

OPINION NO. 92-067**Syllabus:**

An individual serving as a county court judge may be employed pursuant to a municipal ordinance as a solicitor of a charter city which is located in an area of jurisdiction not under his control as county court judge, provided, that the individual, as solicitor, does not engage in the practice of law in matters pending or originating in that county court during his term as judge, and that no local departmental regulation, charter provision, ordinance, or provision of the contract employing him as solicitor prohibits the individual from simultaneously holding both positions.

To: Timothy A. Oliver, Warren County Prosecuting Attorney, Lebanon, Ohio

By: Lee Fisher, Attorney General, December 29, 1992

You have requested an opinion regarding the compatibility of the positions of county court judge and solicitor for a city within the jurisdiction of the county court.

I. The Position of County Court Judge

County court judges are elected by the electors of a county court district. *See* R.C. 1907.13. The powers of a county court judge 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. R.C. 1907.18.

II. The Position of City Solicitor

The position of city solicitor about which you ask is not expressly provided for in the Revised Code. *But see generally* R.C. 733.49-.62 (creating the position of, and setting forth the powers and duties of a city director of law). Rather the position of "solicitor" is created pursuant to Springboro Municipal Code ("S.M.C.") 232.01. The responsibilities of the solicitor include (1) acting as attorney and counsel for the municipal corporation and the officers thereof in their official capacities, (2) prosecuting and defending all actions by or against the municipal corporation or any department or officer thereof, (3) rendering legal opinions to the

city council and to departments or officers of the municipal corporation, and (4) providing advisory information to all departments upon request. S.M.C. 232.03-.04.

III. Compatibility Analysis

1979 Op. Att'y Gen. No. 79-111 set forth seven questions for determining whether an individual may simultaneously hold two public positions. The seven questions are as follows:

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 2-368.¹

A. R.C. 124.57

Question one asks 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. 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. Pursuant to Art. X, §10.01(b) of the Springboro Charter, the unclassified service of Springboro includes, *inter alia*, "[a]ny office or position requiring exceptional or professional qualifications." Because the position of city solicitor for Springboro requires professional qualifications, *see* S.M.C. 232.03 ("[t]he Solicitor shall be an attorney at law"), the express provision of Springboro Charter Art. X, §10.01(b) provides that the position of solicitor in Springboro is in the unclassified service. Insofar as neither of the positions which with you are concerned is a classified employment, the prohibition of R.C. 124.57 does not apply.

B. Outside Employment

Question two asks whether the empowering statutes of either position limit outside employment. S.M.C. Chapter 232 sets forth no provision limiting the outside employment possible of the solicitor. Moreover, you have not indicated whether a provision within the contract employing the individual as solicitor limits such

¹ The sixth and seventh questions concern the applicability of state and federal departmental regulations and local departmental regulations, charter provisions, and ordinances. There are no applicable state or federal departmental regulations. Further, whether there is an applicable local

individual's ability to hold other positions. It is therefore assumed, for purposes of this opinion, that no such contractual provision exists.

A county court judge is prohibited from holding "any other office of profit or trust, under the authority of this state, or of the United States." Ohio Const. art. IV, §6(B); accord R.C. 1907.16(B); see also 1991 Op. Att'y Gen. No. 91-010 at 2-51 and 2-52. The Ohio Supreme Court has set forth the following criteria for determining whether a public position constitutes a "public office" for purposes of the prohibition set out in Ohio Const. art. IV, §6(B):

" [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.)

State ex rel. Bricker v. Gessner, 129 Ohio St. 290, 293-94, 195 N.E. 63, 65 (1935);² cf., e.g., *State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950).

