

MAINE STATE LEGISLATURE

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DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

September 27, 1989

G. William Diamond
Secretary of State
State House Station #29
Augusta, ME 04333

Dear Secretary of State Diamond:

I am writing in response to an inquiry from Deputy Secretary of State Gary Cooper concerning whether it is unconstitutional or illegal for a law enforcement officer to hold the office of notary public. For the reasons which follow, it is the opinion of this Department that, while the holding of both of these offices simultaneously was for some time in Maine's history unconstitutional, in view of the current limited powers of the office of notary public, there is no constitutional or other impediment to their being held simultaneously today.

The source of the constitutional problem which your question presents is the so-called "separation of persons" provision of the Maine Constitution, Article III, Section 2, which provides:

No person or persons, belonging to one of [the legislative, executive, and judicial] departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

In the early days of Maine's history as an independent state, this provision was the subject of an Opinion of the Justices of the Supreme Judicial Court, written in response to a request from the Maine Senate as to whether it was possible for a sheriff or deputy sheriff (as well as a coroner) to serve as a

justice of the peace. In that Opinion, the justices analyzed the functions of these officers and determined that since sheriffs and deputy sheriffs were charged with assisting the executive branch in the execution of the laws, and that justices of the peace were included within the category of judicial officers by Article VI, Section 4 of the original Maine Constitution, the same person could not occupy both positions, since in doing so he would necessarily be exercising executive and judicial powers simultaneously. Opinion of the Justices, 3 Me. 484, 485-86 (1825). Accord Pooler v. Reed, 73 Me. 129 (1882) (municipal constable may not be justice of the peace); Stubbs v. Lee, 64 Me. 195 (1874) (deputy sheriff may not be trial justice).

It appears, however, that the question of whether a law enforcement officer could be a notary public was not addressed until an Opinion of the Attorney General issued on December 14, 1936. In that document, Deputy Attorney General Sanford L. Fogg advised the Treasurer of the Town of Union:

I regret to have to inform you that in our statutes it is provided that Notaries Public can do all the things that a Justice of the Peace can do, consequently it is my opinion that the office of Notary Public would likely be held to be incompatible with the office of Deputy Sheriff.^{1/}

The basis for Deputy Attorney General Fogg's statement that notaries and justices of the peace perform the same functions was the fact that during the nineteenth century, the Legislature slowly vested the office of notary public with various functions historically performed by a justice of the peace, culminating with the enactment, in 1905, of a provision that a notary public "may do all things that justices of the peace are or may be authorized to do and shall have the same territorial jurisdiction." P.L. 1905, ch. 58, appearing at the time of Deputy Attorney General Fogg's opinion at R.S. ch. 97, § 38 (1930). This opinion served as the basis for at least eight more Opinions of the Attorney General, all declaring that a person could not hold the office of notary public or justice

^{1/}It should be noted that Deputy Attorney General Fogg rested his opinion upon the common law doctrine of incompatibility of offices rather than the "separation of persons" provision of the Maine Constitution, as did the Law Court in its 1874 and 1882 opinions cited above. As indicated below in this opinion, however, this office does not believe that the functions of the office of notary and that of a law enforcement officer are incompatible.

of the peace on the one hand and be a law enforcement officer on the other.^{2/}

These opinions, which were clearly correct at the time that they were issued, would appear to end the matter, were it not for the fact that the Legislature, in the last decade, has seen fit to separate the functions of justice of the peace and notary public, and to restore the latter office to its historic, non-judicial function. This process began with a constitutional amendment in 1975 which eliminated the office of notary public as a constitutional office. Me. Const. amend. CXXIX, effective January 4, 1977. It then continued in 1981, when the Legislature abolished the office of justice of the peace and merged its functions with those of the notary public. P.L. 1981, ch. 456, enacting amendments to various sections of the Maine Code. In 1988, however, the Legislature revived the office of justice of the peace in order to assign to it judicial functions formerly discharged by an officer known as a "Complaint Justice." P.L. 1988, ch. 736. At the same time, the Legislature established a clear separation between the functions of the newly-established justice of the peace and those of the notary public. In the words of the Statement of Fact of the bill resulting in this separation, the Legislature sought to accomplish this objective "by reassigning all judicial functions which were assigned in 1981 to the office of notary public to the new office of justice of the peace, . . ." L.D. 2452, Statement of Fact (113th Legis. 1988). Thus, "the office of notary public is restored to its historic function of taking oaths required by law and issuing subpoenas . . ." Id.

