purposes of construing the prohibition now set out in Ohio Const. art. IV, §6(B):⁴

"[A] public office is a charge or trust conferred by public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of the sovereign power, whether great or small. A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law."

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

Cf., e.g., State ex rel. Milburn v. Pethtel, 153 Ohio St. 1, 90 N.E.2d 686 (1950); *State ex rel. Landis v. Board of Comm'rs of Butler County*, 95 Ohio St. 157, 115 N.E. 919 (1917).

Under this definition, it appears that township solicitors are not officers. An individual is neither appointed nor elected in a manner prescribed by law to the position of township solicitor. See R.C. 309.09(A). Rather, a board of township trustees, when it "deems it advisable or necessary to have additional legal counsel...may employ an attorney other than the prosecuting attorney of the county." *Id.* (Emphasis added.) The General Assembly, thus, has indicated, through the language used in R.C. 309.09(A), that township solicitors are employed by boards of township trustees. Further, the title "township solicitor," is not one which is bestowed expressly by law. *Id.* Moreover, township solicitors have no official duties that are either prescribed by statute or involve the exercise of sovereign power on behalf of the public. As indicated above, township solicitors are employed by a township "to represent the township and its officers in their official capacities and to advise them on legal matters." *Id.* Thus, under R.C. 309.09(A), a township solicitor acts in an advisory capacity to the township and its officers. Accordingly, a township solicitor's duties do not involve the exercise of independent governmental functions. See generally *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898) (syllabus, paragraph two) ("[t]o constitute a public office...it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the

³ Since the issuance of 1973 Op. Att'y Gen. No. 73-081 and 1969 Op. Att'y Gen. No. 69-131, Ohio Const. art. IV, §6(B) has been amended. See 1973 Ohio Laws, Part I, 2024 (Am. S.J.R. 30, eff. Nov. 6, 1973). The amendment to Ohio Const. art. IV, §6(B), however, does not affect the conclusion that Ohio Const. art. IV, §6(B) applies to judges of county courts.

⁴ When the decision in *State ex rel. Bricker v. Gessner*, 129 Ohio St. 290, 195 N.E. 63 (1935) was rendered, the provision of Ohio Const. art. IV, §6(B) prohibiting judges from holding any other office of profit or trust was set forth in Ohio Const. art. IV, §14. See generally 1967-1968 Ohio Laws, Parts II-III, 2878 (Am. Sub. H.J.R. 42, eff. Jan. 10, 1970).

incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else"). It follows that an individual who serves as a township solicitor is not an "officer," as that term is used in its traditional sense to refer to an individual who exercises part of the sovereignty of the state.

In addition to the above considerations for determining what constitutes a public office generally, there are other considerations in determining what constitutes a township office. "[B]ased upon the [*State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917)] case, in order to create a township office, the General Assembly must observe the provisions of Ohio Const. art. II, §§20 and 26, and Ohio Const. art. X, §2 (formerly at Ohio Const. art. X, §1)."⁵ 1990 Op. Att'y Gen. No. 90-077, at 2-329. These sections require that the compensation of officers be set by the General Assembly, Ohio Const. art. II, §20; that laws of a general nature operate uniformly throughout the state, Ohio Const. art. II, §26; and that township offices be filled by election, not by appointment, Ohio Const. art. X, §2. In this regard, I note that township solicitors are neither elected nor have their compensation set by statute. I must assume, therefore, that the General Assembly acted in accordance with these constitutional mandates in providing for the employment of township solicitors, and did not intend to confer the status of officer upon township solicitors. I find, accordingly, that since the position of township solicitor is not an office of trust or profit, a county court judge is not prohibited by Ohio Const. art. IV, §6(B) or R.C. 1907.16(B) from serving as a township solicitor.

