May 29, 1996

OPINION NO. 96-031

The Honorable Paul W. Cox, Jr.
Pike County Prosecuting Attorney
108 North Market Street
Waverly, Ohio 45690

Dear Prosecutor Cox:

I am in receipt of your letter asking whether the positions of judge of the court of common pleas and judge of the probate division of the court of common pleas in the same county are compatible. The specific issue that you ask me to consider in this regard is whether the constitutional and statutory prohibitions against judges holding "any other office" apply only to nonjudicial offices.

Ohio Const. art. IV, § 6(B) states: "Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States." The term "judges," in this context, includes judges of the courts of common pleas and divisions thereof. *See also* 1973 Op. Att'y Gen. No. 73-081. R.C. 141.04(D) states: "Neither the chief justice of the supreme court nor any justice or judge of...the court of common pleas, or the probate court[1] shall hold any other office of trust or profit under the authority of this state or the United States." (Footnote added.)

It is my understanding, based upon information provided with your request, that in accord with the basic judicial structure established by Ohio Const. art. IV, § 4, the General Assembly has provided that your county shall have one judge of the court of common pleas and one judge of the probate division of the court of common pleas. R.C. 2101.01-.02; R.C. 2301.01-.02(A). These two judicial positions have not been combined in your county, as is permissible pursuant to Ohio Const. art IV, § 23. *See also* R.C. 2301.02 (specifying the seven counties in which the common pleas and probate judgeships have been combined). In the absence of such combination, judges must be elected specifically to the division of the court of common pleas on which they sit. Ohio Const. art

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[1] The term "probate court," as used in the Revised Code, means the probate division of the court of common pleas. R.C. 2101.01.

IV, § 4(C); R.C. 2101.02; R.C. 2301.02. Thus, the judicial positions described in your request are two separate and distinct offices of trust or profit under the authority of this state.

Existing authority does not expressly address whether the prohibition against holding "any other office" should be construed as including or excluding other judicial offices. A brief review, however, indicates that the prohibition has long been understood to include other judicial offices. In *State ex rel. Hogan v. Hunt*, 84 Ohio St. 143, 95 N.E. 666 (1911), the court was faced with the issue of whether, for purpose of a quo warranto action, the statutorily created position of supervising judge of a court of common pleas was a separate and distinct office from that of judge of the court of common pleas. In holding that it was not, the court reasoned that if the position of supervising judge constituted a separate office, the common pleas judge would be prohibited by the constitution from holding it. *Id.* at 153, 95 N.E. at 669. In another early case, which involved a compensation issue rather than compatibiltiy, a lower court noted that because the constitutional prohibition at that time did not apply to probate judges, a judge of the probate court could serve simultaneously on another court in the absence of any conflict in duties or jurisdiction. *Derhammer v. Board of County Comm'rs*, 38 Ohio Op. 439, 442, 83 N.E.2d 400, 405 (C.P. Medina County 1948) (citing 1851 Ohio Const. art. IV, § 14).[2] More recently, in 1986 Op. Att'y Gen. No. 86-002, one of my predecessors concluded that the current constitutional provision prohibits a judge of the court of common pleas from also serving as an acting judge of a municipal court. The fact that both positions are judicial offices was simply not a factor in the analysis. The conclusion was based solely on the determination that the position of acting municipal judge constitutes an office of trust or profit under state law. I note further that the word "any" generally connotes "all," and precludes adding implied limitations. *See, e.g., Wachendorf v. Shaver*, 149 Ohio St. 231, 239-40, 78 N.E.2d 370, 375 (1948). Based on these authorities, it appears that the constitutional and statutory prohibitions against a judge holding "any other office" applies to all state and federal positions of trust or profit, regardless of whether they are judicial or nonjudicial.

This conclusion is also compelled by consideration of the other provisions of the Ohio Constitution governing judges. A judge of one division of a court of common pleas cannot be assigned to sit or hold court in another division of that same court except as provided in Ohio Const. art. IV, § 5(A)(3) and the provisions of law enacted pursuant thereto. *See, e.g.*, R.C. 2101.37; C.P. Sup. R. 2.[3] *See generally Schucker v. Metcalf*, 22 Ohio St. 3d 33, 36-37, 488 N.E.2d 210, 213-14

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[2] The constitutional prohibition against holding another office at that time applied only to judges of the supreme court and the courts of common pleas. Until 1970, the probate court was established as an independent constitutional court. It was reorganized as a division of the court of common pleas under the Modern Courts Amendment to the Ohio Constitution. *See* 1967-1968 Ohio Laws, Part II, 2878 and Part III, 2966 (Am. Sub. H.J.R. 42, eff. Jan. 10, 1970).

[3] Pursuant to Ohio Const. art. IV, § 5(A)(3) and C.P. Sup. R. 2, the chief justice of the supreme court or the presiding judge of a multi-judge court of common pleas are authorized to make transfers between divisions of a common pleas court. Under R.C. 2101.37, the probate judge may request a judge of the court of common pleas in the same county to assist in the probate court or act in the probate judge's absence, or the probate judge may ask the chief justice of the supreme court to

(1986). Such authorized assignments are simply an addition of duties to the originally held judicial position and thus do not violate the prohibition against holding another office. *See generally State ex rel. Stanton v. Powell*, 109 Ohio St. 383, 142 N.E. 401 (1924); *State ex rel. Hogan*, 84 Ohio St. at 152, 95 N.E. at 668-69; 1986 Op. Att'y Gen. No. 86-002 at 2-7. Additionally, Ohio Const. art. IV, § 23 expressly provides that laws may be passed allowing the electors of a county to vote on whether in that county "the same person shall serve as judge of the court of common pleas, judge of the probate court, judge of the juvenile court, judge of the municipal court, and judge of the county court, or of two or more of such courts." It is implicit both in this provision and in the limitation on assignments in Ohio Const. art. IV, § 5 that the Ohio Constitution does not contemplate that the same person shall serve simultaneously in more than one judicial capacity except as expressly provided by law. Accordingly, I find no basis for implying that the prohibition against holding "any other office" in either Ohio Const. art. IV, § 6(B) or R.C. 141.04(D) applies only to nonjudicial offices.

It is, therefore, my opinion, and you are hereby advised that Ohio Const. art. IV, § 6(B) and R.C. 141.04(D) prohibit the same person from simultaneously serving in the positions of judge of the court of common pleas under R.C. 2301.01-.02 and judge of the probate division of the court of common pleas under R.C. 2101.02-.021, except in circumstances authorized under the provisions of Ohio Const. art. IV, §§ 5(A)(3) and 23.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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designate a common pleas or probate judge from any county to so serve.

May 29, 1996

The Honorable Paul W. Cox, Jr.
Pike County Prosecuting Attorney
108 North Market Street
Waverly, Ohio 45690

SYLLABUS: 96-031

Ohio Const. art. IV, § 6(B) and R.C. 141.04(D) prohibit the same person from simultaneously serving in the positions of judge of the court of common pleas under R.C. 2301.01-.02 and judge of the probate division of the court of common pleas under R.C. 2101.02-.021, except in circumstances authorized under the provisions of Ohio Const. art. IV, §§ 5(A)(3) and 23.