

**OPINION NO. 86-002****Syllabus:**

1. Pursuant to R.C. 1901.10 and R.C. 1901.12, when a municipal court has only one judge, that judge may appoint a substitute to serve as acting judge while the municipal court judge is on vacation or otherwise temporarily absent or incapacitated. The acting judge must have the qualifications set forth in R.C. 1901.06 and is entitled to be paid in the same manner and at the same rate as the incumbent judge.
2. Pursuant to R.C. 141.04 and R.C. 1901.11, a common pleas judge may not serve as acting judge of a municipal court under R.C. 1901.10 or R.C. 1901.12.
3. No provision is made under Ohio law for the judge of a municipal court with county-wide jurisdiction to appoint a common pleas judge, at no additional expense to the county, to hear municipal court cases while the municipal court judge is on vacation or otherwise unavailable.

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**To: Mark A. Ochsenbein, Jackson County Prosecuting Attorney, Jackson, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, January 9, 1986**

You have requested an opinion on the following questions:

Does a County Municipal Judge have the authority to appoint a Common Pleas Judge to hear cases in the Municipal Court in his absence?

If so, would the Common Pleas Judge be immune from civil liability for all cases heard and decided by him in the Municipal Court?

Your letter of request indicates that there are currently three judges within Jackson County: (1) a judge of the Common Pleas Court, General Division, see R.C. 2301.02(A); (2) a judge of the Common Pleas Court, Probate/Juvenile Division, see R.C. 2101.02; R.C. 2151.07; R.C. 2301.02; and (3) a part-time judge of the Jackson County Municipal Court, see R.C. 1901.08(A), which has county-wide jurisdiction, see R.C. 1901.02. You have informed me that the county commissioners have raised the question whether the common pleas judge may hear cases for the municipal judge, at no additional charge to the county, when the municipal judge is unavailable or on vacation. Since a

judge of the probate division of the court of common pleas is a judge of the court of common pleas, see R.C. 2301.02; see also R.C. 2151.07, I shall, for purposes of this opinion, refer to both the judge of the Jackson County Common Pleas Court, General Division, and the judge of the Jackson County Common Pleas Court, Probate/Juvenile Division, as common pleas judges.

In considering your first question, I note that the Jackson County Municipal Court was established by the General Assembly pursuant to Ohio Const. art. IV, §1. See R.C. 1901.01, 1901.02. See generally State ex rel. Ramey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1929). Pursuant to Ohio Const. art. IV, §18, "[t]he several judges...of such...courts as may be created, shall...have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law."

The General Assembly has made express provision for the manner in which a substitute is to be provided for the judge of a municipal court which has only one judge. R.C. 1901.10 states, in relevant part:

When a judge of a municipal court having only one judge is temporarily absent or incapacitated, the judge may appoint a substitute who has the qualifications required by section 1901.06 of the Revised Code, and if such judge is unable to make the appointment the chief executive shall appoint a substitute. Such appointee shall serve during the absence or incapacity of the incumbent, shall have the jurisdiction and powers conferred upon the judge of the municipal court, and shall be styled "acting judge." He shall sign all process and records during the time he is serving, and shall perform all acts pertaining to the office, except that of removal and appointment of officers of the court. All courts shall take judicial notice of the selection and powers of the acting judge, who shall be paid in the same manner and at the same rate as the incumbent judge. (Emphasis added.)

R.C. 1901.12 contains a similar provision relating specifically to the appointment of a substitute to serve when the judge is on vacation. It states, in part: "When a [municipal] court consists of a single judge, a qualified substitute may be appointed in accordance with [R.C. 1901.10] to serve during the thirty day vacation period, who shall be paid in the same manner and at the same rate as the incumbent judge."

Pursuant to R.C. 1901.10 and R.C. 1901.12, when a municipal court has only one judge, that judge may appoint a substitute to serve while he is on vacation or otherwise temporarily absent or incapacitated. The substitute must have the qualifications required by R.C. 1901.06--that is, he must be a qualified elector and a resident of the territory of the court, he must have been admitted to the practice of law in Ohio, and he must have had the necessary legal or judicial experience. The substitute will be known as the acting judge. R.C. 1901.10 and R.C. 1901.12 both expressly provide that the acting judge "shall be paid in the same manner and at the same rate as the incumbent judge."

