

## OPINION NO. 73-074

**Syllabus:**

A vacancy was created on the Hamilton County Court of Common Pleas, Division of Domestic Relations, by the indefinite suspension from the practice of law and resultant disqualification of an incumbent judge of that court. The Governor may fill such a vacancy by appointment pursuant to Article IV, Section 13, Ohio Constitution.

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To: John J. Gilligan, Governor, Columbus, Ohio  
By: William J. Brown, Attorney General, July 26, 1973

Your request for my opinion reads as follows:

As you know, the U.S. Supreme Court recently refused to hear an appeal from George S. Weitzler, formerly of the Hamilton County Court of Common Pleas, Division of Domestic Relations, relative to Mr. Weitzler's attempt to be reinstated as a judge of that court.

In order that I might take action to fill the vacancy which I presume exists on the Hamilton County Court of Common Pleas as a result of Mr. Weitzler's removal from that office by the Ohio Supreme Court, I would appreciate an opinion from you stating whether, in fact, a vacancy does exist which can legally be filled by the Governor of Ohio.

The case you refer to was Cincinnati Bar Ass'n. v. Weitzler, 32 Ohio St. 2d 214 (1972). This was a disbarment proceeding by which the Ohio Supreme Court ordered that Judge Weitzler be suspended indefinitely from the practice of law.

Following this decision, Judge Weitzler by a petition for writ of certiorari, sought review of the case by the United States Supreme Court. On May 7, 1973, the Supreme Court denied certiorari, and thereafter the petitioner failed to make a motion for rehearing as provided in Rule 58, Rules of the Supreme Court. The United States Supreme Court declined to disturb the Ohio Supreme Court's ruling, and the suspension as ordered, must be viewed as effective.

The question then is whether that suspension operates to create a vacancy which can legally be filled by the Governor. The Governor's authority in this area is established by Article IV, Section 13, Ohio Constitution, which provides:

In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. (As amended November 3, 1941.) (Emphasis added.)

As to what constitutes a vacancy, it has been held that a vacancy exists when there is no legally qualified incumbent. State ex rel. Baker v. Lea, 10 Ohio W.P. (n.s.) 364, 368 (1910). See also 344 O. Jur. 2d, Public Officers Section 183, and 31 O. Jur. 2d, Judges Section 99, and cases cited therein.

It is well settled that judges who are required by statute to be attorneys at law must necessarily maintain their status as members of the legal profession. Cincinnati Bar Association v. Weitzler, supra; Mahoning County Bar Ass'n v. Franko, 168 Ohio St. 17 (1958); State ex rel. Saxbe v. Franko, 168 Ohio St. 338 (1958).

R.C. 2301.01 provides that:

There shall be a court of common pleas in each county held by one or more judges, each of whom has been admitted to practice as an attorney at law in this state and has, for a total of at least six years preceding his appointment or commencement of his term, engaged in the practice of law in this state or served as a judge of a court of record in

any jurisdiction in the United States, or both, resides in said county, and is elected by the electors therein. \* \* \*

(Emphasis added.)

It follows that a judge of a court of common pleas, division of domestic relations, must maintain his privilege to practice law. An indefinite suspension from the practice of law would, therefore, disqualify him as a judge and work a forfeiture of office. State ex rel. Saxbe v. Franko, supra. Such a disqualification would appear to create a vacancy for purposes of the Governor's power of appointment under Article IV, Section 13, supra. See Baker v. Lea, supra, and Planton v. Littrell, 76 Ohio App. 228 (1945). The latter case held that the language of this provision is restricted to vacancies in office which contemplate that the incumbent of the office has died, resigned, or been removed from office as distinguished from temporary absence or incapacity. In the present case the indefinite suspension is more than a temporary absence or incapacity. Rather as stated above it works a forfeiture of office, which provides the basis for a quo warranto action to enforce a removal from office.

I am mindful of R.C. 2701.11 and R.C. 2701.12 which provide a procedure for removing a judge from office. R.C. 2701.12 lists disbarment or indefinite suspension as a proper cause for removal. However, it does not follow that this procedure constitutes an exclusive or necessary method for the creation of a vacancy in the office of judge. In its opinion in the present case, Cincinnati Bar Association v. Weitzler, supra, the Ohio Supreme Court considered at 221-222, a claim by the respondent that the disbarment proceeding was improper since there was a procedure available for the removal of judges for misconduct. The Court determined that the availability of a procedure for removal from office did not preclude an action for disbarment, and also noted at 223-224 that the respondent had originally requested such a course of action which could result in a disqualification from holding office, and could therefore not complain that his "suggestion" was followed.

In addition consider the case of State, ex rel. Saxbe v. Franko, supra, in which a quo warranto action was instituted after the indefinite suspension of a judge in order to enforce a removal from office. That action, which was brought before R.C. 2701.11 established a separate procedure for removal, was necessitated by the suspended judge's refusal to relinquish his office and other emoluments of the position. It is my understanding that in the present case, Mr. Weitzler is making no such attempts in light of his disqualification as a judge. Therefore, there would appear to be no need for further action, either under R.C. 2701.11 or by quo warranto, to establish and enforce the removal from office.

Since Judge Weitzler's indefinite suspension disqualifies him as a judge, leaving no qualified incumbent in that office, I must conclude that there is a vacancy and that the Governor may proceed under authority of Article IV, Section 13, Ohio Constitution, to appoint a judge to that position.

In specific answer to your question it is my opinion, and you are so advised, that a vacancy was created on the Hamilton

County Court of Common Pleas, Division of Domestic Relations,  
by the indefinite suspension from the practice of law and  
resultant disqualification of an incumbent judge of that court.  
The Governor may fill such a vacancy by appointment pursuant to  
Article IV, Section 13, Ohio Constitution.