March 1, 2011

The Honorable William D. Mason
Cuyahoga County Prosecuting Attorney
Justice Center
Courts Tower
1200 Ontario Street
Cleveland, Ohio 44113

SYLLABUS: 2011-006

1. Insofar as the chief magistrate of the Cleveland Municipal Court performs services for, and is compensated by, the City of Cleveland, the chief magistrate is in the service of a political subdivision for purposes of Article V, § 5.06 of the Cuyahoga County Charter.

2. The chief magistrate of the Cleveland Municipal Court does not advise or represent a political subdivision for purposes of Article V, § 5.06 of the Cuyahoga County Charter.

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OPINION NO. 2011-006

The Honorable William D. Mason
Cuyahoga County Prosecuting Attorney
Justice Center
Courts Tower
1200 Ontario Street
Cleveland, Ohio 44113

Dear Prosecutor Mason:

You have requested an opinion whether full-time service as the chief magistrate of the Cleveland Municipal Court qualifies as "experience in advising or representing" a political subdivision for purposes of Article V, § 5.06 of the Cuyahoga County Charter ("Charter"). Article V, § 5.06 of the Charter states:

> **SECTION 5.06 DIRECTOR OF LAW: POWERS, DUTIES AND QUALIFICATIONS**
>
> The Director of Law shall be the legal advisor to and representative of the County Executive and County Council. The Director of Law shall be an attorney at law in good standing in the State of Ohio and shall have had at least five years' experience in advising or representing political subdivisions in Ohio.

Thus, the performance of the duties of the chief magistrate of the Cleveland Municipal Court for over five years does not satisfy the experience requirement of Article V, § 5.06 of the Charter unless it involves "advising or representing" an Ohio political subdivision.

Resolution of your specific question requires us to address two distinct issues. First, we must consider whether the chief magistrate of the Cleveland Municipal Court performs his duties for a "political subdivision" for purposes of Article V, § 5.06 of the Charter. If the chief magistrate performs his duties for a political subdivision, we must then determine whether the duties of the chief magistrate include providing advice or representation for purposes of Article V, § 5.06 of the Charter.

The Chief Magistrate of the Cleveland Municipal Court Is in the Service of the City of Cleveland

R.C. 1901.01(A) provides for the establishment of a municipal court in the City of Cleveland. The jurisdiction of the Cleveland Municipal Court includes the territory within the corporate limits of

the City of Cleveland and the City of Bratenahl in Cuyahoga County. R.C. 1901.02(A)-(B); *see also* R.C. 1901.02(C) (as used in R.C. 1901.02, "'[w]ithin a municipal corporation' includes all land within the territorial boundaries of the municipal corporation and any townships that are coextensive with the municipal corporation").

The operating costs of the Cleveland Municipal Court are paid, in part, by the City of Cleveland: "The current operating costs of a municipal court … that has territorial jurisdiction under [R.C. 1901.02] that extends beyond the corporate limits of the municipal corporation in which the court is located shall be apportioned pursuant to this section among all of the municipal corporations and townships that are within the territory of the court." R.C. 1901.026(A); *see also* R.C. 1901.11(C) (in the case of a municipal court that is other than a county-operated municipal court, the compensation of the court's judges "may be paid in either biweekly installments or semimonthly installments, as determined by the payroll administrator, three-fifths of the amount being payable from the city treasury and two-fifths of the amount being payable from the treasury of the county in which the municipal corporation is situated"). *See generally* 1994 Op. Att'y Gen. No. 94-043 (syllabus) (if a municipal court includes "in its budget as a cost of operation of the court an amount for payment of professional association dues on behalf of a judge of that court, to the extent that a [municipal corporation] is responsible for the payment of the court's operating costs, it has a duty to appropriate the requested sum, unless it can show that the request is unreasonable or not necessary for the proper administration of the court's business").

In addition, the City of Cleveland is responsible for providing for the accommodations and needs of the Cleveland Municipal Court:

> The legislative authority of a municipal court shall provide suitable accommodations for the municipal court and its officers….
>
> The legislative authority shall provide for the use of the court suitable accommodations for a law library, complete sets of reports of the supreme and inferior courts, and such other law books and publications as are considered necessary by the presiding judge, and shall provide for each courtroom a copy of the Revised Code.
>
> The legislative authority shall provide any other employees that are necessary, each of whom shall be paid such compensation out of the city treasury as the legislative authority prescribes…. It shall provide all necessary form books, dockets, books of record, and all supplies, including telephone, furniture, heat, light, and janitor service, and for such other ordinary or extraordinary expenses as it considers advisable or necessary for the proper operation or administration of the court.