The fact that R.C. 1901.10 permits the appointment of any substitute who meets the qualifications set forth in R.C. 1901.06 makes it clear that R.C. 1901.10 does not impose the

duty to hear municipal court cases upon the common pleas judge, in his capacity as such judge. Rather, R.C. 1901.10 contemplates the appointment of an individual to a distinct position known as "acting judge." Under Ohio law, a common pleas judge is not eligible to serve in that position.

R.C. 141.04 states: "Neither the chief justice of the supreme court nor any judge of...the court of common pleas, or the probate court shall hold any other office of trust or profit under the authority of this state or the United States." See also Ohio Const. art. IV, §6(B) ("[j]udges 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");<sup>1</sup> 1969 Op. Att'y Gen. No. 69-131 (approved and followed in 1973 Op. Att'y Gen. No. 73-081, which was, in turn, approved and followed in 1973 Op. Att'y Gen. No. 73-082). The position of acting judge of a municipal court is an office of trust under the authority of this state.<sup>2</sup> See State ex rel. Sowell v. Lovinger, 6 Ohio St. 3d 21, 450 N.E.2d 1176 (1983) (recognizing that R.C. 1901.10 creates the office of acting judge); 1965 Op. Att'y Gen. No. 65-061 (finding that the office of municipal judge is a public position of trust, and that such conclusion applies also to the temporary position of a substitute who serves during the judge's vacation). See generally State ex rel. Bricker v. Gessner, 129 Ohio St. 290, 195 N.E. 63 (1935) (holding that membership on a county charter commission is a public office of trust and that a common pleas judge may not hold such position). Therefore, a common pleas judge may not serve as acting judge of a municipal court.

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<sup>1</sup> Ohio Const. art. IV, §23 expressly authorizes legislation which would, in certain circumstances, permit an individual to serve as judge of both a common pleas court and a municipal court. It states, in part:

Laws may be passed to provide that in any county having less than forty thousand population, as determined by the next preceding federal census, the board of county commissioners of such county, by a unanimous vote or ten per cent of the number of electors of such county voting for governor at the next preceding election, by petition, may submit to the electors of such county the question of providing that in such 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. If a majority of the electors of such county vote in favor of such proposition, one person shall thereafter be elected to serve in such capacities, but this shall not affect the right of any judge then in office from continuing in office until the end of the term for which he was elected. (Emphasis added.)

This provision is, however, not applicable to the situation with which you are concerned.

<sup>2</sup> The position of acting judge of a municipal court is also an office of profit. See R.C. 1901.10; R.C. 1901.12; 1965 Op. Att'y Gen. No. 65-061. An individual serving as

Further, R.C. 1901.11, which provides that "[n]o municipal judge shall hold any other office of trust or profit under the authority of this state or the United States," would prohibit any individual acting as municipal court judge from holding the position of common pleas judge. See generally Op. No. 73-082. Thus, because of the prohibitions contained in P.C. 141.04 and R.C. 1901.11, a common pleas judge may not be appointed under R.C. 1901.10 or R.C. 1901.12 to serve as acting judge of a municipal court.

There are various provisions of Ohio law which permit the judge of one court, in his capacity as such judge, to hear cases for another tribunal. Where such duties are assigned to a judge by law, they simply constitute additional duties of the judge, and do not come within the prohibitions of R.C. 141.04 or R.C. 1901.11. See generally, e.g., State ex rel. Hoqan v. Hunt, 84 Ohio St. 143, 95 N.E. 666 (1911); Derhammer v. Board of County Commissioners, 38 Ohio Op. 439, 83 N.E.2d 400 (C.P. Medina County 1948) (decided prior to adoption of existing Ohio Const. art. IV, §6(B), see generally Op. No. 69-131; discussing statute which created, within the probate court, a juvenile court, presided over by the probate judge, and holding that the probate judge could serve in, and be compensated for, both judicial offices). None of these provisions, however, authorizes a municipal court judge to appoint a common pleas judge to hear municipal court cases while the municipal court judge is unavailable.

Ohio Const. art. IV, §5(A)(3) provides that "[r]ules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law." R. Sup. Munic. Ct. 14 provides for the assignment and transfer of judges to emergency judicial duties during time of riot, civil disorder, or disaster. Such assignments are, however, to be made only by the Chief Justice or the acting Chief Justice of the Ohio Supreme Court.

