

OPINION NO. 92-070**Syllabus:**

1. The judges and clerk of the Licking County Municipal Court are not "county officers" for purposes of R.C. 309.09(A).
2. The judges and clerk of the Licking County Municipal Court are not "employees" of Licking County for purposes of R.C. 2744.07(A)(1).

To: Robert L. Becker, Licking County Prosecuting Attorney, Newark, Ohio
By: Lee Fisher, Attorney General, December 29, 1992

You have requested an opinion regarding the status of the judges and clerk of the Licking County Municipal Court for purposes of R.C. 309.09 and R.C. 2744.07(A)(1). Your specific questions are as follows:

1. In light of [1990 Op. Att'y Gen. No. 90-092], what is the County Prosecutor's obligation toward the Municipal Court Judges and Clerk pursuant to R.C. 309.09[?]
2. In light of [1990 Op. Att'y Gen. No. 90-092], what is the obligation of the County toward the Municipal Court Judges and Clerk pursuant to R.C. 2744.07(A)(1)[?]

1990 Op. Att'y Gen. No. 90-092 considered, *inter alia*, whether the board of county commissioners of Licking County had the authority to provide health insurance benefits for the judges and clerk of the Licking County Municipal Court. Noting the absence of any statute specifically authorizing the payment of health insurance benefits for judges by the board of county commissioners, Op. No. 90-092 indicated that any authority on the part of the board of county commissioners in that regard would be governed by R.C. 305.171(A), which grants the board the authority to procure various health care insurance benefits "for county officers and employees and their immediate dependents from the funds or budgets from which the officers or employees are compensated for services." (Emphasis added.) Relying upon the statement in *State ex rel. Higley v. Shale*, 137 Ohio St. 311, 313, 29 N.E.2d 214, 215 (1940) that "a municipal judge is neither a state nor county officer" for purposes of the constitutional requirement that elections for state and county officers be held in even numbered years, *see* Ohio Const. art. XVII, §1, Op. No. 90-092 concluded that the judges and, by analogy, the clerk of a municipal court, are not "county officers" for purposes of R.C. 305.171(A), *id.* at 2-395 and 2-396. Op. No. 90-092, thus, advised that the board of county commissioners of Licking County was not authorized to provide health insurance benefits for the judges or clerk of the Licking County Municipal Court.¹

The Authority of a Prosecuting Attorney to Provide Legal Advice to County Officers

The issue presented by your first question is whether the judges and clerk of the Licking County Municipal Court are "county officers" for purposes of R.C. 309.09. R.C. 309.09 addresses the duty of the prosecuting attorney to serve as legal adviser to various governmental officers and boards at the county level. R.C. 309.09(A) states as follows:

The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections and all other county officers and boards, including all tax-supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code. (Emphasis added.)

Thus, whether the prosecuting attorney is required by R.C. 309.09(A) to provide legal advice and representation to the judges and clerk of the Licking County Municipal Court depends upon whether the judges and clerk are "county officers." Resolution of that question, in turn, requires a consideration of the statutory scheme enacted by

¹ The recent amendment of R.C. 305.171 and enactment of R.C. 1901.111 and R.C. 1901.312 in Am. Sub. S.B. 175, 119th Gen. A. (1992) (eff. May 6, 1992) furnish express authorization, however, for the appropriate legislative authority of a municipal court to provide health insurance coverage for municipal court judges, clerks, and deputy clerks.

the General Assembly in R.C. Chapter 1901 for the establishment, organization, and operation of the Licking County Municipal Court,² and statements and determinations in decisions of Ohio courts and prior Attorney General opinions regarding the status of municipal court judges and clerks as either state, county, or municipal officers for purposes of other constitutional or statutory provisions.