Question number three addresses whether one position is subordinate to, or in any way a check upon, the other. As an elected official, *see* R.C. 1907.13, a county court judge is accountable to the people who elected him. A township solicitor, however, is employed, pursuant to R.C. 309.09(A), by the board of township trustees, and, therefore, is responsible to the board of township trustees which employs him. Hence, the positions operate independently of each other and neither is subordinate to the other. *See generally Pistole v. Wiltshire*, 22 Ohio Op. 2d 464, 467, 189 N.E.2d 654, 657-58 (C.P. Scioto County 1961) (where one position is responsible to the people who elect the officeholder and the other is responsible to the employee's appointing authority, neither position is subordinate to, or a check upon, the other). Further, I have been unable to locate an area in which one position would serve as a check upon the other. Therefore, I conclude that the positions of township solicitor and county court judge are not subordinate to, or in any way a check upon, each other.

Question number four addresses whether it is physically possible for one person to discharge the duties of both positions. Prior opinions of the Attorney General have determined that physical possibility is a question of fact, best answered by the interested parties. 1989 Op. Att'y Gen. No. 89-052, at 2-220; 1989 Op. Att'y Gen. No. 89-022, at 2-105; 1988 Op. Att'y Gen. No. 88-020, at 2-78; Op. No. 79-111, at 2-373. I shall, therefore, refrain from determining whether it is physically possible for the individual in question to discharge the duties of county court judge and township solicitor. *See generally* 1983 Op. Att'y Gen. No. 83-057, at 2-232 ("[t]his office is not equipped to serve as a fact-finding body....I shall not attempt to make final determinations where issues of fact are involved").

Question number five addresses whether there is a conflict of interest between the two positions. An individual is prohibited from simultaneously holding two positions if he would be subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public. 1985 Op. Att'y Gen. No. 85-042, at 2-150; Op. No. 79-111, at 2-371. A conflict of interest occurs when an individual's "responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective."

⁵ At the time the Ohio Supreme Court rendered its opinion in *State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917), the provisions of present Ohio Const. art. X, §2 were set forth in Ohio Const. art. X, §1. *See* 1990 Op. Att'y Gen. No. 90-077, at 2-328 n.1.

1980 Op. Att'y Gen. No. 80-035, at 2-149; *see also State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 344 (Ct. App. Butler County 1934) (a conflict of interest results when the duties of one position may be administered or discharged in such a way as to result in favoritism and preference being accorded the other position).

A township solicitor, as indicated above, may represent the township and its officers in their official capacities. R.C. 309.09(A). As a result, a clear conflict of interest exists where the township solicitor is required by the township to represent the township or its officers in a suit or controversy in the county court to which he has been elected judge. The General Assembly, apparently cognizant of this type of conflict of interest, enacted the following language in R.C. 4705.01:

No judge of any court of record in this state shall engage in the practice of law during his term of office, either by appearing in court, by acting as advisory or consulting counsel for attorneys or others, by accepting employment or acting as an attorney, solicitor, collector, or legal advisor for any bank, corporation, or loan or trust company, or by otherwise engaging in the practice of law in this state, in or out of the courts, except as provided in section 1901.11⁶ of the Revised Code. (Footnote added.)

