

August 19, 2002

The Honorable Matthew P. Puskarich  
Harrison County Prosecuting Attorney  
Post Office Box 248  
111 W. Warren Street  
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SYLLABUS:

2002-020

1. The requirement in R.C. 2301.01 that a judge of the court of common pleas must have engaged in the practice of law or served as a judge of a court of record “for a total of at least six years” prior to the commencement of his term does not require the judge to have practiced law or served as a judge for the six years immediately preceding his term.
2. A judge of the court of common pleas who was suspended from the practice of law and from his judicial office for a period of six months during the year prior to the expiration of his term does not cease to meet the six-year requirement of R.C. 2301.01 for purposes of running for election to a new term.

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OPINION NO. 2002-020

The Honorable Matthew P. Puskarich  
Harrison County Prosecuting Attorney  
Post Office Box 248  
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Cadiz, Ohio 43907

Dear Prosecutor Puskarich:

You have asked whether a common pleas court judge is eligible to be a candidate for election to a new term at the November 2002 general election, in light of the fact that he was suspended from the practice of law and his judicial office, in January 2002, for a period of six months.<sup>1</sup> Your question calls for an interpretation of R.C. 2301.01, which requires a common pleas court judge, “for a total of at least six years preceding ... commencement of the judge’s term,” to have engaged in the practice of law or served as a judge of a court of record, or both.<sup>2</sup>

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<sup>1</sup> The term of office of the incumbent Harrison County common pleas court judge, who is the subject of your inquiry, ends on April 17, 2003. The next election for the office of judge of the Harrison County common pleas court’s general division will be held on November 5, 2002, and is for a six-year term beginning on April 18, 2003. *See* R.C. 2301.01; R.C. 2301.02(A); R.C. 3501.02(C).

<sup>2</sup> R.C. 2301.01 states in full:

There shall be a court of common pleas in each county held by one or more judges, each of whom has been admitted to practice as an attorney at law in this state and has, for a total of at least six years preceding the judge’s appointment or commencement of the judge’s term, engaged in the practice of law in this state or served as a judge of a court of record in any jurisdiction in the United States, or both, resides in said county, and is elected by the electors therein. Each judge shall be elected for six years at the general election immediately preceding the year in which the term, as provided in sections 2301.02 and 2301.03 of the Revised Code, commences, and the judge’s successor shall be elected at the general election immediately preceding the expiration of such term.

The judge of the Harrison County common pleas court was the subject of disciplinary proceedings reported at *Disciplinary Counsel v. Karto*, 94 Ohio St. 3d 109, 760 N.E.2d 412 (2002). The Ohio Supreme Court suspended the judge from the practice of law for six months, and from his judicial office, without pay, for the duration of his suspension from the practice of law. *Id.*, 94 Ohio St. 3d at 117, 760 N.E.2d at 420. See Gov. Bar R. V, §§ 8, 10; Gov. Jud. R. III, § 7. The judge's suspension expired on July 17, 2002. He has filed with the county board of elections a statement of candidacy and nominating petition to be an independent candidate for election to the office of judge of the Harrison County common pleas court, general division, at the November 2002 election.<sup>3</sup>

There is no dispute that the judge in question had, prior to his suspension in January 2002, "engaged in the practice of law in this state or served as a judge of a court of record" for more than six years.<sup>4</sup> The issue raised by your question, therefore, is whether R.C. 2301.01

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<sup>3</sup> Any person who wishes to become an independent candidate for an office for which candidates are nominated at a primary election, which includes the office of common pleas court judge, must file a statement of candidacy and nominating petition no later than four p.m. of the day before the primary election. R.C. 3513.257. See also R.C. 3513.08; R.C. 3513.16. In 2002, the filing deadline for independent candidates was May 6th. (Although candidates for judicial office are nominated at a primary election, their names appear on a nonpartisan ballot at the general election. R.C. 3505.04.)