R.C. 1901.36(A). This duty to provide for the accommodations and needs of the Cleveland Municipal Court includes, among other things, compensating the chief magistrate of the Cleveland Municipal Court for his services, even though the court is the appointing authority for the position of chief magistrate. *See* R.C. 1901.026(A); R.C. 1901.33; R.C. 1901.36(A); *see also* Ohio R. Civ. P. 53(A) ("[a] court of record may appoint one or more magistrates"); Ohio Sup. R. 19.1(A) ("[a]ll municipal courts having more than two judges shall appoint one or more magistrates").

A review of the foregoing provisions of law governing the establishment and operation of the Cleveland Municipal Court discloses that the court performs its services for, and is primarily funded by, the City of Cleveland. As a result, the chief magistrate of the Cleveland Municipal Court is in the service of the City of Cleveland.[1] *See State ex rel. Huppert v. Sparma,* 9 Ohio App. 2d 30, 33, 222 N.E.2d 798 (Stark County 1966); *State ex rel. Thompson v. Wall,* 17 Ohio N.P. (n.s.) 33, 28 Ohio Dec. 631 (C.P. Montgomery County 1914); 1992 Op. Att'y Gen. No. 92-070; 1970 Op. Att'y Gen. No. 70-029; 1952 Op. Att'y Gen. No. 1132, p. 107, at 110-15; *see also State ex rel. Stanley v. Bernon,* 127 Ohio St. 204, 187 N.E. 733 (1933). *See generally State ex rel. Pogue v. Groom,* 91 Ohio St. 1, 9, 109 N.E. 477 (1914) ("[t]he character of a public office is determined by the nature of the public service to be performed in connection with the territorial limits of the authority to act in an official capacity"); *State ex rel. Attorney General v. Brennan,* 49 Ohio St. 33, 38-39, 29 N.E. 593 (1892) (in determining that a particular public office was a county office, the court stated: "where such duties are wholly performed within the limits of a county, and for the people of that county, the salary to be paid by the disbursing officer of the county, from the funds of the county, the office is a county office"); 1990 Op. Att'y Gen. No. 90-110 at 2-487 ("the territorial jurisdiction of the public entity and the source of compensation of the entity's officers and employees are two common means of determining the nature of the public service rendered by such personnel"). *See generally also* R.C. 1901.32(B) (stating that certain positions with the Cleveland Municipal Court are in the civil service of the City of Cleveland). *But see generally* 1938 Op. Att'y Gen. No. 3438, vol. III, p. 2311, at 2314 ("I find no authority to support the position that officers whose functions are not confined to purely municipal affairs are municipal officers").

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[1] Although a municipal court is in the broad sense an agency or instrumentality of the State of Ohio to which the public administration of justice is delegated, the officers and employees of a municipal court are deemed to be in the service of a municipal corporation, rather than in the service of the state. *See State ex rel. Thompson v. Wall,* 17 Ohio N.P. (n.s.) 33, 28 Ohio Dec. 631 (C.P. Montgomery County 1914); 1992 Op. Att'y Gen. No. 92-070 at 2-293 through 2-295; 1970 Op. Att'y Gen. No. 70-029; *see also* R.C. 1901.32; *State ex rel. Stanley v. Bernon,* 127 Ohio St. 204, 187 N.E. 733 (1933); *State ex rel. Pogue v. Groom,* 91 Ohio St. 1, 9, 109 N.E. 477 (1914); *State ex rel. Attorney General v. Brennan,* 49 Ohio St. 33, 38-39, 29 N.E. 593 (1892); 1990 Op. Att'y Gen. No. 90-110 at 2-487. *See generally* Ohio Const. art. IV, § 1 (a municipal court is vested with the judicial power of the state); *State ex rel. Cherrington v. Hutsinpiller,* 112 Ohio St. 468, 471, 147 N.E. 647 (1925) ("[a] court is an instrumentality and an incident to sovereignty and is the repository of its judicial power. It is the agency of the state by means of which justice is administered, and is that entity in the government to which the public administration of justice is delegated and committed"). *But see generally State v. Smith,* Case No. 46171, 1983 Ohio App. LEXIS 15962 (Cuyahoga County Nov. 17, 1983) (a Cleveland Municipal Court judge is a state officer, agent, or employee for purposes of R.C. 2921.51).

The Chief Magistrate of the Cleveland Municipal Court Is in the Service of a Political Subdivision for Purposes of Article V, § 5.06 of the Charter

Having determined that the chief magistrate of the Cleveland Municipal Court is in the service of the City of Cleveland, we must now determine whether such service is performed for a "political subdivision" for purposes of Article V, § 5.06 of the Charter. The term "political subdivision," as used in Article V, § 5.06 of the Charter, has not been defined. Absent such a definition, the term is accorded its common, ordinary meaning. *See* Charter art. I, § 1.03 ("[t]he rules of statutory construction contained in the Ohio Revised Code shall govern the interpretation of the provisions of this Charter"); *see also* R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage").