The Licking County Municipal Court

R.C. 1901.01 establishes a municipal court in Newark, and R.C. 1901.02(A)(7) provides that the municipal court thus established "shall be styled and known as the 'Licking county municipal court.'" In addition to exercising jurisdiction throughout Newark, *see* R.C. 1901.02(A), R.C. 1901.02(B) provides that the Licking County Municipal Court "has jurisdiction within Licking County." However, the General Assembly has not designated the Licking County Municipal Court a county-operated municipal court. *Cf.* R.C. 1901.03(F) (as used in R.C. Chapter 1901, "[c]ounty-operated municipal court" means "the Auglaize county, Clermont county, Crawford county, Hamilton county, Hocking county, Jackson county, Lawrence county, Madison county, Miami county, Portage county, or Wayne county municipal court").

R.C. 1901.026(A) provides that the current operating costs of a municipal court that is other than county-operated, and that has territorial jurisdiction that extends beyond the corporate limits of the municipal corporation in which the court is located, shall be apportioned "among all of the municipal corporations and townships that are within the territory of the court"; each such municipal corporation and township shall be assigned "a proportionate share of the operating costs of the municipal court that is equal to the percentage of the total criminal and civil caseload of the municipal court that arose in that municipal corporation or township"; and each such municipal corporation or township shall be liable for "its assigned proportionate share of the current operating costs of the court, subject to [R.C. 1901.026(B)]."³ For purposes of R.C. 1901.026, "[t]ownship" means "a

² 1990 Op. Att'y Gen. No. 90-110, issued shortly after 1990 Op. Att'y Gen. No. 90-092, reviewed the structure and nature of the municipal court system thus established by the provisions of R.C. Chapter 1901 in the course of addressing several questions concerning the availability of vacation, holiday, and sick leave benefits for municipal court judges and municipal court employees. Op. No. 90-110 noted that R.C. Chapter 1901 creates a statewide municipal court system and makes certain features common to all those courts, yet significant differences do exist among the individual municipal courts such that those courts, as a general matter, "are not susceptible of uniform identification as entities of the state or one of its political subdivisions," *id.* at 2-489. Accordingly, in addressing your questions, it is appropriate to focus principally upon those provisions of R.C. Chapter 1901 particularly applicable to the Licking County Municipal Court, and the judges and clerk of that court.

³ R.C. 1901.026(B) reads as follows:

A municipal corporation or township within the territory of a municipal court is not required to pay that part of its proportionate share of the current operating costs of the court, as determined in accordance with division (A) of this section, that exceeds the total amount of costs, fees, fines, bail, or other moneys that was disbursed by the clerk of the court under division (F) of section 1901.31 of the Revised Code, to the municipal corporation or township during the period for which its proportionate share of the operating costs was determined. The

township that has adopted the limited self-government form of government pursuant to [R.C. Chapter 504]." R.C. 1901.026(D)(2). See R.C. 1901.026(D)(1) (defining "operating costs" for purposes of R.C. 1901.026). Thus, current operating costs of the Licking County Municipal Court are apportioned among and paid by the municipal corporations within its territory, and those townships within its territory that, pursuant to R.C. Chapter 504, have adopted a limited self-government form of government.

R.C. 1901.06-.121 address variously the qualifications, election, terms of office, and compensation of all municipal court judges. R.C. 1901.08 provides that in the Licking County Municipal Court, "one full-time judge shall be elected in 1951, and one full-time judge shall be elected in 1971." R.C. 1901.07(A) states, in part, that, "[a]ll municipal court judges shall be elected on the nonpartisan ballot for terms of six years," and R.C. 1901.07(B) sets forth the several ways in which candidates for the office of municipal court judge may be nominated. Finally, the law provides that the candidacies of the judges thus nominated shall be submitted to the electors of the territory on a nonpartisan, judicial ballot in the same manner as provided for judges of the court of common pleas, except that, in a municipal corporation operating under a charter, all candidates for municipal judge shall be elected in conformity with the charter if provisions are made in the charter for the election of municipal judges. *Id.* The City of Newark has not adopted a charter; thus, the judges of the Licking County Municipal Court are elected by the electors of Licking County, which comprises that court's territory. R.C. 1901.03(A) (as used in R.C. Chapter 1901, "[t]erritory" means "the geographical areas within which municipal courts have jurisdiction as provided in [R.C. 1901.01] and [R.C. 1901.02]").

