November 29, 1994

OPINION NO. 94-079

The Honorable R. Larry Schneider
Union County Prosecuting Attorney
111 West Sixth Street
Marysville, Ohio 43040-0231

Dear Prosecutor Schneider:

You have requested an opinion concerning the propriety of a county commissioner serving as defense counsel in a criminal case. Specifically, you wish to know:

1. Is a county commissioner who is appointed by a court or privately retained by an individual to serve as defense counsel in a criminal case subject to an impermissible conflict of interest?

2. May the law partners of a county commissioner serve as defense counsel in a criminal case?

I. County Commissioner as Defense Counsel in a Criminal Case

No provision within the Revised Code prohibits a county commissioner from serving as defense counsel in a criminal case. *See, e.g.*, R.C. 120.39(A) (except as provided in R.C. 120.39(B),[1] "counsel appointed by the court ... shall not be a partner or employee of any prosecuting attorney, city director of law, village solicitor, or similar chief legal officer"). There are, however, other statutes and certain common law principles that regulate the conduct of public officials and relate to your inquiry.

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[1] R.C. 120.39(B) provides, in pertinent part, that "[a] partner or employee of a village solicitor or of a law firm, legal professional association, or legal clinic with which the village solicitor is affiliated may be appointed by the court ... in any criminal proceedings in which the village solicitor is not acting as prosecuting attorney."

A.Conflict of Interest

A principle recognized in the common law prohibits a county commissioner from participating in a situation that subjects him to conflicts of interest. In particular, "[a] public servant may not simultaneously hold an additional position which would subject him or her to divided loyalties and conflicting duties or to the temptation to act other than in the best interests of the public." 1989 Op. Att'y Gen. No. 89-037 at 2-164; *see Halliday v. Norfolk & Western Railway Co.*, 44 Ohio Law Abs. 208, 213, 62 N.E.2d 716, 719 (Franklin County 1945) ("[a] public office is a public trust and the prosecution of such a trust must always be consonant with the fiduciary and confidential relationship that the office imposes"); *State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902) ("[t]he self interest of the public official and the public interests which he represents, must not be brought into conflict"); 1973 Op. Att'y Gen. No. 73-043 at 2-167 and 2-168 ("[a] public officer must be beyond temptation and he should not be in a position to profit from his public office. His position is one of a fiduciary nature to the community which requires that all his public decisions be completely objective"). A county commissioner who also serves as court appointed defense counsel in a criminal case may confront a conflict of interest in his capacity as county commissioner by reason of certain directives in R.C. 120.33. Under R.C. 120.33(A), in lieu of using a county public defender or joint county public defender to represent indigent persons in the proceedings set forth in R.C. 120.16(A),[2] the board of county commissioners of any county "may adopt a resolution to pay counsel who are either personally selected by the indigent person or appointed by the court." If a board of county commissioners has adopted a resolution to pay counsel who are either personally selected by an indigent individual or appointed by a court, the board is required to "establish a schedule of fees by case or on an hourly basis to be paid to counsel for legal services provided pursuant to [the] resolution." R.C. 120.33(A)(3).

Insofar as a member of the board of county commissioners may be required to discuss and vote on whether to increase, decrease, or otherwise modify, pursuant to R.C. 120.33, the compensation paid to legal counsel selected by an indigent individual or appointed by a court, a

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[2] R.C. 120.16(A) provides as follows:

> (1) The county public defender shall provide legal representation to indigent adults and juveniles who are charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty and in postconviction proceedings as defined in this section.
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> (2) The county public defender may provide legal representation to indigent adults and juveniles charged with the violation of an ordinance of a municipal corporation for which the penalty or any possible adjudication includes the potential loss of liberty, if the county public defender commission has contracted with the municipal corporation to provide legal representation for indigent persons charged with a violation of an ordinance of the municipal corporation.

county commissioner who is appointed by a court to serve as legal counsel in a criminal case in which he is compensated pursuant to R.C. 120.33 will be exposed to influences that may prevent him from making completely objective, disinterested decisions, and thus will face a conflict of interest. "Prior opinions of the Attorney General have determined that when a public officer is exposed to influences that may prevent him from making completely objective, disinterested decisions in a particular matter, the public officer should abstain from any discussions or votes concerning that matter," if such abstention is possible. 1994 Op. Att'y Gen. No. 94-039 at 2-201; *see, e.g.*, 1994 Op. Att'y Gen. No. 94-022; 1994 Op. Att'y Gen. No. 94-013. Thus, a member of a board of county commissioners who is subject to appointment by a court to serve as defense counsel in a criminal case in which he is compensated pursuant to R.C. 120.33 should abstain from any discussions or votes on any matter that may concern or affect the compensation paid to court appointed counsel under R.C. 120.33.[3]

