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A PERSON WHO IS SERVING AS SHERIFF OR DEPUTY SHERIFF OF A COUNTY MAY NOT SERVE AT THE SAME TIME AS CLERK OR DEPUTY CLERK OF A COUNTY COURT—§1907.101, R.C.

SYLLABUS:

1. A person who is serving as sheriff or deputy sheriff of a county may not serve at the same time as clerk or deputy clerk of a county court.

2. The clerk of a county court, whether he is the clerk of courts acting as clerk of the county court under authority of Section 1907.101, Revised Code, or whether he has been appointed clerk under that section, may not appoint the sheriff, or persons who are serving as deputy sheriffs, to serve as deputy clerks for the purpose of accepting bail and appearance bonds.

Columbus, Ohio, March 18, 1961

Hon. Bernard W. Freeman, Prosecuting Attorney
Huron County, Norwalk, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

“I should like your informal opinion on the following matter.

“In 1960 Attorney General’s Opinion No. 1641, you ruled that the County Sheriff cannot accept appearance bonds in misdemeanor cases coming within the jurisdiction of the County. You further stated in the opinion that Section 1907.101, R.C., empowers the Clerk of the County Court to collect bail. However,

in our County, the County Clerk leaves at 4:00 P.M. I am wondering if the Clerk of Courts could appoint deputy sheriffs as deputy clerks for the purpose of accepting bail and appearance bonds. I also should like to know if the Sheriff might be appointed deputy clerk of the court for that purpose also.' ”

In Opinion No. 1641, Opinions of the Attorney General for 1960, referred to in your request, I ruled that a county sheriff could not accept bail in his capacity as ministerial officer of the county court under Section 1907.511, Revised Code. That opinion was predicated upon the proposition that Sections 2937.22 and 2935.12, Revised Code, specifically set forth what officers may accept such bail, and the county sheriff was not included as such. The conclusion of that opinion is further strengthened by the fact that the legislature repealed former Section 2937.35, Revised Code, (128 Ohio Laws, 97), effective January 1, 1960, which section had given the sheriff authority to take recognizances in certain cases. That section before its repeal, read :

“A sheriff, deputy sheriff, marshal, deputy marshal, watchman, or police officer charged with the execution of a warrant on an indictment or information for a misdemeanor, during the vacation of the court, and also in term time of such court when it is not in actual session, may take the recognizance of the person so charged, together with sufficient sureties, in a sum not less than fifty nor more than five hundred dollars for the appearance of such person, if in vacation, on the first day of the next term of such court, or if in term time of such court, on the first day thereof when such court shall be in actual session. For the purposes of such recognizance, such officer may administer oaths to the proposed sureties, or accept personal property in lieu of real property bonds, and such officer shall make a return on such warrants, and file such recognizance without delay with the clerk of the court of common pleas.”

I further note that the legislature in enacting Section 2937.46, Revised Code, (128 Ohio Laws, 97, 1959), has empowered the Supreme Court of Ohio to adopt rules and regulations for the establishment of uniform rules of practice and procedure in courts inferior to common pleas courts, in traffic cases, including the power to designate special referees for the purpose of receiving bail.

Thus it becomes obvious that sheriffs have been denied the power to accept bail short of possible action by the Supreme Court of Ohio.

The question then arises as to whether the positions of sheriff or deputy sheriff and the clerk or deputy clerk of a county court are compatible.

The general rule or test of compatibility is stated in *State ex rel. Attorney General v. Gebert*, 12 C.C. (N.S.) 274, as follows:

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“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.

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The sheriff and his deputies are the chief law enforcement officers of the county (Section 311.07, Revised Code; 36 Ohio Jurisprudence, 628, Sheriffs and Constables, Section 4). The sheriff is responsible not only for law enforcement but also for the service of process, maintenance of certain records, control of the county court house, levies, execution and other ministerial duties. As to the clerk of a county court, Section 1907.101, Revised Code, provides:

“(A) The clerk of courts shall be the clerk of the county court except that the board of county commissioners, with the concurrence of the county court judge or judges, may appoint a clerk for each county court judge. Such appointed clerk shall serve at the pleasure of the board and shall receive compensation as set by the board, payable in semimonthly installments from the treasury of the county.