R.C. 1901.11 sets the amount of compensation municipal court judges receive, R.C. 1901.11(A), (B), and specifies the percentages of that compensation to be paid by local political subdivisions, R.C. 1901.11(C). In the case of a municipal court that is other than county-operated, R.C. 1901.11(C) states that the municipal judges' compensation "shall be paid in semimonthly installments, 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." Accordingly, in the proportions thus stated, the compensation of the judges of the Licking County Municipal Court is paid from the treasury of the City of Newark and the treasury of Licking County.⁴

R.C. 1901.31 governs the selection, compensation, and powers and duties of municipal court clerks and deputy clerks. R.C. 1901.31(A)(1)(a) states, in pertinent part, that if the population of the municipal court's territory

equals or exceeds one hundred thousand at the regular municipal election next preceding the expiration of the term of the present clerk, the clerk shall be nominated and elected by the qualified electors of the territory in the manner that is provided for the nomination and election of judges in [R.C. 1901.07].

municipal corporation in which the court is located is liable, in addition to its proportionate share, for any part of the proportionate share of a municipal corporation or township that the municipal corporation or township is not required to pay under this division.

⁴ Pursuant to R.C. 1901.11(B)(1)(b), the judges of the Licking County Municipal Court also receive, in accordance with R.C. 141.04(B), the compensation described in R.C. 141.04(A)(5), which is payable from the state treasury. See generally 1988 Op. Att'y Gen. No. 88-014.

Thus, the clerk of the Licking County Municipal Court is elected by the qualified electors of Licking County.

R.C. 1901.31(C) sets forth the amount of compensation to be received by a municipal court clerk. As pertains here, R.C. 1901.31(C) provides that in a municipal court for which the population of the territory is one hundred thousand or more, the clerk of the municipal court "shall receive annual compensation in a sum equal to eighty-five per cent of the salary of a judge of the court," which is "payable in semimonthly installments from the same sources and in the same manner as provided in [R.C. 1901.11]." *See generally* 1988 Op. Att'y Gen. No. 88-014. Thus, in accordance with R.C. 1901.11, the compensation of the clerk of the Licking County Municipal Court is paid from the treasury of the City of Newark and the treasury of Licking County, in the proportions therein stated.

The Judges and Clerk of the Licking County Municipal Court Are Not "County Officers" for Purposes of R.C. 309.09(A)

A. The Statutory Scheme

The statutory scheme set forth in R.C. Chapter 1901 may be amenable to different conclusions regarding the status of the judges and clerk of the Licking County Municipal Court for purposes of R.C. 309.09(A). Several provisions indicate that the judges and clerk could be characterized as "county officers." *See* R.C. 1901.02(B) (conferring county-wide jurisdiction upon the Licking County Municipal Court); R.C. 1901.07(B) (providing for the election of the judges of the court by the electors of Licking County); R.C. 1901.31(A)(1)(a) (providing for the election of the clerk of the court by the electors of Licking County). On the other hand, other provisions suggest a different conclusion on that point, insofar as those provisions confer a significant measure of responsibility for particular aspects of the court's operations on local subdivisions other than just the county and its legislative authority. *See* R.C. 1901.026(A) (current operating costs of the Licking County Municipal Court are to be apportioned among and paid by the municipal corporations within the county, and those townships within the county that have adopted a limited self-government form of government); R.C. 1901.11(C) (providing for the payment of the judges' compensation from the treasury of the City of Newark and the treasury of Licking County, and the larger percentage thereof being apportioned to the city); R.C. 1901.31(C) (providing the same with respect to the clerk's compensation). *See also* R.C. 1901.03(F) (omitting the Licking County Municipal Court from the designation "[c]ounty-operated municipal court"). Nonetheless, the balance does appear to weigh in favor of the conclusion that the judges and clerk of a municipal court that is other than county-operated, such as the Licking County Municipal Court, are not "county officers" for purposes of R.C. 309.09(A).