The question thus presented is whether this newly-constituted office of notary public exercises judicial powers within the meaning of the "separation of persons" clause of the Maine Constitution. In the opinion of this Department, it does not. First of all, at the time of the entry into force of the Maine Constitution, it is clear that notaries public

^{2/}Op. Me. Att'y Gen. (Sept. 1, 1977) (law enforcement officer and justice of the peace or notary public); Op. Me. Att'y Gen. (Sept. 4, 1974) (deputy sheriff and justice of the peace or notary public); Op. Me. Att'y Gen. (Apr. 25, 1969) (same); Op. Me. Att'y Gen. (Mar. 15, 1968) (town constable and justice of the peace or notary public); Op. Me. Att'y Gen. (Mar. 25, 1966) (same); Op. Me. Att'y Gen. (Sept. 22, 1958) (deputy sheriff and justice of the peace or notary public); Op. Me. Att'y Gen. (June 24, 1942), reprinted in 1941-42 Me. Att'y Gen. Ann. Rep. 125 (auxilliary policeman and justice of the peace or notary public); Op. Me. Att'y Gen. (Oct. 14, 1943) (deputy sheriff and notary public).

were not regarded as judicial officers. In an opinion issued in 1890 on the question of whether a woman could be appointed to the office of notary public, the Justices of the Supreme Judicial Court of Massachusetts, from which Maine separated in 1820, outlined the history of the office and observed that, while the office of notary did exercise important judicial functions in civil law jurisdictions, "None of the acts which a notary public in this commonwealth is authorized, either by custom^{3/} or by statutes, to perform, is a judicial act," and that although "[n]otaries public are to be appointed in the same manner as judicial officers are appointed, . . . they are not judicial officers." Opinion of the Justices, 23 N.E. 850, 852 (Mass. 1890) (Holmes, J., concurring). This view was reflected in the text of the original Maine Constitution which provided that the Governor "shall nominate, and, with the advice and consent of the Council, appoint all judicial officers, the Attorney General, the Sheriffs, Coroners, the Registers of Probate, and Notaries Public." Me. Const. art. V, pt. 1, § 8 (amended 1975). By listing notaries public separately from judicial officers, the framers of the Maine Constitution manifested their understanding that notaries did not perform judicial functions.

This view of the traditional function of a notary continues today. In a recent decision concerning whether the requirement that a notary be a citizen of the United States is constitutional, the United States Supreme Court described the officer's duties as "essentially clerical and ministerial," and stated that notaries are not "invested either with policy making responsibility or broad discretion in the execution of public policy that requires routine exercise of authority over individuals." Bernal v. Fainter, 467 U.S. 216, 225, 226 (1984). Of course, there is nothing to prevent the Maine Legislature from turning the office of notary public into a judicial one, as it did, at least between 1905 and 1981, by assigning various judicial functions to it. With the re-establishment of the independent office of justice of the peace in 1988, however, it appears clear that the current office fits within the descriptions of the traditional notary public set forth above. Thus, it may safely be concluded that under the current state of Maine law, the notary public is not a judicial officer.

Before concluding that there is no constitutional or other impediment to a person occupying the offices of law enforcement officer and notary public, however, it is necessary to dispose

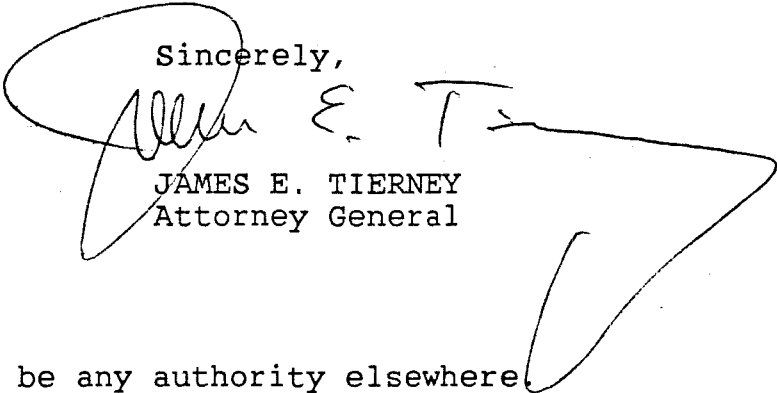
^{3/}At common law, the powers of a notary were confined to matters of proof of international commercial transactions. Opinion of the Justices, 23 N.E. 850, 851 (Mass. 1890).

of one other possible difficulty. In addition to the constitutional prohibition against persons simultaneously discharging executive and judicial functions generally, there exists also the common law doctrine of "incompatibility" of offices, under which it is possible that a person may not occupy two offices if the discharge of one is found to be incompatible with the discharge of another. Howard v. Harrington, 114 Me. 443 (1916). As indicated above, there is no judicial authority in Maine with regard to whether the office of notary public in its original form was incompatible with that of a law enforcement officer; and, although several of the opinions of this office cited above relied on the doctrine of incompatibility in determining that the two offices were incompatible, those opinions were issued at a time when the notary public did discharge judicial functions and thus may well have been incompatible with law enforcement. Consequently, there is no authority in the jurisdiction precisely on point.^{4/}

Nonetheless, it is clear to this Department that, so long as the notary public does not exercise judicial functions, the exercise of this office is not incompatible with law enforcement. As indicated above, the functions of the notary today essentially involve the taking of oaths and issuance of subpoenas, both ministerial acts. Thus, although a law enforcement officer enjoys considerable discretion in the performance of his duties, there can be no conflict with the exercise of that discretion should he be a notary, since the nature of that office is entirely non-discretionary. While it may be that such an officer would be well-advised for policy reasons not to administer oaths to persons against whom he is enforcing the criminal laws, such an action cannot be said to be illegal. Consequently, the discharge of the two offices by the same person does not present an incompatibility problem, and they may therefore be held simultaneously.

I hope this answers your question. If not, please feel free to re-inquire.

Sincerely,



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Attorney General

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^{4/}Nor does there appear to be any authority elsewhere.