Pursuant to R.C. 1907.01, a county court is a court of record. Hence, the prohibition set forth in R.C. 4705.01 applies to judges of the county court. However, the restriction imposed upon county court judges by R.C. 4705.01 is limited by R.C. 1907.16(B). *See* 1962 Op. Att'y Gen. No. 3291, p. 736 (syllabus, paragraph one) ("[t]he provisions of Section 1907.081, Revised Code [now R.C. 1907.16],⁷ a special statute pertaining to the practice of law by judges of county courts, constitute an exception to the provisions of Section 4705.01, Revised Code, a general statute barring judges of courts of record from practicing law during their terms of office" (footnote added)). R.C. 1907.16(B) provides specifically that "[a] judge of a county court shall be disqualified from the practice of law only as to matters pending or originating in that county court during his term of office." It is, thus, clear that the language of R.C. 1907.16(B) and R.C. 4705.01 prohibits a county court judge from engaging in the practice of law only with respect to matters pending or originating in the county court to which he is elected. *See, e.g.*, 1972 Op. Att'y Gen. No. 72-019 (syllabus) (a judge of a county court "may engage in the defense of individuals accused of a crime so long as the matter is not related to matters pending or originating in the court on which the judge sits during the judge's term of office"); 1967 Op. Att'y Gen. No. 67-119 (a judge of a county court may represent defendants in criminal actions which originated in courts of the county other than the one to which he was elected to serve as judge and in criminal actions in counties other than the one for which he was elected to serve as judge). Furthermore, the fact that a judge of a county court has been assigned, pursuant to R.C. 1907.15, exclusive jurisdiction of an area within a county court district has no effect upon the application of the disqualification provision. A county court judge is disqualified from the practice of law with respect to *all matters* pending or originating in his county court during his term, "regardless of whether or not his 'area of jurisdiction' is separate from that of another county court judge." Op. No. 67-119, at 2-187; *accord* 1958 Op. No. 2143 (syllabus, paragraph one). In light of the foregoing, I find that an individual serving simultaneously as a judge of a county court and township solicitor may not engage, pursuant to R.C. 1907.16(B) and R.C. 4705.01, in the practice of law, as township solicitor, in matters pending or originating in the county court during his term of office as county court judge.

⁶ R.C. 1901.11 provides an exemption from R.C. 4705.01 to part-time judges of municipal courts. Specifically, R.C. 1901.11(A)(2) states "[p]art-time judges shall be disqualified from the practice of law only as to matters pending or originating in the courts in which they serve during their terms of office."

⁷ 1985-1986 Ohio Laws, Part I, 1532 (Am. Sub. H.B. 158, eff. March 1, 1987) amended and renumbered R.C. 1907.081 as R.C. 1907.16.

A second type of conflict of interest exists, however, in that the individual, as judge, may sit in judgment of his own professional work for the township, regardless of the township's participation in the controversy. See 1980 Op. Att'y Gen. No. 80-015; 1966 Op. Att'y Gen. No. 66-138; 1964 Op. Att'y Gen. No. 1023, p. 2-185; see also 1990 Op. Att'y Gen. No. 90-005; 1919 Op. Att'y Gen. No. 222, vol. 1, p. 390. The rationale for this type of conflict of interest was stated in 1964 Op. No. 1023, in which one of my predecessors opined on the compatibility of the positions of part-time village solicitor and part-time judge of a municipal court:

In the case presented by your question, although the village solicitor is prohibited by ordinance from appearing in the court in which he is a judge, still, considering that the village is within the jurisdiction of the court in question, it would appear probable that matters upon which the solicitor has worked or involving policies or positions adopted by the village in reliance on his professional advice as solicitor eventually will come before that court. It has been suggested that, in such cases, the solicitor-judge could disqualify himself; and I have no doubt that the gentleman in question would do so, but that is not the point. In this case *there appears to be a substantial probability of the municipal judge being presented with situations where he could sit in judgment on his own professional work for, and legal advice to, the village which he serves as solicitor.*

I am cognizant of the fact that this sort of problem might arise in the case of any judge who is permitted to carry on a private practice and that, in the case of part-time municipal judge, such private practice is authorized. But, in this case more than mere private practice is involved; another public office is involved, that of solicitor for a village within the territorial jurisdiction of the court. In such a situation there is, in my opinion, a sufficient risk of the duties of one office being so administered and discharged that favoritism and preference could be shown the other that the offices in question must be deemed incompatible and may not, therefore, be held by the same person.

