

OPINION NO. 1023

Syllabus:

The offices of "part time" municipal court judge and "part time" village solicitor are incompatible where the jurisdiction of the municipal court includes the village which the solicitor serves (Opinion No. 781, Opinions of the Attorney General for 1964, approved and followed).

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To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William B. Saxbe, Attorney General, May 4, 1964

You have requested my opinion in answer to the following question:

"May one legally hold both the positions of part-time solicitor for the Village of North Randall and part-time Judge of the Bedford Municipal Court, which includes the Village of North Randall within its jurisdiction, where said individual is not the Village's Prosecutor and where he is expressly prohibited by ordinance from representing the Village in any matters before the Bedford Municipal Court, and where, if any matter upon which he has advised the Council, boards or officials of said Village, were to find its way into his Court, he would disqualify himself from hearing the same."

I have recently had occasion to answer essentially this same question in Opinion No. 781, Opinions of the Attorney General for 1964, the syllabus of which is as follows:

"The offices of 'part-time' municipal court judge and 'part-time' village solicitor are incompatible

where the jurisdiction of the municipal court includes the village which the village solicitor serves."

Because there is an additional fact in your request which raises certain questions not there treated, however, I shall take this opportunity to restate and elaborate the reasons for the conclusion I reached in that opinion.

As to part-time judges of municipal courts, the only statutory prohibition on other duties which they may undertake is contained in Section 1901.11, Revised Code, which reads as follows:

"* * * (S)uch 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. * * *"

Since I have found no specific statutory prohibition applicable to village solicitors, and your question involves a village solicitor who is expressly prohibited from practicing, as such, in the court in which he is a judge, no incompatibility is established by statute in this case.

If there is incompatibility in the two offices under the circumstances you describe, then, it exists by virtue of the common law rule on that subject. The most often quoted formulation of the common law rule appears in State ex rel. Attorney General v. Gebert, 12 C.C. (N.S.) 274 (1909):

"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 to discharge the duties of both."

Another statement of the rule, and in this case, perhaps, a more helpful one, appears in State ex rel. Baden v. Gibbons, 17 Ohio Law Abs. 341 (1934) at 344:

"It has long been the rule in this state that one may not hold two positions of public employment when the duties of one may be so administered and discharged that favoritism and preference may be accorded the other, and result in the accomplishment of the purposes and duties of the second position which otherwise could not be effected.
* * *"
(Emphasis added)

However stated, I conceive this rule to be grounded in the principle that the public shall be protected from the possible misuse of any public office as the result of more than one such office being held by a single person. It is not that an honest and scrupulously careful person might not faithfully discharge the duties of both, but that the dual position raises the possibility of favoritism and preference between them which could defeat the system of checks and balances built into our system of government.

Also, because of the particular offices involved in your question, there is an additional, if collateral, problem presented by the special ethical standards of the legal profession. Canon 24 of the American Bar Association Canons of Judicial Ethics provides

as follows:

"A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions."

This and the other Canons of Judicial Ethics were adopted by the Ohio Supreme Court on January 27, 1954 and, therefore, constitute the standards of conduct for judges in this state.

I do not wish to be understood as indicating that the conduct described in your question necessarily violates Canon 24, supra. Any such determination could properly be made only by the Ohio Supreme Court. I would point out, however, that it would be rather anomalous for the Attorney General to hold two public offices compatible where an attorney acting in both capacities would run even a risk of violating professional ethics.

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.

In conclusion it is my opinion and you are advised that the offices of "part time" municipal court judge and "part time" village solicitor are incompatible where the jurisdiction of the municipal court includes the village which the solicitor serves (Opinion No. 781, Opinions of the Attorney General for 1964, approved and followed).