The fact that the judge was on suspension at the time he was required to file his statement of candidacy and nominating petition would not render him ineligible to be a candidate at the November 2002 election, since his term of suspension will have expired by the time he would begin a new term of office if elected thereto. (We assume he will be reinstated by the Supreme Court upon the expiration of his suspension. See Gov. Bar R. V, § 10 (procedure for applying for reinstatement after suspension of six months to two years)). As stated by the court in *State ex rel. Wolfe v. Lorain County Board of Elections*, 59 Ohio App. 2d 257, 258, 394 N.E.2d 321, 322 (Lorain County 1978), "[u]nder Ohio election laws, a candidate generally need not qualify for the prospective office in order to run for or be elected to that office," but rather "must be qualified when he assumes that office." Accord *State ex rel. Vana v. Maple Heights City Council*, 54 Ohio St. 3d 91, 94, 561 N.E.2d 909, 912 (1990) ("[u]nder general Ohio election laws, a candidate for public office need not be qualified in order to run for that office, but must remove any disqualifications immediately upon assuming the office; otherwise, the officeholder forfeits that office"). Therefore, a person who has been suspended from the practice of law is not precluded from being a candidate for the office of common pleas court judge, so long as his suspension will have expired and he is reinstated by the time he assumes office if elected thereto.

<sup>4</sup> As set forth in *Disciplinary Counsel v. Karto*, 94 Ohio St. 3d 109, 110, 760 N.E.2d 412, 414 (2002), the respondent judge was admitted to the practice of law in Ohio in 1977, and has served as judge of the Harrison County Court of Common Pleas since April 1991. The pertinent

requires a common pleas court judge to have engaged in the practice of law or served as a judge for the six years *immediately* preceding the commencement of his term. Based on principles of statutory construction, legislative history, and case law, we conclude that a common pleas court judge is not limited to acquiring the requisite experience during the six, consecutive years immediately prior to his term, but may include all of the time during which he practiced law or served as a judge towards meeting the six-year requirement of R.C. 2301.01, regardless of when such experience was acquired prior to the commencement of his term.<sup>5</sup>

First, to interpret R.C. 2301.01 as requiring a common pleas judge to have met the requisite professional experience during the six years *immediately* prior to the commencement of his term would require us to insert a word that was not used by the General Assembly. Such an interpretation violates a basic principle of statutory construction. As stated in *Cleveland Electric Illuminating Co. v. City of Cleveland*, 37 Ohio St. 3d 50, 524 N.E.2d 441 (1988) (syllabus, paragraph 3), “[i]n matters of construction, it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” *Accord State ex rel. Celebrezze v. Board of County Commissioners*, 32 Ohio St. 3d 24, 512 N.E.2d 332 (1987); *Columbus-Suburban Coach Lines, Inc. v. Public Utilities Commission*, 20 Ohio St. 2d 125, 254 N.E.2d 8 (1969).

We must also consider that R.C. 2301.01 requires that a common pleas judge have engaged in the practice of law or served as a judge “for a *total* of at least six years” preceding the commencement of his term. The use of the word “total” suggests that the six years are to be

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six-year requirement was enacted prior to, and has continued since, the time he first assumed office, and there is no question but that he met this requirement and was eligible to serve during his previous terms as common pleas court judge. (The legislative history of R.C. 2301.01 is discussed below.)

<sup>5</sup> In so framing the issue we assume that the time during which a common pleas judge is suspended from the practice of law and from his judicial office may not be included as time during which he engaged in the practice of law or served as a judge for purposes of determining compliance with the six-year requirement of R.C. 2301.01. In light of our conclusion, that the requisite experience need not have occurred during the six years immediately prior to the commencement of a judge’s term, however, we need not render a determination as to the question of whether a judge who is on suspension from the practice of law and from his judicial office is engaged in the practice of law or serving as a judge for purposes of R.C. 2301.01. *Cf. State ex rel. Carr v. Cuyahoga County Board of Elections*, 63 Ohio St. 3d 136, 586 N.E.2d 73 (1992) (a person seeking to become a candidate for municipal court judge could not count the time, after which she was admitted to the practice of law, but prior to her filing a certificate of registration, towards meeting the requirement in R.C. 1901.06 that a municipal court judge be engaged in the practice of law for at least six years preceding commencement of the judge’s term of office).

considered in the aggregate or in combination, whenever those years occurred, and that the six years need not be served consecutively, without interruption, or within a specific time period. *See, e.g., Webster's New World Dictionary* 1502 (2nd college ed. 1984) (defining the noun “total” as “the whole amount or number; sum; aggregate”). *Cf.* 1971-1972 Ohio Laws, Part II, 1129, 1130 (Am. Sub. H.B. 18, eff. July 1, 1972) (discussed below). If we were to interpret R.C. 2301.01 as requiring a judge to acquire the relevant experience during the six consecutive years immediately preceding commencement of his term, we would, in effect, be reading the word “total” out of the statute, which, again, would violate the principle of statutory construction described above.