In light of the aforementioned criteria and the information provided in your letter of request, it appears that the city solicitor position in question is not an office of trust or profit. An individual is neither appointed nor elected in a manner prescribed by law to the position of solicitor. Rather, the city council employs the solicitor for a term that must not exceed two years and pays his compensation pursuant to a contract approved by a majority of council. S.M.C. 232.01-.02. The language of S.M.C. 232.01-.02, thus, indicates that city council intended that the solicitor be an employee of the municipal corporation. See generally Op. No. 91-010 at 2-52 (township solicitor is not an office of profit or trust). Further, as noted above, the solicitor is employed to represent and advise the municipal corporation and the officers thereof. S.M.C. 232.03-.04. The solicitor's duties also do not include the prosecution of criminal or traffic cases in the courts of this state. See S.M.C. 232.05(a) ("[t]he Prosecutor shall act as attorney and counsel for the Mayors Court and the officers of the City in their official capacity and, as such attorney, shall prosecute all criminal, traffic cases in the Mayors Court or other courts where criminal and traffic actions are filed or appealed"). Thus, the solicitor has no duties which involve the exercise of sovereign power or independent governmental functions. See Op. No. 91-010 at 2-51 and 2-52. 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

departmental regulation, charter provision, or ordinance is a matter of local concern; thus, it is assumed, for purposes of this opinion, that there are no local departmental regulations, charter provisions or ordinances that prohibit the simultaneous holding of the two positions in question.

² 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).

certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the 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"). Accordingly, the position of city solicitor is not an office of trust or profit, and a county court judge is not prohibited by Ohio Const. art. IV, §6(B) or R.C. 1907.16(B) from serving as solicitor.

C. Subordination or Control

Question three asks whether one position is subordinate to, or 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. The solicitor is employed by the city council, *see* S.M.C. 232.01, and thus is responsible to the council. The positions therefore operate independently of each other and neither is subordinate to or in any way a check upon the other.³ *See generally Esler v. Summit County*, 39 Ohio Misc. 2d 8, 10, 530 N.E.2d 973, 975 (C.P. Summit County 1985) ("[n]either the chief county building inspector nor the township trustees have any direct responsibilities to or powers over the other. Under this fact situation, the possibility of responsibilities and duties overlapping is remote; therefore, the occasion for one position to have a check on the other would be rare").

D. Physical Constraints

Question four asks whether it is physically possible for one person to discharge the duties of both positions. An individual may not simultaneously serve in two public positions if he is physically unable to adequately discharge the duties of both positions. *See* Op. No. 79-111 at 2-373; *see also* S.M.C. 244.07 ("[f]ull-time employees [of Springboro] may not carry on, concurrently with their Municipal Employment, any private business or undertaking the attention to which affects their working hours or the quality of their Municipal work"). Whether an individual is physically able to adequately discharge the duties of both positions is a question of fact which is best answered by the parties concerned. Op. No. 91-010 at 2-53. It seems possible, however, that the two positions can be filled competently by the same individual.

E. Conflict of Interest

The final question asks whether there is a conflict of interest between the two positions.⁴ An individual is prohibited from simultaneously holding two public 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.

³ An individual, as a county court judge, may be required to hear a case in which the city, which employs him as solicitor, is involved or to sit in judgment of his professional work for the city, regardless of the city's participation in the case. Although such situations represent an occasion for the position of county court judge to have a check upon the position of city solicitor, such situations are traditionally dealt with as potential conflicts of interest. *See, e.g.*, 1991 Op. Att'y Gen. No. 91-010; 1990 Op. Att'y Gen. No. 90-005. Accordingly, a discussion of these potential conflicts of interest is set forth in the section of this opinion concerning conflicts of interest.

⁴ This opinion does not address potential conflicts of interest that may arise under the ethics provisions of R.C. Chapter 102 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 ethical provisions of R.C. Chapter

The solicitor, as stated above, is required to represent the municipal corporation and the officers thereof. S.M.C. 232.03. Since the solicitor may be required to represent the municipal corporation or the officers thereof in a suit or controversy in the county court on which he serves as judge, an individual who simultaneously holds these two positions within the same county is subject to a conflict of interest. The General Assembly, recognizing the potential for this type of conflict of interest, enacted R.C. 4705.01, which provides, in part:

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 1901.11 of the Revised Code.