As used in common parlance, the term "political subdivision" means "a limited geographical area of the State, within which a public agency is authorized to exercise some governmental function." 1972 Op. Att'y Gen. No. 72-035 at 2-135; *accord Ohio Historical Soc'y v. SERB*, 66 Ohio St. 3d 466, 478, 613 N.E.2d 591 (1993); 2009 Op. Att'y Gen. No. 2009-013 at 2-107. "Moreover, courts and prior Attorney General opinions have determined that this general definition of 'political subdivision' includes municipal corporations," which are cities and villages.[2] 2009 Op. Att'y Gen. No. 2009-013 at 2-107; *see, e.g., Wolf v. City of Columbus*, 98 Ohio App. 333, 129 N.E.2d 309 (Franklin County 1954); 2002 Op. Att'y Gen. No. 2002-038 at 2-245. Therefore, insofar as the chief magistrate of the Cleveland Municipal Court performs services for, and is compensated by, the City of Cleveland, the chief magistrate is in the service of a political subdivision for purposes of Article V, § 5.06 of the Charter.

The Chief Magistrate of the Cleveland Municipal Court Does Not Advise or Represent a Political Subdivision for Purposes of Article V, § 5.06 of the Charter

Let us turn now to the issue whether the duties of the chief magistrate of the Cleveland Municipal Court include providing advice or representation for purposes of Article V, § 5.06 of the Charter. Nothing in the Charter indicates what the phrase "experience in advising or representing" means for purposes of Article V, § 5.06 of the Charter. As a result, we must consider the context in which this phrase is used. *See* Charter art. I, § 1.03; *see also* R.C. 1.42.

Article V, §§ 5.01 and 5.06 of the Charter provide for the appointment of a director of law. The sole duty of the director of law is to "be the legal advisor to and representative of the County Executive and County Council." Charter art. V, § 5.06. For that reason, Article V, § 5.06 of the Charter requires that an applicant for the position of director of law have prior experience advising and representing a political subdivision.

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[2] Municipal corporations are classified as cities and villages. Ohio Const. art. XVIII, § 1; R.C. 703.01.

When an attorney advises and represents a political subdivision, an attorney-client relationship exists between the attorney and the political subdivision. *See, e.g., Kremer v. Cox*, 114 Ohio App. 3d 41, 682 N.E.2d 1006 (Summit County 1996) (communications between the county coroner and county prosecuting attorney are protected by attorney-client privilege as the prosecuting attorney is the legal representative of the county coroner pursuant to R.C. 309.09(A)). During the course of that relationship, the attorney provides legal advice and opinions to the political subdivision and advocates on behalf of the political subdivision in adversarial proceedings. *See generally* Ohio Prof. Cond. R. (second clause of the preamble) ("[i]n representing clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system").

By way of example, R.C. 309.09(A) provides:

> The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards … and any of them may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties. The prosecuting attorney shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party….

Similarly, a city director of law prepares "all contracts, bonds, and other instruments in writing in which the city is concerned, and shall serve the several directors and officers provided in [R.C. Title 7] as legal counsel and attorney." R.C. 733.51; *see also* R.C. 705.11. In addition, a city director of law has a duty to advocate on behalf of the city in adversarial proceedings:

> The city director of law, when required to do so by resolution of the legislative authority of the city, shall prosecute or defend on behalf of the city, all complaints, suits, and controversies in which the city is a party, and such other suits, matters, and controversies as he is, by resolution or ordinance, directed to prosecute.

R.C. 733.53; *see also* R.C. 705.11; Chapter 15, § 85 Charter of the City of Cleveland. A city director of law also is required to provide legal opinions to the city's officers. R.C. 733.54; *see also* Chapter 15, § 86 Charter of the City of Cleveland.

County prosecuting attorneys, city directors of law, and their assistants thus have an attorney-client relationship with their political subdivisions. Also, should an attorney in private practice be retained by a political subdivision, the attorney-client relationship would exist in that situation as well. During this relationship, the aforementioned public officials and private attorneys are responsible for providing legal advice and opinions to the political subdivisions and advocating on behalf of the political subdivisions in adversarial proceedings.

Because the role of the director of law under Article V, § 5.06 of the Charter is similar to that performed by county prosecuting attorneys, city directors of law, and their assistants, Article V, § 5.06 of the Charter contemplates the establishment of an attorney-client relationship between the director of

law and the County Executive and County Council. And, in order to facilitate that relationship, Article V, § 5.06 of the Charter mandates prior experience participating in an attorney-client relationship with a political subdivision. This requirement may help ensure that an applicant for the position of director of law will have the necessary experience to provide legal advice and opinions to the County Executive and County Council and advocate on behalf of the County Executive and County Council in adversarial proceedings.

