

you have made for the cancellation of these leases. I am accordingly approving your proceedings in this matter as is evidenced by my approval endorsed upon the transcripts of your proceedings relating to these cancellations and upon the copies thereof, all of which are herewith returned.

Respectfully,  
 JOHN W. BRICKER,  
*Attorney General.*

3823.

OFFICES COMPATIBLE—OFFICIAL SHORTHAND REPORTER OF COMMON PLEAS COURT IN PROSECUTING ATTORNEY'S OFFICE—OFFICES INCOMPATIBLE—SAID SHORTHAND REPORTER AS DEPUTY CLERK OF COURT.

*SYLLABUS:*

1. *The official shorthand reporter of the common pleas court of a county may not legally be employed by the clerk of the common pleas court of such county as deputy during such time as the said shorthand reporter is not engaged in performing the duties of shorthand reporter and receive pay therefor from the county.*

2. *The prosecuting attorney of a county may legally employ the official shorthand reporter of the common pleas court in his office providing that it is physically possible for the shorthand reporter to properly perform the duties of both positions.*

COLUMBUS, OHIO, January 16, 1935.

HON. R. E. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter, requesting my opinion, reading as follows:

"I am asked to advise whether or not the official court stenographer, or court reporter, can be employed by a county officer as deputy during such time as the official duties as official stenographer are not needed in that position, and receive pay therefor from the county.

In the matter now being considered the Clerk of our Common Pleas Court was without a deputy and employed the Court Stenographer to perform the duties of deputy at such times as the court stenographer was not employed in court work, or duties incident to her official position as court stenographer.

I find nothing to preclude the official stenographer from accepting employment, even by other county officials, or anything to prevent her from collecting from the county pay for services actually rendered to the county official for the time she served such county official, said employment being outside the time required in her official capacity as court stenographer, but am asking you for your opinion as to the legality of paying her for such services in addition to her regular salary as court stenographer.

I am further asking you whether or not the prosecuting attorney may legally employ the official court stenographer in his office, such employment to be paid for by the county, and being under his regular allowance for help in his office and which will not interfere in any way with the duties of court stenographer?"

With respect to your two questions, I may say at the outset that I presume when you speak of the official court stenographer or court reporter you have reference to the official shorthand reporter of the court of common pleas, appointed by the said court under authority of section 1546 of the General Code.

It is well recognized by the courts of Ohio and opinions of former attorneys general, as well as of myself, that public offices and positions are incompatible when made so expressly by provision of constitution or statute, or when rendered so by reason of the common law test of incompatibility. The common law test of incompatibility is set forth in the case of *State ex rel. vs. Gebert*, 12 C. C. (N. S.) 274, as follows:

“Offices are considered incompatible when one is subordinate to or in any way a check upon the other, or when it is physically impossible for one person to discharge the duties of both.”

After pointing out this common law test of incompatibility, in Opinions of the Attorney General for 1921, Vol. I, page 440, the then Attorney General proceeded to discuss certain provisions of the statutes then in force which clearly made the position of court stenographer and office of clerk of courts incompatible under such test. The syllabus of such opinion reads:

“The office of clerk of courts and the position of court stenographer are incompatible.”

In the opinion it is stated at pages 440 and 441:

“Without a general discussion of the various duties required of the clerk of courts, your attention is invited to section 1552 G. C. which requires said clerk to certify as to the correctness of the amount of compensation due the court stenographer for making transcripts of testimony when paid from the county fund. It will be observed that in the event the clerk of courts held both positions, he would be certifying to the correctness of his own bill. Clearly, under such circumstances, the performance of this duty would be inconsistent with the rule announced. It will be further observed that while the court stenographer is engaged in taking testimony in the trial of a case, there are duties to be performed by the clerk, such as swearing of witnesses, etc., which he could not well perform if he held both positions. Too, while engaged in taking testimony the clerk would not be at liberty to attend to numerous duties which those having business with his office have the right to expect him to perform without inconvenience to the public or to the court.