In addition, a county commissioner who is appointed by a court or privately retained to serve as defense counsel in a criminal case may be subject to a conflict of interest as a result of the role of the board of county commissioners in approving the budget of the county prosecuting attorney. *See* R.C. 307.01 (a board of county commissioners is required to "provide equipment, stationery, and postage, as it considers reasonably necessary for the proper and convenient conduct of county offices, and such facilities as will result in expeditious and economical administration of such offices" and appropriate the amount of money that it determines is reasonably necessary to meet all administrative expenses of the court of common pleas); R.C. 309.06(A) (the aggregate sum to be expended for the compensation of assistants, clerks, and stenographers of the county prosecuting attorney is fixed by the court of common pleas). Because a member of the board of county commissioners may be required to deliberate, discuss, or vote upon the budget of the county prosecuting attorney, an individual who serves simultaneously as a county commissioner and defense counsel in a criminal case prosecuted by the county prosecuting attorney may be tempted to use his position as a county commissioner to influence the county prosecuting attorney with respect to matters pertaining to that criminal case. For instance, the individual may make an overt attempt to influence the county prosecuting attorney's handling of a particular case by reminding the prosecuting attorney that his budget request must be approved by the board of county commissioners. Another possibility is that the individual, as county commissioner, will be influenced in the way he votes upon the prosecuting attorney's budget requests, knowing that a vote to deny a portion of his budget request may eventually hamper the prosecuting attorney's ability to effectively prosecute particular criminal cases. Thus, a potential conflict of interest exists because a county commissioner who is appointed by a court or privately retained to serve as defense counsel in a criminal case prosecuted by the county prosecuting attorney will be subject to the temptation of acting in a manner that is inconsistent with the public's best interest.

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[3] Because an attorney who is privately retained by an individual to serve as defense counsel in a criminal case is not compensated with public funds pursuant to R.C. 120.33, a county commissioner who is privately retained to serve as defense counsel in a criminal case is not required to abstain from any discussions or votes on any matter that may concern or affect the compensation paid to court appointed counsel under R.C. 120.33.

Similarly, pursuant to R.C. 307.01(B), a board of county commissioners is required to provide funding for a court of common pleas. R.C. 307.01(B) provides in relevant part:

> The court of common pleas shall annually submit a written request for an appropriation to the board of county commissioners that shall set forth estimated administrative expenses of the court that the court considers reasonably necessary for its operation. The board shall conduct a public hearing with respect to the written request submitted by the court and shall appropriate the amount of money each year that it determines, after conducting the public hearing and considering the written request of the court, is reasonably necessary to meet all administrative expenses of the court.

Insofar as a member of the board of county commissioners may be required to deliberate, discuss, or vote on the budget of the court of common pleas, an individual who serves simultaneously as a county commissioner and defense counsel in a criminal case prosecuted before the court of common pleas may be tempted to use his position as a county commissioner to influence the court with respect to matters pertaining to that criminal case. For example, the individual may attempt to influence the court to reach a decision favorable to his client's interests by reminding the court that its funding request must be approved by the board of county commissioners. A potential conflict of interest thus exists because a county commissioner who serves as defense counsel in a criminal case prosecuted in the court of common pleas would be tempted to use his position as a county commissioner for the benefit of his private gain and his client's cause. *See generally* Ohio Code of Professional Responsibility DR 9-101(C) (1970) ("[a] lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official").

Although there exists the possibility for abuse, it must be assumed, absent evidence to the contrary, that the county commissioner in question will act in good faith, and in accordance with the law and the ethical precepts that govern his conduct as an attorney. *See* Op. No. 94-022 at 2-102; 1985 Op. Att'y Gen. No. 85-099 at 2-420 and 2-421; 1983 Op. Att'y Gen. No. 83-037 at 2-141; *see also State ex rel. Corrigan v. Hensel*, 2 Ohio St. 2d 96, 206 N.E.2d 563 (1965) (syllabus) ("[a] person, whose private vocation is that of owner and manager of a teachers' placement agency, duly elected to office as a member of a local board of education and who continues in said private occupation after his election, will not be ousted from said elective office by quo warranto, on the ground that by reason of his private occupation he *might possibly or could* secure personal monetary benefits by using his public office in a wrongful manner, it being established by the evidence that said person had not committed, nor was he about to commit, any act or acts in violation of law or violative of his oath of office"). In particular, it may be assumed that the county commissioner will perform his duties relating to the funding of the office of the county prosecuting attorney and court of common pleas in a disinterested, unbiased manner. Therefore, the possibility that a member of the board of county commissioners who serves as defense counsel in criminal cases prosecuted by the county prosecuting attorney in the court of common pleas may use his position as county commissioner to influence the county prosecuting attorney or the court with respect to matters

pertaining to those cases does not subject the county commissioner to a conflict of interest.

