

or should perform her duties in that regard negligently, she might well be legally responsible.

In summation, I find no specific authority on the questions you ask but under general rules of law there is a possibility that the nurse or physician might be civilly liable under some circumstances.

OFFICIAL OPINION NO. 33

April 12, 1951.

Mr. Addison M. Dowling,
State Representative,
5159 Park Avenue,
Indianapolis, Indiana.

Dear Sir:

I have your recent letter in which you make the following request:

"I respectfully request an official opinion from your office on the question as to whether or not, under the Indiana Constitution and other applicable Indiana Laws now in force, a member of the Indiana General Assembly can legally serve as a Special Judge or Judge *Pro Tempore* in a state criminal case and receive compensation for his services as such judge."

Before becoming involved too deeply in your question I think it is desirable to analyze the status and duties of special judges and judges *pro tempore*. The Supreme Court of Indiana, in the case of State *ex rel.* Hodshire v. Bingham, Judge (1941), 218 Ind. 490, 37 N. E. 2d 771, said:

"A judge *pro tem* is appointed for the term or some part thereof, during which time he exercises all the functions of the regular judge.

"A special judge is appointed to act in a particular case and his authority continues until the same is finally disposed of, unless the venue is changed."

See also 1950 Opinions of the Attorney General No. 69.

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Two constitutional provisions occur to me as possible obstacles to a legislator acting as either a special judge or a judge *pro tempore*. The first of these is Section 9, Article 2, prohibiting the holding of two lucrative offices, and the second is Section 1, Article 3, which prohibits an officer in one branch of government from performing any function in another branch. In the case of State *ex rel.* Black, *et al.* v. Burch (1941), 226 Ind. 445, 80 N. E. 2d 294, this provision was construed as preventing an officer in one branch of the government from holding a position, whether it was an office or a mere employment, in another branch.

I find only one case in Indiana which would seem to deal directly with the status of the special judge as an officer. That is *Dukes v. The State* (1858), 11 Ind. 557, 563. In that case it was said:

“Objection was made in the Circuit Court to the competency of the judge sitting at the trial. He was the judge of the Court of Common Pleas, for the district composed of the counties of *Carroll* and *Clinton*. He had been designated by the circuit judge, to preside during the trial, the competency of the circuit judge having been excepted to.

“The objection is that the Common Pleas judge was thus holding two offices, in contravention of the constitution. We do not think the case fully within the constitutional prohibition. The permission given to the Common Pleas judge to sit for a circuit judge, in a particular case in which the latter is incompetent, does not, in our opinion, vest in the former the two offices of judge of the Circuit Court and of the Common Pleas. The office of circuit judge was not vacant, and, of course, the person presiding at this trial did not and could not, by such mode, get into it. Nor could there be two circuit judges, in the same circuit, at one and the same time. See *Case v. The State*, 5 Ind. 1.”

Generally it is considered that an element of permanency and tenure is inherent in the holding of an office. 42 Am. Jur. 882, 883, 46 Corpus Juris 922 (Officers, Section 2, L. R. A. 1917-A, p. 234.) This concept is recognized by dicta in the

form of definitions in several Indiana cases, including *Wells v. State ex rel.* (1910), 175 Ind. 380, 384, 94 N. E. 321:

“* * * *An office is a public charge or employment, in which the duties are continuing, and prescribed by law and not by contract, invested with some of the functions pertinent to sovereignty, or having some of the powers and duties which inhere within the legislative, judicial or executive departments of the government, and emolument is a usual, but not a necessary element thereof.* * * *” (Our emphasis).

In the case of *Foltz v. Kerlin* (1885), 105 Ind. 221, 223, it was said:

“It is quite evident that the framers of the constitution intended that postmasters should be regarded as Federal officers, but, on principle, independent of the language of that instrument, there can be no contrariety of opinion upon this subject. They are officers within the definition given by the authorities. ‘An office,’ says the Supreme Court of the United States, ‘is a public station, or employment, conferred by the appointment of government. *The term embraces the ideas of tenure, duration, emolument, and duties.*’ *United States v. Hartwell*, 6 Wall. 385.”

From the basis of these authorities it is my opinion that neither a special judge nor a judge *pro tempore* can be considered to be an officer within the constitutional prohibition against holding more than one lucrative office.

As previously indicated, the question of performing a function in another branch of the government is somewhat more complicated.

The case of *State ex rel. Black v. Burch* (1948), 226 Ind. 445, 463, 80 N. E. 2d 294, 302, 80 N. E. 2d 560, 81 N. E. 2d 850, deals exhaustively with the question of what constitutes a function of another branch of government. The fact situations at issue in that case are not directly analogous to the question you present. However, it is important to note the expression of the court, particularly as follows:

“In view of the fact that it is obvious that the purpose of all these separation of powers provisions

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of Federal and State constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if S 1 of Art. 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the New York and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an employee of an officer, even though he be performing a duty not involving the exercise of sovereignty, may be and is, executing one of the functions of that public office, and this applies to the case before us."

It is important to note the authorities discussed as to permanency and tenure of public office, particularly L. R. A. (1917 A), page 234, which applies that test to separation of powers provisions in constitutions.

Thus, I believe that the function referred to by the Constitution in this provision is a general exercise of powers. The action of a special judge in a single case seems to me to be clearly not such an exercise of powers as was being forbidden by this provision of the Constitution. However, the duties of a judge *pro tempore* presents a more difficult problem. As pointed out earlier, he exercises all of the functions of the judge for whom he is acting for a limited period of time. I find no persuasive authority as to whether or not such action would be considered the exercise of a function of the judicial department of government.

In addition to the constitutional provisions heretofore discussed there are, of course, other possible reasons why it might be improper for a member of the General Assembly to serve as a special judge or judge *pro tempore*. His exercise of his duties might conflict in time with his attendance and duties as a legislator. Furthermore, through his status as a legislator or through the exercise of his duties as a member of the legislature he might acquire some interest in the outcome of litigation.

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I see no difference in the rules of law to be applied in regard to civil cases or criminal cases. However, it is to be noted that some of the foregoing rules might have varied application depending on whether the case was civil or criminal. In summation, it is my opinion that it is not improper for a member of the legislature to act as a special judge and that whether it is proper or not for a member of the legislature to act as a judge *pro tempore* is doubtful.

OFFICIAL OPINION NO. 34

April 12, 1951.

Mr. William R. Allen,
Secretary,
Indiana State Board of
Barber Examiners,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Sir:

Your letter of 5 April 1951 has been received, requesting an Official Opinion on the following questions:

“In view of the Amendment (Senate Bill 59) to the 1951 Beauty Culturist Act, authorizing Beauty Culturists to cut women’s hair, is this Board authorized to issue hair cutter’s license under the Barber Law? If so, for what purpose shall such hair cutter’s License be issued?”

Senate Bill 59 referred to in your question is Chapter 76 of the Acts of 1951, and it amends Section 2 of the Beauty Culturist Law, same being Section 63-1802, Burns 1943 Replacement. The provision pertinent to this inquiry, is Clause (3) of said Section, which, among other things, defines the practice of beauty culturists to be: “To cut, trim and style the hair of any female—at any time.” Prior to its amendment in 1951 this Clause read: “To cut, clip or trim the hair combined with a permanent wave, and at no other time.”

Since 1933, the Barber’s statute, Section 10, Chapter 48 Acts 1933, same being Section 63-310, Burns 1943 Replace-