Section 1554 G. C. provides that the county commissioners shall provide a suitable room in the court house for the official stenographer. It would seem that the law contemplates an office for the clerk and also an office for the court stenographer, and in view of this situation it will be seen that it would be difficult for the clerk of courts to properly fill both positions.

In a former opinion of this department found in Vol. 1, 1911-12 Reports, page 128, it was said:

‘The presumption of law is that one elected to an office, such as clerk of court, may ordinarily be found at the office.’

While it perhaps cannot be said to be wholly physically impossible for the clerk to perform the duties of both positions, it must be said that it does appear to be inconsistent with the proper efficiency required where one person attempts to fill both positions. In other words, it does appear that one person cannot at

all times perform the duties of one position without in some degree neglecting the duties of the other.

Therefore, without further consideration, it is the opinion of this department, for the reasons above pointed out, that the office of clerk of courts and the position of official court stenographer are incompatible under the law."

While sections 1552 and 1554, General Code, mentioned in the foregoing opinion, have been amended since the rendition of such opinion, yet the amendments in no way affect the reasoning of the said opinion and it is still sound law in my view of the matter. The amendments of sections 1552 and 1554, General Code, merely changed the designation of "stenographers" to "shorthand reporters," increased the fee to be received for making transcripts and added a fee for making copies of decisions in pending cases. See sections 1552 and 1554, General Code, as amended in 1925 (111 Ohio Laws, 110-113).

Section 9, General Code, reads in part:

"A deputy, when duly qualified, may perform all and singular the duties of his principal. A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. \* \* \*

In the recent case of *State ex rel. Baden vs. Gibbons*, 17 Ohio Law Abstract, 341, 40 Ohio Law Reporter, 285, decided by the Court of Appeals of Butler County under date of May, 1934, it was held that the position of deputy county auditor and office of city commissioner were incompatible. In the eighth paragraph of the syllabus it was stated:

"Under section 9, General Code, a deputy county auditor, as distinguished from a mere clerical employee, may, in the absence of his principal, perform the duties of the county auditor."

At page 344 of 17 Ohio Law Abstract, the court said:

"Although defendants counsel expends much energy upon the theory that the offices or employments are not incompatible the court unanimously disagrees therewith. The case of *Hulle (Hulse) vs. State*, 35 Ohio St. 421, is urged as authority for this view. An examination of this case discloses that, as a matter of statutory construction, a deputy county auditor could not act for the county auditor in a particular instance, that is in the selection of jurors, because of a special statute providing that in the absence of the county auditor the court should appoint some one to perform this duty in his stead. The statute upon which this case turned was a subsequent general act which placed a special exception limitation upon the general authority conferred upon deputy auditors by section 9, G. C. The case is therefore not authority for the theory advanced. \* \* \* To our notion that portion of section 9, G. C. above quoted is so plain and clear that it is not in need of court construction. It means exactly what it says, in that 'a deputy, when duly qualified, may perform all and singular the duties of his principal', unless that power has been subsequently limited by some special act thereafter passed. We therefore take the view that a deputy county auditor, as distinguished from a mere clerical employe, may in the absence of his principal perform the duties of the county auditor."

Section 2871, General Code, provides:

"The clerk (of the court of common pleas) may appoint one or more deputies to be approved by the court of common pleas if in session, or by one

of the judges thereof, if not in session. Such appointment shall be by certificate, signed by the clerk, which, with the approval of the court or judge, shall be entered on the journal."

I presume that the clerk of the court of common pleas of your county duly appointed the official shorthand reporter of the common pleas court, as a deputy, under authority of this section.

Section 2563, General Code, relative to a county auditor's deputies, reads in part:

"The county auditor may appoint one or more deputies to aid him in the performance of his duties. \* \* \* When a county auditor appoints a deputy, he shall make a record thereof in his office and file a certificate thereof with the county treasurer who shall record and preserve it \* \* \*."