B.Ohio Code of Professional Responsibility

As a general matter, however, canon 9 of the Ohio Code of Professional Responsibility provides that a lawyer should avoid even the appearance of professional impropriety. *See generally* Ohio Code of Professional Responsibility EC 9-1 (1970) ("[c]ontinuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession"); Ohio Code of Professional Responsibility EC 9-6 (1970) ("[e]very lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; ... to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety"). Pursuant to Ohio Gov. Bar R. V, § 2(C), the Board of Commissioners on Grievances and Discipline of the Supreme Court is authorized to "issue informal, nonbinding advisory opinion letters in response to prospective or hypothetical questions directed to the Board regarding the application of ... the Code of Professional Responsibility." Accordingly, since Ohio Gov. Bar R. V, § 2(C) authorizes the Board of Commissioners on Grievances and Discipline of the Supreme Court to render opinions regarding the professional responsibilities of lawyers, it is appropriate for the Attorney General to refrain from advising concerning the application or interpretation of this canon and the ethical considerations and disciplinary rules thereunder. *See* 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). Rather, it is recommended that you request the Board of Commissioners on Grievances and Discipline of the Supreme Court for advice concerning the application of canon 9 of the Ohio Code of Professional Responsibility to the situation described in your first question.[4]

C.R.C. Chapter 102 and R.C. 2921.42

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[4] The Board of Commissioners on Grievances and Discipline of the Supreme Court has examined the question whether it would be a conflict of interest for a county commissioner to practice law in the court of common pleas of the same county and concluded that "[u]nder the Code of Professional Responsibility, a County Commissioner is not specifically precluded from appearing in the County's Court of Common Pleas provided doing so does not create the appearance of impropriety." Board of Commissioners on Grievances and Discipline of the Supreme Court, Op. No. 88-020 (Aug. 12, 1988) (syllabus). That opinion notes that such conclusion applies to representation by a county commissioner in civil cases and as defense counsel in criminal cases. The Ohio State Bar Association's Committee on Legal Ethics and Professional Conduct, however, has suggested in an informal opinion that a county commissioner serving as defense counsel in a criminal case may create an appearance of impropriety. Ohio State Bar Association, Informal Opinion of the Committee on Legal Ethics and Professional Conduct, slip op. at 4-5 (Apr. 8, 1981) (available from the Ohio State Bar Association); *accord* Ethics Committee of the North Carolina State Bar Association, Informal Opinion (Oct. 18, 1989); Maine Professional Ethics Commission of the Board of Overseers of the Bar, Informal Opinion (Feb. 4, 1982).

Finally, pursuant to R.C. Chapter 102 and R.C. 2921.42, public officials are prohibited from using their positions to secure anything of value that manifests a substantial and improper influence upon them, from having unlawful interests in public contracts, and from authorizing or using their authority or influence to secure authorization of public contracts in which they, family members, or business associates have an interest. Because the Ohio Ethics Commission is authorized to render advisory opinions on the applicability of the provisions of R.C. Chapter 102 and R.C. 2921.42 governing ethics and conflicts of interest with respect to public officials and employees, R.C. 102.08, it is appropriate that the Attorney General decline the issuance of opinions on matters governed by those provisions. Op. No. 89-037 at 2-167; *see* Op. No. 87-033 (syllabus, paragraph three). *See generally* 1987 Op. Att'y Gen. No. 87-025 at 2-179 ("[t]his policy respects the jurisdiction of the Ethics Commission and prevents the possibility that the Attorney General and the Ethics Commission would render conflicting opinions on the same question"). It is, therefore, recommended that you contact the Ohio Ethics Commission for an analysis of the situation you have described.[5]

In light of the foregoing, it appears that a member of a board of county commissioners who is appointed by a court to serve as defense counsel in a criminal case in which he is compensated pursuant to R.C. 120.33 is not subject to a conflict of interest provided he abstains from any discussions or votes by the board of county commissioners on any matter that may concern or affect the compensation paid to court appointed criminal defense counsel under R.C. 120.33. A member of a board of county commissioners who is privately retained to serve as defense counsel in a criminal case is not subject to a conflict of interest. Finally, whether a member of a board of county commissioners who is appointed by a court or privately retained to serve as defense counsel in a criminal case violates a provision of the Ohio Code of Professional Responsibility or the ethical