Ohio Const. art. IV, §6(C) provides that a retired judge may be assigned, with his consent, by the Chief Justice or acting Chief Justice of the Supreme Court to active duty as a judge, and that he shall receive the established compensation for the office on a per diem basis, in addition to his retirement benefits. R. Sup. Munic. Ct. 13(A) authorizes the assignment of a retired full-time municipal court judge who is not engaged in the practice of law to active duty as a judge on any municipal, county, or police court. The assignment is to be made by the Chief Justice or acting Chief Justice of the Supreme Court, and the retired judge is to be compensated for the time spent in such service.

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acting judge of a municipal court under R.C. 1901.10 or R.C. 1901.12 is entitled to be paid "in the same manner and at the same rate as the incumbent judge." See generally 1973 Op. Att'y Gen. No. 73-083. Thus, if a municipal court judge were to appoint a substitute under this provision, the substitute would be entitled to be compensated for his services, and the county would not satisfy its goal of obtaining additional judicial services without incurring additional expenses. I note, however, that R.C. 141.13 prohibits a common pleas judge from receiving any fees or remuneration in addition to the compensation to which he is entitled as common pleas judge under R.C. 141.01-.12.

R.C. 1901.10 provides that, if the volume of cases pending in a municipal court necessitates an additional judge, the Chief Justice of the Supreme Court may, upon request, "designate a judge of another municipal court to serve for such period of time as he may prescribe." Such judge shall be paid for his original position and, in addition, shall receive per diem compensation for holding court outside his territory, together with his actual and necessary expenses. If no municipal judge is available to serve by designation, the judges of the municipal court may appoint a substitute, as provided in R.C. 1901.10, to be paid in the same manner and at the same rate as the incumbent judges. See generally 1964 Op. Att'y Gen. No. 1017, p. 2-183. As discussed above, under R.C. 141.04 and R.C. 1901.11, a common pleas judge may not serve as such a substitute.

R.C. 2937.20 sets forth the procedure to be followed when an affidavit is filed stating that a magistrate or judge of a court inferior to a court of common pleas is disqualified from sitting in a cause pending before him. R.C. 2937.20 provides that the matter is to be brought before "the presiding judge, or the chief justice of the court of common pleas, or if there is no such officer, then a judge of the court of common pleas or if such judge is not available then a judge of the probate court of such county," who is to examine the affidavit and, if he finds that disqualification exists, is to designate another magistrate or another judge of the inferior court, or the court of common pleas, to hear and determine the cause. Thus, if the municipal court judge about whom you have inquired should be disqualified for reasons of interest, relationship, bias, or prejudice from hearing and determining a particular matter, a judge of the court of common pleas could be designated to sit in the case. In such a situation, however, the designation would be made by a judge of the court of common pleas, rather than by the municipal court judge, and would relate only to the case specified. See generally City of Columbus v. Bonner, 2 Ohio App. 3d 34, 440 N.E.2d 606 (Franklin County 1981).

It is evident from the provisions discussed above that Ohio law contains a comprehensive scheme for determining when a person other than a municipal court judge is to hear and decide cases in a municipal court. No provision is made for the judge of a municipal court with county-wide jurisdiction to appoint a common pleas judge, at no additional expense to the county, to hear municipal court cases while the municipal court judge is on vacation or otherwise unavailable. I conclude, therefore, that a municipal court judge does not have the authority to make such an appointment.

In light of my response to your first question, it is unnecessary for me to address your second question.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. Pursuant to R.C. 1901.10 and R.C. 1901.12, when a municipal court has only one judge, that judge may appoint a substitute to serve as acting judge while the municipal court judge is on vacation or otherwise temporarily absent or incapacitated. The acting judge must have the qualifications set forth in R.C. 1901.06 and is entitled to be paid in the same manner and at the same rate as the incumbent judge.

2. Pursuant to R.C. 141.04 and R.C. 1901.11, a common pleas judge may not serve as acting judge of a municipal court under R.C. 1901.10 or R.C. 1901.12.
3. No provision is made under Ohio law for the judge of a municipal court with county-wide jurisdiction to appoint a common pleas judge, at no additional expense to the county, to hear municipal court cases while the municipal court judge is on vacation or otherwise unavailable.