1964 Op. No. 1023, at 2-187 (emphasis added).

With respect to your specific inquiry, you have stated that the individual in question is a township solicitor in an area of jurisdiction not under his control as county court judge. See R.C. 1907.15 (authorizing the assigning of areas of separate jurisdiction to county court judges). Since the township is located in an area of jurisdiction separate and distinct from the area of jurisdiction to which he is assigned as a county court judge, it would seem unusual that the individual in question would be required, as county court judge, to sit in judgment on his own professional work for, and legal advice to, the township which he serves as solicitor. "Where possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated." Op. No. 79-111 (syllabus, paragraph three). It is apparent in the situation you have presented that the possibility of a conflict of interest is remote and speculative, since the individual is not required as county court judge to sit in judgment on his professional work for, and legal advice to, the township which he serves as solicitor.⁸ See generally Op. No. 90-005, at 2-20 (determining that an individual is not prohibited by a conflict of interest from serving simultaneously as a part-time domestic relations referee and an assistant county prosecuting attorney in an adjoining county). I find, accordingly, that an individual who serves simultaneously as a county court judge and township solicitor in an area of jurisdiction not under his control as county court judge, is not subject to an impermissible conflict of interest, provided the individual as county court

⁸ I note that under R.C. 1907.15 a judge of a county court may be transferred from one area of jurisdiction within the county court district to another area of jurisdiction. Since you have not indicated that such a transfer is contemplated for the individual in question, I assume, for purposes of this opinion, that such a transfer is unlikely, and, therefore do not address such a circumstance.

judge does not engage in the practice of law, as township solicitor, in matters pending or originating in that county court during his term of office.

I note that my consideration of the question of conflict of interest does not constitute an opinion on the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42 or the rules and canons governing the professional responsibilities of county court judges. Pursuant to R.C. 102.08, the Ohio Ethics Commission is delegated the authority to render advisory opinions interpreting the provisions set forth in R.C. Chapter 102 and R.C. 2921.42. The Board of Commissioners on Grievances and Discipline of the Supreme Court is empowered to "issue informal, nonbinding advisory opinion letters in response to prospective or hypothetical questions regarding the application of [the Supreme Court Rules for the Government of the Bar of Ohio], the Rules of the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office...." Ohio Gov. Bar R. V(2)(b).

Where another governmental entity has been granted the authority to render advisory opinions concerning particular subject matters, the Attorney General will abstain from rendering an opinion regarding these matters. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three); *see, e.g.*, 1990 Op. Att'y Gen. No. 90-040, at 2-162; Op. No. 90-005, at 2-21; Op. No. 89-022, at 2-101 n.2. Since the Board of Commissioners on Grievances and Discipline of the Supreme Court is empowered to render opinions concerning the professional responsibilities of county court judges and the Ohio Ethics Commission is authorized to render advisory opinions concerning R.C. Chapter 102 and R.C. 2921.42, it would be improper for the Attorney General to render an opinion concerning matters in the province of these governmental entities.

Questions number six and seven concern the applicability of state and federal departmental regulations, and local departmental regulations, charter provisions, and ordinances. I am unaware of any state or federal regulation which prohibits an individual from serving simultaneously in the positions of county court judge and township solicitor. Further, whether there is an applicable local departmental regulation, charter provision, or ordinance is a matter of local concern and must be determined at the local level. *See* Op. No. 89-052, at 2-220; Op. No. 79-111, at 2-368. Thus, I assume, for purposes of this opinion, that there are no local departmental regulations, charter provisions, or ordinances which would prohibit the simultaneous holding of the positions in question.

Based upon the foregoing, it is my opinion and you are hereby advised that an individual elected under R.C. 1907.13 as a judge of a county court may be employed, pursuant to R.C. 309.09(A), as a township solicitor in an area of jurisdiction not under his control as county court judge, provided the individual, as township solicitor, does not engage in the practice of law in matters pending or originating in that county court during his term of office, and further provided that he is not in violation of any local departmental regulations, charter provisions or ordinances, or statutory provisions, rules, or canons subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08 or the Board of Commissioners on Grievances and Discipline of the Supreme Court pursuant to Ohio Gov. Bar R. V(2)(b).