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A clerk of a county court is specifically charged with the responsibility of receiving costs, fines, penalties, bail and other funds. He has the power to administer oaths, take affidavits, issue executions, writs, processes, subpoenas and other papers issuing from the court. He is responsible for the dockets and all of the papers of the court. A consideration of the duties and responsibilities of the clerk of court make it evident that a sheriff in so far as service of process, execution of affidavits and other miscellaneous matters, is subordinate to and dependent upon the clerk of the county court. It is further apparent that since the sheriff is the chief law enforcement agent of the county he would necessarily be called upon to investigate any irregularities arising in the handling of funds collected by the clerk and in the general operation of the office. The legislature has recognized this conflict in the enactment of Section 3.11, Revised Code, which, as amended by House Bill No. 1 of the 104th General Assembly effective January 10, 1961, reads as follows:

“No person shall hold at the same time by appointment or election more than one of the following offices: *sheriff*, county

auditor, county treasurer, *clerk of the court of common pleas*, county recorder, prosecuting attorney, and probate judge." (Emphasis added)

Section 3.11, *supra*, specifically prohibits a person from holding the office of sheriff and the office of clerk of courts at the same time. The statute does not mention deputies but since a deputy may perform the duties of his principle (Section 3.06, Revised Code), I believe that the situation should be considered to cover deputies of the sheriff and of the clerk. It follows, therefore, that when the clerk of courts acts as clerk of the county court under Section 1907.101, Revised Code, neither the clerk or his deputies may serve in the capacity of sheriff or deputy sheriff.

The question remains, however, as to whether when the board of county commissioners elects to appoint a clerk for each county court judge under Section 1901.101, *supra*, such a clerk or his deputy clerk may also serve as sheriff or deputy sheriff. As to this question, I believe that the same reasons which have been advanced for my conclusion that there is a conflict between the office of the clerk of court and the sheriff are equally applicable to the position of appointed clerk of the county court and sheriff, or their deputies.

I have been unable to find any cases or opinions which deal directly with the question presented by your request. I am, however, not unmindful of several opinions which have dealt with the problem of compatibility as it relates to the office of deputy sheriff and to the office of clerk of courts. In Opinion No. 328, Opinions of the Attorney General for 1911, page 322, one of my predecessors held that the offices of deputy clerk of courts and court constable were compatible. Opinion No. 6127, Opinions of the Attorney General for 1956, page 8, held that the position of mayor of a city and a deputy clerk of courts are not incompatible. Opinion No. 689, Opinions of the Attorney General for 1927, page 1175, held that the position of court bailiff and deputy sheriff or county probation officer were compatible. I believe, however, that the reasoning of the above opinions does not apply to the instant situation. It is readily apparent that the position of clerk of court is not subordinate to the position of court constable. It is likewise apparent that the mayor of a city is not to any degree subordinate to the clerk of courts, nor is a sheriff subordinate to a county probation officer. The same test, however, when applied to the position of sheriff or deputy sheriff and the clerk or deputy clerk of the county court does not reveal this lack of conflict between the two positions.

The county sheriff must act upon the demand of the clerk. The county clerk of courts must collect and account for funds collected as a result of the actions of the sheriff. These positions are clearly designed to separate the function of law enforcement from the ministerial duties of accounting not only for documents served by the sheriff but bail posted to secure appearance and fines levied by the court. The separation of such duties are well founded and thus the two cannot be joined for the sake of expediency.

Accordingly, it is my opinion and you are advised :

1. A person who is serving as sheriff or deputy sheriff of a county may not serve at the same time as clerk or deputy clerk of a county court.
2. The clerk of a county court, whether he is the clerk of courts acting as clerk of the county court under authority of Section 1907.101, Revised Code, or whether he has been appointed clerk under that section, may not appoint the sheriff or persons who are serving as deputy sheriffs, to serve as deputy clerks for the purpose of accepting bail and appearance bonds.

Respectfully,
MARK MCELROY
Attorney General