First, notwithstanding its formal appellation, the Licking County Municipal Court has not been designated a county-operated municipal court in R.C. 1901.03(F). Consequently, the General Assembly has not imposed any responsibility upon Licking County to bear a portion of the costs incurred in connection with the court's general operations. *Cf.* R.C. 1901.024(D) ("[t]he board of county commissioners of a county in which a county-operated municipal court is located shall pay all of the costs of operation of the municipal court"). Rather, pursuant to R.C. 1901.026(A), those costs are apportioned, as specified in R.C. 1901.026(A) and (B), among the municipal corporations within Licking County, as well as the townships within Licking County that have adopted a limited home rule form of government under R.C. Chapter 504. Moreover, while R.C. 1901.11 and R.C. 1901.31 make the treasury of Licking County responsible for payment of the compensation of the judges and clerk of court, that responsibility is shared with the treasury of the City of Newark, which, in fact, must pay the larger percentage of the judges' and clerk's compensation, *see* R.C. 1901.11(C); R.C. 1901.31(C). *See also* R.C. 1901.111(C)(2) (health care benefits for municipal court judges); R.C. 1901.312(C)(2) (health care benefits for municipal court clerks and deputy clerks).

Indeed, the foregoing statutory scheme thus reflects an understanding on the part of the General Assembly that a municipal court that is not county-operated is, for fiscal purposes, neither exclusively, nor primarily, an agency, subdivision, or other entity of county government, unlike the various county boards, commissions, departments, and offices that are created and governed directly by R.C. Title 3, and that derive the larger portion of their operating budgets from county tax revenues. It would, therefore, be incongruous to conclude that the judges and clerk of such court are county officers entitled to legal representation by the county prosecuting attorney when the General Assembly has not otherwise made the county responsible for funding the general operations of the court itself.

Equally important, these statutory provisions suggest that when the General Assembly intends a county to fulfill certain responsibilities with respect to particular aspects of a municipal court's functions and operations, or particular activities of a municipal court's officers and employees, it has communicated that intention in express language tailored to the specific function or activity in question. Given the absence of an express statement from the General Assembly in R.C. Chapter 1901 regarding the obligation of the county to furnish legal representation to the judges or clerk of a municipal court that is not county-operated, *cf. generally, e.g.,* R.C. 1901.38; R.C. 1901.381, that obligation should not be imposed upon a county's prosecuting attorney simply by characterizing those individuals as "county officers" under R.C. 309.09(A).

B. Case Law and Attorney General Opinions

The conclusion that the judges and clerk of the Licking County Municipal Court are not "county officers" for purposes of R.C. 309.09(A) draws support also from several Ohio court decisions and various Attorney General opinions that have considered the status of municipal court officers under other constitutional or statutory provisions, or for purposes of particular municipal ordinances or charter enactments. In most instances those decisions and opinions have determined that municipal court judges, clerks, or bailiffs should be characterized as municipal officers, not state officers. Syllabus paragraph one of *State ex rel. Thompson v. Wall*, 17 Ohio N.P. (n.s.) 33, 28 Ohio Dec. 631 (C.P. Montgomery County 1914) reads as follows: "Inasmuch as the judge of a municipal court is a municipal and not a state officer, it is competent for the General Assembly to delegate to council the power to fix his compensation." In *State ex rel. Stanley v. Bernon*, 127 Ohio St. 204, 187 N.E. 733 (1933) the Ohio Supreme Court cited the *Thompson* decision with approval in the course of holding that a judge of a city police court, established pursuant to city charter, is an elective municipal officer, whose nomination is governed by charter provision:

However, the relatrix insists that the provision is inapplicable because a police judge is a state and not a municipal officer. She lays particular stress upon the fact that the court here involved is now a creature of the statute. Neither she nor the respondents cite Ohio authority with reference to this contention. Nevertheless, in 28 Ohio Jurisprudence, 302, appears the statement that "a judge of a municipal court is a municipal and not a state officer." Likewise in the case of *State, ex rel. Thompson, v. Wall, Dir. of Finance*, 17 N.P. (N.S.), 33, 28 O.D. (N.P.), 631, it was held that a judge of a municipal court is a municipal and not a state officer. Of course this is a decision of a *nisi prius* court, but the cogency of its reasoning and the recognized authorities upon which it relies entitle it to consideration, especially in view of the fact that the judgment was affirmed by the Court of Appeals.