If, as the court held in the Baden case, *supra*, a deputy county auditor may legally perform all the duties of his principal, in his absence, it appears to me that it is equally true that a deputy of the clerk of common pleas court appointed under section 2871, General Code, may legally perform all the duties of his principal, the clerk of the court of common pleas, in his absence.

Hence, it is my view that if the position of official shorthand reporter of the common pleas court and the office of clerk of the court of common pleas are incompatible, the same is equally true of the position of official shorthand reporter and the position of deputy clerk of the court of common pleas.

While you do not specifically so ask, it may be pointed out in passing that under the reasoning of the Baden case there would be nothing to prevent the clerk of the common pleas court from hiring the official shorthand reporter of the common pleas court in the capacity of a clerk, bookkeeper, assistant, or other employe, in his office. Section 2981, General Code, provides in part that "such officers (including the clerk of courts) may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation, and discharge them, and shall file with the county auditor certificates of such action."

Of course, the hiring of such a clerk, etc., would be subject to the qualification that it would be physically possible for the shorthand reporter to perform the duties of both positions.

I am therefore of the opinion, in specific answer to your first question, that the official shorthand reporter of the common pleas court of a county may not be employed by the clerk of the common pleas court of such county as deputy during such time as the said shorthand reporter is not engaged in performing the duties of shorthand reporter and receive pay therefor from the county.

Coming now to your second question, I may call your attention to an opinion of this office appearing in *Opinions of the Attorney General for 1920, Vol. I, page 205*. The syllabus of such opinion reads:

"A court stenographer may legally serve as a prosecuting attorney's stenographer, providing that it is physically possible to properly perform the duties of both positions, and such stenographer under such circumstances is entitled to receive additional compensation from funds allowed to the prosecuting attorney for the payment of a stenographer."

While sections 1546, 1547 and 1550, General Code, mentioned in such opinion have

been amended since the rendition of the opinion, such amendments made in 1925 (111 Ohio Laws, 110-113) to sections 1546, 1547 and 1550, General Code, do not affect the reasoning of the opinion for the purposes of such question answered therein.

I am therefore of the opinion, in specific answer to your second question, that the prosecuting attorney may legally employ the official shorthand reporter of the common pleas court in his office, providing it is physically possible for the shorthand reporter to properly perform the duties of both positions.

Respectfully,  
 JOHN W. BRICKER,  
*Attorney General.*

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3824.

SOLICITOR—ORDINANCE OF CITY PERMITTING SOLICITOR TO DETERMINE EXTRA COMPENSATION FOR HIMSELF FOR DEFENDING AND PROSECUTING CASES IN COURTS ILLEGAL.

**SYLLABUS:**

1. *An ordinance of a city which, after providing that a city solicitor shall receive as compensation for his services a definite sum per annum, payable semi-monthly, stipulates expressly that such salary does not cover his services in cases filed for or against the said city in the common pleas and higher courts and that he shall be paid extra for such services, but which does not definitely fix the amount to be paid for such services in the handling of cases in court or fix a rule by which the amount may be definitely determined, is not legally drawn.*

2. *Under such an ordinance as described in syllabus 1, the city solicitor cannot legally receive extra amounts which he determines for himself for prosecuting and defending cases in the common pleas and higher courts.*

COLUMBUS, OHIO, January 16, 1935.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads:

“A city in Ohio has an ordinance fixing the compensation of its city solicitor, which reads as follows:

‘The solicitor of the city of.....shall receive as compensation for his services the sum of Nine Hundred (\$900) Dollars per annum payable semi-monthly. The above salary does not cover cases filed for or against the city of.....in the court of Common Pleas of.....county, Ohio, or higher courts, and he shall be paid extra for all suits and actions at law for and on behalf of said city in said courts.’

While we do not seem to have any Attorney Generals’ opinions relating thereto, our correspondence shows that this Department has always held that the salary ordinance for a city solicitor could include a definite extra amount for representing the city in court, but you will note that in the above ordinance no definite amount is fixed for such extra services.

Will you kindly advise this Department whether this ordinance is legally drawn and whether, under same, the city solicitor can receive extra amounts,