

OPINION NO. 72-073

Syllabus:

Under Section 1925.01, Revised Code, a private attorney who practices before a municipal court may be appointed by that court to serve as small claims referee.

To: Neil M. Laughlin, Pros. Atty., Licking County, Newark, Ohio
By: William J. Brown, Attorney General, August 23, 1972

I have your request for my opinion, which may be stated as follows:

May an attorney, practicing before a municipal court in both civil and criminal matters, serve as a small claims referee?

Section 1925.01, Revised Code, reads as follows:

"(A) Each municipal and county court shall establish a small claims division.

"(B) Proceedings in the small claims division of a municipal court may be conducted by a referee appointed by the court, who shall be a person admitted to the practice of law in this state, and who shall receive such annual compensation as the court prescribes from the same sources and in the same manner as provided in section 1901.11 of the Revised Code. A part-time solicitor or part-time assistant solicitor of any municipal corporation may be appointed as a referee, serve in any case in which the municipal corporation is not an interested party, and receive the prescribed compensation.

"(C) The court may appoint an administrative assistant who shall perform such duties as are assigned by the court.

"(D) The appearance of an attorney at law on behalf of any party is permitted but not required. Notice to the attorney of record for a party is equivalent to notice to such party,"
(Emphasis added.)

Section 1925.02, Revised Code, delineates the jurisdiction of the small claims court and reads in part as follows:

"A small claims division established under section 1925.01 of the Revised Code has jurisdiction in civil actions for the recovery of money only, other than libel, slander, alienation of affections, malicious prosecution

and abuse of process actions, for amounts not exceeding one hundred fifty dollars, exclusive of interests and costs. * * *

Section 1925.16, Revised Code, governs the procedural aspects of the small claims division and reads in part as follows:

"Except as inconsistent procedures are provided in Chapter 1925. of the Revised Code or in rules of court adopted in furtherance of the purposes of such chapter, all proceedings in the small claims division of a municipal court are subject to Chapter 1901. * * *

These statutes show a legislative purpose to establish a small claims division of a municipal court; and at the same time, a purpose to allow the part-time referee appointed to preside over such a small claims division to continue his private practice, including appearances before the parent municipal court which appointed him.

By way of explanation, let me first state that a referee is an agent and officer of the appointing court, and clothed with the powers and duties of the judicial office which appoints him. 47 O. Jur. 2d, References 84, Section 2; Strietelmeier v. Angelo, 66 Ohio L. Abs. 312 (1952); The Mennel Milling Co. v. Slosser, 140 Ohio St. 445 (1942); and Burch v. Harte, 1 Ohio N.P. (n.s.) 477 (1903). Usually, he would be thought disqualified from practicing before the court which appoints him. The situation is similar to that of a part-time municipal court judge, who, for instance, is prohibited from practicing before his own municipal court, even when he is not sitting. Opinion No. 781, Opinions of the Attorney General for 1964, construing Section 1901.11, Revised Code.

Secondly, to show that the referee is not disqualified, it has been held that the offices of part-time municipal judge and part-time village or city solicitor are incompatible, because such a solicitor performs a substantial portion of his duties in the municipal court, which has jurisdiction over his city or village. See Opinion No. 781, supra. But Section 1925.01 was amended in 1969, to provide that a city solicitor could lawfully be appointed as a part-time referee by the very court before which he also will conduct a very substantial practice. He is limited in only one way; he may not serve in any case in which the municipality is an interested party.

If it is the stated legislative purpose to allow a part-time city solicitor to be a referee and still practice before the municipal court which appointed him, it seems clear that a person with a lesser degree of potential incompatibility, such as a private attorney, should be allowed to practice before the municipal court which has appointed him. One would imagine that the same restriction would apply to him as applies to the city solicitor; that he may not serve in any case in which one of his private clients appears before him in his capacity as referee. This conclusion is supported by the fact that the legislature amended the original Section 1925.01 by adding the following authorization which is the basis for the foregoing argument:

"(B) * * * A part-time solicitor or part-time assistant solicitor of any municipal corporation may be appointed as a referee, serve in any case in which the municipal corporation is not an interested party, and receive the prescribed compensation."

It must be remembered that the legislation allowing the creation of small claims divisions was just enacted in 1967; and Section 1925.01 was amended to allow the appointment of a part-time solicitor to the office of referee in 1969. Certainly this new legislation must be given effect over older precedent. In this instance, its language seems to have changed the prior existing view of incompatibility drastically.

In view of this fact, it might be useful to suggest consideration of our Canons of Judicial Ethics, especially No. 31, which reads as follows:

"In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

"He should not practice in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy.

"If forbidden to practice law, he should refrain from accepting any professional employment while in office.

"He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefore, if such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law." (Emphasis added.)

The Canons of Judicial Ethics are reproduced in our annual Ohio Legal Directory. As stated before, Section 1925.01 specifically allows the appointment of a part-time solicitor as a referee, and by analogy, the appointment of a private attorney to the same position. As mentioned in Canon No. 31, this puts him "in a position of greater delicacy", and requires that he be "scrupulously careful." It is clear, however, that Section 1925.01 allows the attorney to serve as referee, and supersedes Canon No. 31 where it may be inconsistent therewith.

In specific answer to your question it is my opinion, and you are so advised, that under Section 1925.01, Revised Code,

a private attorney who practices before a municipal court may be appointed by that court to serve as small claims referee.