Id. at 208, 187 N.E. at 735. See also *State ex rel. Higley v. Shale*.

Prior Attorney General opinions have generally followed the holdings in the *Thompson* and *Bernon* cases by concluding that the judge or clerk of a municipal court is a municipal officer, notwithstanding that the judge or clerk is, in a broader sense, an officer of the state. The following analysis appears in 1952 Op. Att'y Gen. No. 1132, p. 107, at 113-115, and is fairly representative of similar conclusions reached by several different Attorneys General:

It may be noted at this point that in some instances a municipal court created by the new municipal court act, Section 1581 et seq., General Code, is authorized and required to exercise jurisdiction in territory outside the geographical limits of the municipal corporation in which it is established and, in several cases, in other municipal corporations within such territory. This situation did not exist with reference to the Dayton municipal court, which was the subject of consideration in the *Thompson* case. As pointed out by Snediker, J., in that case in his quotation from Dillon on Municipal Corporations, it is the constant practice of the states to make use of the corporate instrumentality, or of its officers, to exercise powers, perform duties, and execute functions that are not strictly or properly local or municipal in their nature, but which are state powers exercised by local officers within defined territorial limits. The decision in the *Thompson* case thus appears to be based on the theory that the exercise by municipal officers of state powers, in addition to municipal powers, does not necessarily constitute such officers as state officers. In this view of the matter, I can perceive no logical reason why the exercise by such municipal officers of state powers outside the territorial limits of the municipal corporation in which the court is established would have any different effect.⁵

...

Accordingly, although freely conceding that municipal courts are in a very real and substantial sense agencies of the state, I must conclude that in a limited sense such courts are municipal agencies, and the judges thereof municipal officers to the extent that they are engaged in disposing of cases involving violation of municipal ordinances. I conclude further that in cases where a particular municipal court is dealing with a case involving a violation of an ordinance of a municipality other than the most populous city in such court's territorial jurisdiction, the judge of such court is, in a limited sense, an officer of such municipality rather than of such most populous city.

All that has been said above with respect to the status of a judge of a municipal court as an officer of a municipal corporation in which such court is established is equally applicable to the office of clerk of a municipal court for the reason that both are officers within such court. It is my conclusion, therefore, in particular cases, that the office of clerk of a municipal court established under the provisions of Section 1610, General Code, is, in a limited sense, an office of the

⁵ The same must be said with respect to the possible status of the judges and clerk of the Licking County Municipal Court as county officers under R.C. 309.09(A). Specifically, the exercise of county-wide jurisdiction by the court, and the selection of the court's judges and clerk by the qualified electors of Licking County, are not sufficient bases for concluding that the judges and clerk are county officers for purposes of R.C. 309.09(A).

municipal corporation the ordinance of which is being applied.
(Footnote added.)

Accord, 1970 Op. Att'y Gen. No. 70-029 at 2-48; 1952 Op. Att'y Gen. No. 1872, p. 712, at 717 and 718; 1939 Op. Att'y Gen. No. 1202, vol. II, p. 1763, at 1767 and 1768; 1936 Op. Att'y Gen. No. 5318, vol. I, p. 386, at 392 ("this office has squarely taken the stand that all judges of municipal courts are municipal officers"); 1936 Op. Att'y Gen. No. 5088, vol. I, p. 36, at 38. *But see* 1958 Op. Att'y Gen. No. 2362, p. 430, at 431 and 432 (noting that, "for special purposes and to a limited extent, the officers of a municipal court are officers of the municipality in which such court is established," yet apparently concluding that the bailiff of a municipal court having county-wide jurisdiction is a state officer who is not subject to the provisions of a municipal charter limiting the political activities of appointive officers and employees of city government); 1938 Op. Att'y Gen. No. 3438, vol. III, p. 2311, at 2314 (concerning a judge of a municipal court the jurisdiction of which extends beyond the municipality's territorial limits, and noting the absence of any authority "to support the position that officers whose functions are not confined to purely municipal affairs are municipal officers").