Furthermore, we are guided by the fact that other qualification statutes do use the word “immediately,” to modify or describe when a minimum number of years of experience or other requirement for holding office, such as residency, must have been met prior to election, assumption of office, or other specified event. For example, R.C. 2153.02 requires that a judge of the juvenile division of the Cuyahoga County court of common pleas “shall have been admitted to practice as an attorney at law in this state for a period of at least six years immediately preceding his appointment or commencement of his term.” In order to qualify as county coroner, a person must have been “licensed to practice as a physician in this state for a period of at least two years immediately preceding election or appointment as a coroner.” R.C. 313.02(A). And, the word “immediately” is used seven times in R.C. 311.01 to modify when various qualifications for the office of sheriff must have been met. *See, e.g.,* R.C. 311.01(B)(2) (in order to be a candidate for election to, or appointed to, the office of sheriff, a person must have been “a resident of the county in which the person is a candidate for or is appointed to the office of sheriff for at least one year immediately prior to the qualification date”). Indeed, R.C. 2301.01 itself uses the word “immediately” twice to describe at which general election a judge and his successors shall be elected. *See* note 2, *supra*. *See also* 1995-1996 Ohio Laws, Part I, 549, 598-99 (Am. Sub. H.B. 99, eff. Aug. 22, 1995).

It is thus apparent that, if the General Assembly had intended to require that a judge engage in the practice of law or serve as a judge for the six-year period immediately preceding the commencement of his term, it would have explicitly so stated.<sup>6</sup> *See generally Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81, 83 (1927) (“[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended”); *Lake Shore Electric Railway Co. v. Public*

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<sup>6</sup> R.C. 311.01 contains another example of language that conveys the same sense as the use of the word “immediately.” Division (B)(8)(b) requires a person to have been “employed for at least the last three years prior to the qualification date as a full-time law enforcement officer” in order to be a candidate for, and hold, the office of sheriff. Again, when the General Assembly intends not only to require that a public officer possess a minimum number of years of relevant experience, but to mandate a specific time period during which the officer must have accrued such experience, it has done so in clear and unmistakable language.

*Utilities Commission*, 115 Ohio St. 311, 319, 154 N.E. 239, 242 (1926) (had the legislature intended a particular meaning, “it would not have been difficult to find language which would express that purpose,” having used that language in other connections). *See also Craftsman Type, Inc. v. Lindley*, 6 Ohio St. 3d 82, 451 N.E.2d 768 (1983) (under the rule of statutory construction, *expressio unius est exclusio alterius*, the naming of a specific class implies the exclusion of those not named).

Secondly, the legislative history of R.C. 2301.01 compels this interpretation. In 1917, the General Assembly enacted, as G.C. 1532, the requirement that a common pleas judge “shall have been admitted to practice as an attorney and counsellor-at-law in this state *for a period of six years immediately preceding* his appointment or election” (emphasis added). 1917 Ohio Laws 164 (H.B. 586, filed March 30, 1917). As enacted by H.B. 586, the statute clearly required a judge to have acquired the relevant experience during the six consecutive years immediately prior to his election.<sup>7</sup>

In 1972, however, the General Assembly amended R.C. 2301.01 (previously G.C. 1532) to require that a common pleas judge have “for a total of at least six years preceding his appointment or commencement of his term, engaged in the practice of law in this state or served as a judge of a court of record in any jurisdiction in the United States, or both.” 1971-1972 Ohio Laws, Part II, 1129, 1130 (Am. Sub. H.B. 18, eff. July 1, 1972). Am. Sub. H.B. 18 thus made, for our purposes, two significant changes to R.C. 2301.01. First, it deleted the word “immediately” as a modifier of the phrase “preceding his appointment or commencement of his term.” Secondly, Am. Sub. H.B. 18 eliminated the language that a judge must have been admitted to the practice of law for a *period* of at least six years, which connotes an interval of consecutive, uninterrupted years, and in its place, substituted the requirement that a judge must have been engaged in the practice of law for a *total* of at least six years, which as discussed above, signifies an aggregate amount of time.<sup>8</sup> It is obvious that the General Assembly, in enacting Am. Sub. H.B. 18, intended to make a change to the qualifications for the office of common pleas judge, and allow a judge to include any relevant experience, regardless of when it was acquired, rather than limiting him to the experience he acquired during the six consecutive years immediately preceding his assumption of office. *See State ex rel. Clampitt v. Brown*, 165 Ohio St. 139, 140, 133 N.E.2d 369, 370 (1956) (a “change in wording creates a presumption that the General Assembly intended by the amendment to change the meaning”); *Lytle v. Baldinger*,