A county court is a court of record, R.C. 1907.01, thus, the prohibition of R.C. 4705.01 applies to county court judges. However, R.C. 1907.16(B) provides 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." Reading R.C. 1907.16(B) and R.C. 4705.01 together reveals that a county court judge is prohibited from engaging in the practice of law only with respect to matters pending or originating in the county court to which he is elected. Op. No. 91-010 at 2-54; *see, e.g.*, 1972 Op. Att'y Gen. No. 72-019; 1967 Op. Att'y Gen. No. 67-119. Therefore, an individual serving simultaneously as a county court judge and a city solicitor employed by a charter city pursuant to an employment contract may not engage in the practice of law, as solicitor, in matters pending or originating in the county court during his term of office as county court judge.⁵

102. Similarly, Ohio Gov. Bar R. V §2(C) empowers the Board of Commissioners on Grievances and Discipline of the Supreme Court to

issue informal, nonbinding advisory opinion letters in response to prospective or hypothetical questions directed to the Board regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary of Ohio, the Code of Professional Responsibility, the Code of Judicial Conduct, or the Attorney's Oath of Office.

Because the Board of Commissioners on Grievances and Discipline of the Supreme Court is empowered to render opinions regarding the professional responsibilities of county court judges and the Ohio Ethics Commission is authorized to render advisory opinions relating to the ethical considerations of R.C. Chapter 102, it is improper for the Attorney General to render an opinion concerning matters in the province of these governmental entities. *See generally* 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three) ("[t]he Attorney General will abstain from rendering an opinion where another governmental entity has been granted the authority to render advisory opinions concerning the relevant subject matter").

⁵ 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 of R.C. 4705.01. Op. No. 91-010 at 2-54. "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

A second type of potential conflict of interest exists in that the individual, as a county court judge, may sit in judgment of his own professional work for the city, regardless of the city's participation in the controversy. *See, e.g.*, Op. No. 91-010 at 2-55; 1966 Op. Att'y Gen. No. 66-138 at 2-279; 1964 Op. Att'y Gen. No. 1023, p. 2-185 at 2-187. With regard to your specific inquiry, you have stated that the individual in question is solicitor for a city that is not located in the area of jurisdiction under his control as a county court judge. *See generally* R.C. 1907.15 (authorizing the assigning of areas of separate jurisdiction to county court judges). Because the city 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 appears unlikely that the individual in question would be required, as a county court judge, to sit in judgment on his own professional work for, and legal advice to, the city as solicitor. *See* Op. No. 91-010 at 2-55; 1990 Op. Att'y Gen. No. 90-005 at 2-20. "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). Insofar as the individual is not required as a county court judge to sit in judgment on his professional work for, and legal advice to, the city which he serves as solicitor,⁶ the possibility of a conflict of interest is remote and speculative. *See* Op. No. 91-010 at 2-55; Op. No. 90-005 at 2-20.

IV. Conclusion

It is therefore my opinion, and you are hereby advised, that an individual serving as a county court judge may be employed pursuant to a municipal ordinance as a solicitor of a charter city which is located in an area of jurisdiction not under his control as county court judge, provided, that the individual, as solicitor, does not engage in the practice of law in matters pending or originating in that county court during his term as judge, and that no local departmental regulation, charter provision, ordinance, or provision of the contract employing him as solicitor prohibits the individual from simultaneously holding both positions.

jurisdiction' is separate from that of another county court judge." *Id.* (quoting 1967 Op. Att'y Gen. No. 67-119 at 2-187); *accord* 1958 Op. Att'y Gen. No. 2143, p. 317.

⁶ 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. Because you have not indicated that such a transfer is contemplated, it is assumed, for purposes of this opinion, that no such transfer will occur. Therefore, this opinion does not address such a circumstance.