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[5] The Ohio Ethics Commission has addressed the question whether a county commissioner who is also an attorney violates R.C. Chapter 102 if he serves as counsel for an individual in matters before a juvenile court, or in criminal matters before the municipal court, within the county in which he serves as commissioner. In Ohio Ethics Commission, Advisory Op. No. 75-018, the Ohio Ethics Commission advised that a member of the board of county commissioners, who is also an attorney, is not prohibited by R.C. 102.04(B), now R.C. 102.04(C), from receiving compensation for services rendered by him personally on matters that are before the courts. R.C. 102.04(C) currently provides as follows:

> Except as provided in division (D) of this section, no person who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee.

considerations set forth in R.C. Chapter 102 and R.C. 2921.42 must be addressed by the governmental entity that has been granted the authority to render advisory opinions concerning the relevant subject matter.

II. Law Partners of a County Commissioner Serving as Defense Counsel in a Criminal Case

Your second question asks whether the law partners of a county commissioner may serve as defense counsel in a criminal case. No provision of the Revised Code prohibits the law partners of a county commissioner from serving as defense counsel in a criminal case. However, because the Board of Commissioners on Grievances and Discipline of the Supreme Court is authorized to render opinions regarding the professional responsibilities of lawyers, and the Ohio Ethics Commission is authorized to render advisory opinions relating to the ethical considerations of R.C. Chapter 102 and R.C. 2921.42, it is recommended that you contact these governmental entities for an opinion that addresses the application of the Ohio Code of Professional Responsibility and the provisions of R.C. Chapter 102 and R.C. 2921.42 to the situation posed in your second question. *See* Op. No. 87-033 (syllabus, paragraph three). *See generally* Ohio Code of Professional Responsibility DR 5-105(D) (1970) ("[i]f a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or [her] firm may accept or continue such employment"); Board of Commissioners on Grievances and Discipline of the Supreme Court, Op. No. 88-020 (Aug. 12, 1988) (syllabus) ("[i]f a lawyer is required to decline employment then his or her partner or associate is also precluded from accepting such employment").

III. Conclusion

Based on the foregoing, it is my opinion and you are hereby advised as follows:

1. A member of a board of county commissioners who is appointed by a court to serve as defense counsel in a criminal case in which he is compensated pursuant to R.C. 120.33 is not subject to a conflict of interest provided he abstains from any discussions or votes by the board of county commissioners on any matter that may concern or affect the compensation paid to court appointed criminal defense counsel under R.C. 120.33.

2. A member of a board of county commissioners who is privately retained to serve as defense counsel in a criminal case is not subject to a conflict of interest.

3. Whether a member of a board of county commissioners who is appointed by a court or privately retained to serve as defense counsel in a criminal case violates a provision of the Ohio Code of Professional Responsibility or the ethical considerations set forth in R.C. Chapter 102 and R.C. 2921.42 must be addressed by the governmental entity that has been granted the authority to render advisory opinions concerning the relevant subject matter.

4. No provision of the Revised Code prohibits the law partners of a county commissioner from serving as defense counsel in a criminal case.

Respectfully,

LEE FISHER
Attorney General

November 29, 1994

The Honorable R. Larry Schneider
Union County Prosecuting Attorney
111 West Sixth Street
Marysville, Ohio 43040-0231

SYLLABUS: 94-079

1. A member of a board of county commissioners who is appointed by a court to serve as defense counsel in a criminal case in which he is compensated pursuant to R.C. 120.33 is not subject to a conflict of interest provided he abstains from any discussions or votes by the board of county commissioners on any matter that may concern or affect the compensation paid to court appointed criminal defense counsel under R.C. 120.33.

2. A member of a board of county commissioners who is privately retained to serve as defense counsel in a criminal case is not subject to a conflict of interest.

3. Whether a member of a board of county commissioners who is appointed by a court or privately retained to serve as defense counsel in a criminal case violates a provision of the Ohio Code of Professional Responsibility or the ethical considerations set forth in R.C. Chapter 102 and R.C. 2921.42 must be addressed by the governmental entity that has been granted the authority to render advisory opinions concerning the relevant subject matter.

4. No provision of the Revised Code prohibits the law partners of a county commissioner from serving as defense counsel in a criminal case.