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<sup>7</sup> G.C. 1532 (now R.C. 2301.01) was amended in 1936 to require a common pleas judge to have been admitted to practice “for a period of *at least* six years immediately preceding his appointment or *commencement of his term*” (emphasis added). 1935-1936 Ohio Laws, Part II, 157 (H.B. 641, filed Feb. 5, 1936).

<sup>8</sup> We note that Am. Sub. H.B. 18 also added service as a judge of a court of record as experience that could be included to meet the six-year requirement.

84 Ohio St. 1, 8, 95 N.E. 389, 390 (1911) (“[t]he presumption is, that every amendment of a statute is made to effect some purpose”).

As a final point, our analysis of R.C. 2301.01 conforms to that of the court’s in *State ex rel. Kelly v. Cuyahoga County Board of Elections*, 70 Ohio St. 3d 413, 639 N.E.2d 78 (1994). *Kelly* involved a protest that was lodged against an attorney’s candidacy for common pleas judge on the grounds that she had not been engaged, *full-time*, in the practice of law for six years and thus did not meet the qualifications of R.C. 2301.01. The court rejected this argument stating:

[R.C. 2301.01], however, does not qualify the minimum experience for judicial candidates beyond the six-year benchmark, and references to full-time employment occur regularly elsewhere in the Revised Code.... R.C. 311.01(B)(9), in particular, mandates that a candidate for sheriff possess at least five years of “full-time law enforcement experience” to qualify for office....

Thus, if a six-year, full-time commitment to the practice of law had been the General Assembly’s intent for common pleas judges, it would have so specified in R.C. 2301.01. The board of elections, therefore, did not disregard the law in accepting Gallagher’s candidacy as a nominee for juvenile court judge.

*Id.*, 70 Ohio St. 3d at 415, 639 N.E.2d at 80. *See also State ex rel. Schenck v. Shattuck*, 1 Ohio St. 3d 272, 274, 439 N.E.2d 891, 893 (1982) (“[w]ords limiting the right of a person to hold office are to be given a liberal construction in favor of those seeking to hold office, in order that the public may have the benefit of choice from all those who are in fact and in law qualified” (citation omitted)).

Similarly, if the General Assembly had intended that a common pleas judge be required to engage in the practice of law or serve as a judge during the six years *immediately* preceding the commencement of his term, it would have so specified in R.C. 2301.01. A person meets the “six-year benchmark” if he has engaged in the practice of law or served as a judge for a total of at least six years prior to commencement of his term, regardless of whether the six years were those immediately preceding his term. Therefore, a common pleas judge, who met the six-year requirement for office when previously elected, *see* note 4, *supra*, but who was suspended from the practice of law and his judicial office during the year preceding commencement of the next term of office, nonetheless remains in compliance with the six-year requirement of R.C. 2301.01. He is eligible to be a candidate for election, so long as he will have been re-instated to the practice of law by the time he assumes office and there are no other impediments to his candidacy.

In conclusion, it is my opinion, and you are so advised, that:

1. The requirement in R.C. 2301.01 that a judge of the court of common pleas must have engaged in the practice of law or served as a judge of a

court of record “for a total of at least six years” prior to the commencement of his term does not require the judge to have practiced law or served as a judge for the six years immediately preceding his term.

2. A judge of the court of common pleas who was suspended from the practice of law and from his judicial office for a period of six months during the year prior to the expiration of his term does not cease to meet the six-year requirement of R.C. 2301.01 for purposes of running for election to a new term.

Respectfully,

BETTY D. MONTGOMERY  
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