A review of the general duties of the chief magistrate of the Cleveland Municipal Court indicates that the duties of the chief magistrate do not entail participation in an attorney-client relationship that involves providing legal advice and opinions to a client and advocating on behalf of a client in adversarial proceedings. Instead, pursuant to Ohio R. Civ. P. 53, the authority of the chief magistrate of the Cleveland Municipal Court involves the exercise of judicial powers in hearing and rendering decisions upon the law and the facts in cases assigned to him by the court. In this regard, Ohio R. Civ. P. 53 provides:

> (C) **Authority.**
>
> (1) **Scope.** To assist courts of record and pursuant to reference under Civ. R. 53(D)(1), magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:
>
> (a) Determine any motion in any case;
>
> (b) Conduct the trial of any case that will not be tried to a jury;
>
> (c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury;
>
> (d) Conduct proceedings upon application for the issuance of a temporary protection order as authorized by law;
>
> (e) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.
>
> ….
>
> (D) **Proceedings in Matters Referred to Magistrates.**
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> ….
>
> (2) **Magistrate's order; motion to set aside magistrate's order.**
>
> (a) **Magistrate's order.**
>
> (i) **Nature of order.** Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.
>
> ….
>
> (4) **Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.**
>
> ….
>
> (b) **Action on magistrate's decision.** Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

See Ohio Sup. R. 19.1(A).

It is apparent from the language of Ohio R. Civ. P. 53 that the chief magistrate of the Cleveland Municipal Court does not perform his duties in the manner of a lawyer working for a client. Neither the Cleveland Municipal Court nor the City of Cleveland is a client of the chief magistrate. Instead, the chief magistrate exercises sovereign powers vested in the judicial branch of government; he is to act as a neutral authority not representing any particular side in the proceedings that come before him (including any matters involving the City of Cleveland). Because the chief magistrate does not perform his duties for a client, he does not engage in an attorney-client relationship in the performance of his duties. Thus, the chief magistrate does not fulfill the requirement of Article V, § 5.06 of the Charter that the position of director of law be filled by a person who has had prior experience participating in an attorney-client relationship with a political subdivision.

Also, the statutory duties and responsibilities of the chief magistrate of the Cleveland Municipal Court do not include (1) providing legal advice and opinions to the court or the City of Cleveland or (2) advocating on behalf of the court or the City of Cleveland in adversarial proceedings. These duties are instead performed by the Cleveland director of law and his assistants. Chapter 15, § 85 Charter of the City of Cleveland; *see also* 1992 Op. Att'y Gen. No. 92-070 at 2-295 ("the judges and clerk of the Licking County Municipal Court are not 'county officers' for purposes of R.C. 309.09(A), and therefore the responsibility to provide legal representation to the judges and clerk in their official capacity does not rest with the prosecuting attorney. It is, rather, the responsibility of the law director of the City of Newark"); 1970 Op. Att'y Gen. No. 70-029 (syllabus) ("[t]he city solicitor has a duty to represent the judge and clerk of a municipal court in a suit arising out of acts done in their official capacity").

Finally, it is significant to note that Ohio Jud. Cond. R. 3.10 states that "[a] judge shall not practice law. A judge may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a *member of the judge's family*, but is prohibited from serving as the family member's lawyer in any forum." Pursuant to the application section of the Ohio Code of Judicial Conduct, the prohibition of Ohio Jud. Cond. R. 3.10 is made applicable to full-time magistrates. Ohio Jud. Cond. R. 3.10 thus indicates further that the chief magistrate of the Cleveland Municipal Court does not serve in an attorney-client relationship with the court that involves (1) providing legal advice and opinions to the court or the City of Cleveland or (2) advocating on behalf of the court or the City of Cleveland in adversarial proceedings.

Accordingly, for the foregoing reasons, the duties of the chief magistrate of the Cleveland Municipal Court do not include advising or representing the court or the City of Cleveland, and, as such, the chief magistrate does not advise or represent a political subdivision for purposes of Article V, § 5.06 of the Charter.

Conclusions

In sum, it is my opinion, and you are hereby advised as follows:

1. Insofar as the chief magistrate of the Cleveland Municipal Court performs services for, and is compensated by, the City of Cleveland, the chief magistrate is in the service of a political subdivision for purposes of Article V, § 5.06 of the Cuyahoga County Charter.

2. The chief magistrate of the Cleveland Municipal Court does not advise or represent a political subdivision for purposes of Article V, § 5.06 of the Cuyahoga County Charter.

Respectfully,

MICHAEL DEWINE
Ohio Attorney General