Thus, when the question has been presented, the weight of authority has favored classifying municipal court judges and clerks as municipal officers, rather than as state officers. For many of the same reasons, one may properly conclude that the judges and clerk of a municipal court that is other than county-operated are not "county officers" for purposes of R.C. 309.09(A). Accordingly, 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. *See, e.g.*, Op. No. 70-029 (because the judge and clerk of a municipal court are municipal officers, the city solicitor (now the city director of law, *see* 1977-1978 Ohio Laws, Part II 2091, 2097 (Am. Sub. H.B. 219, eff. Nov. 1, 1977)) has a duty pursuant to R.C. 705.11⁶ to represent the judge and clerk of a municipal court in a suit arising out of acts done in their official capacity).

Defense Obligations Imposed by R.C. 2744.07

Your second question asks about the obligation of Licking County under R.C. 2744.07(A)(1) to provide for the defense of the judges and clerk of the Licking County Municipal Court in civil actions to recover damages for injury or loss allegedly caused by the judges or clerk in the performance of their official responsibilities. R.C. 2744.07(A)(1) reads as follows:

Except as otherwise provided in this division, a *political subdivision shall provide for the defense of an employee*, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance. The duty to provide for the

⁶ R.C. 705.11 states, in part, that, "[t]he village solicitor or city director of law shall act as the legal advisor to and attorney for the municipal corporation, and for all officers of the municipal corporation in matters relating to their official duties."

defense of an employee specified in this division does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision. (Emphasis added.)

As used in R.C. Chapter 2744, the term "[p]olitical subdivision" means, *inter alia*, a "county" or "municipal corporation," R.C. 2744.01(F). R.C. 2744.01(B) states that "[e]mployee" means "an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of his employment for a political subdivision" and includes "any *elected* or appointed *official* of a political subdivision." (Emphasis added.) The judges and clerk of the Licking County Municipal Court are elected to office. R.C. 1901.07; R.C. 1901.08; R.C. 1901.31(A)(1)(a). The question, therefore, is whether the judges and clerk are elected officials of Licking County, and thus "employees" of Licking County for purposes of R.C. 2744.07(A)(1). See generally 1988 Op. Att'y Gen. No. 88-055.

As discussed above, the judges and clerk of the Licking County Municipal Court are not county officers for purposes of R.C. 309.09(A). For the same reasons, it follows that they are not elected officials of Licking County, and thus are not "employees" of Licking County for purposes of R.C. 2744.07(A)(1). Cf., e.g., Op. No. 88-055, at 2-252 ("the same factors which support my conclusion that a common pleas judge is an officer of the county for purposes of R.C. 309.09 and R.C. 305.14 also lead me to conclude that he may be considered an elected official of the county for purposes of R.C. 2744.01(B) and therefore an employee of the county for purposes of R.C. 2744.07"). They are, instead, elected officials of the City of Newark, and thus are "employees" of the City of Newark for purposes of R.C. 2744.07(A)(1). Accordingly, the City of Newark has an obligation under R.C. 2744.07(A)(1) to provide for the defense of the judges and clerk of the Licking County Municipal Court in civil actions under R.C. Chapter 2744 to recover damages for injury or loss allegedly caused by the judges or clerk in the performance of their official responsibilities.

Conclusion

It is, therefore, my opinion, and you are advised that:

1. The judges and clerk of the Licking County Municipal Court are not "county officers" for purposes of R.C. 309.09(A).
2. The judges and clerk of the Licking County Municipal Court are not "employees" of Licking County for purposes of R.C. 2744.07(A)(1).