

OPINION NO. 96-024**Syllabus:**

An acting judge of a county court, appointed pursuant to R.C. 1907.14, is prohibited by the provisions of Ohio Const. art. IV, § 6 and R.C. 1907.16(B) from holding the position of magistrate of a court of common pleas, appointed pursuant to Ohio R. Civ. P. 53.

To: Greg Carroll, Adams County Prosecuting Attorney, West Union, Ohio

By: Betty D. Montgomery, Attorney General, April 16, 1996

I am in receipt of your letter dated March 27, 1996 asking whether the position of acting judge of a county court is compatible with that of magistrate of a county court of common pleas.

A judge of a county court is prohibited by constitution and statute from holding "any other position of profit or trust under the authority of this state." Ohio Const. art IV, § 6; R.C. 1907.16(B); *see also* 1991 Op. Att'y Gen. No. 91-010 at 2-51 to 2-52; 1973 Op. Att'y Gen. No. 73-081; 1969 Op. Att'y Gen. No. 69-131 at 2-286. An acting judge of the county court, who is appointed "to serve in the absence or incapacity of the incumbent," is vested by such appointment with "the jurisdiction and powers conferred upon the judge of the county court." R.C. 1907.14. Based on a similar identity of jurisdiction and powers, my predecessors have concluded that the prohibition of Ohio Const. art. IV applies equally to both acting and sitting municipal judges. *See* 1990 Op. Att'y Gen. No. 90-089 at 2-380 to 2-381; 1973 Op. Att'y Gen. No. 73-082 at 2-311. Additionally, I am aware of an instance in which a DUI conviction was overturned on the grounds that the acting municipal judge was constitutionally disqualified because he also held the office of assistant county prosecuting attorney. *City of Bowling Green v. Herroon*, C.A. WD-76-27 (Ct. App. Wood County May 27, 1977) (unreported) (citing Op. No. 73-082). I find no basis for distinguishing between an acting judge of a county court and an acting judge of a municipal court with respect to this issue. Accordingly, an acting judge of a county court is prohibited by the provisions of Ohio Const. art. IV, § 6 and R.C. 1907.16(B) from holding "any other position of trust or profit under the authority of this state."

A magistrate of a court of common pleas is appointed pursuant to Ohio R. Civ. P. 53. I note that prior to the amendment of Ohio R. Civ. P. 53 in 1995, the position of "magistrate" was titled "referee." A magistrate exercises various judicial powers and duties, including the power to issue subpoenas, rule on the admissibility of evidence, and enter pretrial and contempt orders. *Id.* A magistrate is compensated as determined by the appointing court. *Id.* It is

apparent from the current provisions of Ohio R. Civ. P. 53 and from interpretations of the prior law pertaining to referees, that the position of magistrate is, for purposes of Ohio Const. art. IV, § 6, an office of trust or profit under the authority of the state. *See e.g.*, Op. No. 90-089 (concluding that an individual may not serve simultaneously as acting judge and referee of a municipal court); Op. No. 69-131 (concluding that a judge of a county court may not serve simultaneously as a referee in either the probate or domestic relations division of a court of common pleas).

It is, therefore, my opinion, and you are hereby advised that an acting judge of a county court, appointed pursuant to R.C. 1907.14, is prohibited by the provisions of Ohio Const. art. IV, § 6 and R.C. 1907.16(B) from holding the position of magistrate of a court of common pleas, appointed pursuant to Ohio R. Civ. P. 53.