March 22, 1999

OPINION NO. 99-027

The Honorable Robert A. Fry
Hancock County Prosecuting Attorney
222 Broadway, Room 104
Findlay, Ohio 45840

Dear Prosecutor Fry:

You have requested an opinion whether the positions of assistant prosecuting attorney and member of the legislative authority of a statutory city are compatible. You have indicated that the assistant prosecuting attorney in question is employed on a part-time basis, and does not serve as your chief deputy or first assistant.

The standard test for determining whether two public positions are compatible is set forth in 1979 Op. Att'y Gen. No. 79-111. The seven questions of the test are as follows:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?

2. Do the empowering statutes of either position limit the outside employment permissible?

3. Is one office subordinate to, or in any way a check upon, the other?

4. Is it physically possible for one person to discharge the duties of both positions?

5. Is there a conflict of interest between the two positions?

6. Are there local charter provisions or ordinances which are controlling?

7. Is there a federal, state, or local departmental regulation applicable?

Id. at 2-367 and 2-368.

Questions six and seven concern the applicability of charter provisions, ordinances, and federal, state, and local departmental regulations. We have found no applicable state or federal regulations. Because the city in question has not adopted a charter, there is no applicable charter provision. Additionally, whether there is an applicable ordinance or local departmental regulation is a matter for local officials to determine. We will assume, for purposes of this opinion, that there is no departmental regulation or ordinance of either the city or the county that prohibits a person from serving simultaneously as an assistant prosecuting attorney and as a member of a city legislative authority.

Question number one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits, *inter alia*, a classified officer or employee of a city or county from participating in partisan political activity other than to vote as he pleases or express freely his political opinions. R.C. 124.11(A)(11) provides that assistant prosecuting attorneys are in the unclassified civil service. Because members of the legislative authority of a city are elected, R.C. 731.01, they are also in the unclassified civil service. R.C. 124.11(A)(1). The prohibition of R.C. 124.57 thus does not prohibit a person from serving simultaneously as an assistant prosecuting attorney and as a member of the legislative authority of a city.

Question number two asks whether the empowering statutes of either position limit outside employment. Except for R.C. 120.39, no other statute limits the outside employment of assistant prosecuting attorneys. R.C. 120.39 prohibits an assistant prosecuting attorney from serving as court appointed counsel or co-counsel appointed to assist the state public defender, or a county or joint county public defender. This statute also prohibits an assistant prosecuting attorney from holding the position of public defender, county public defender, joint county defender, member of the state public defender commission, member of a county or joint county public defender commission, or member of the office of a public defender, county public defender, or joint county defender. R.C. 120.39 thus does not prevent an assistant prosecuting attorney from serving as a member of the legislative authority of a city.

Pursuant to R.C. 731.02, each member of the legislative authority of a city "shall not hold any other public office, except that of notary public or member of the state militia." We must first determine, therefore, whether the position of assistant prosecuting attorney is a public office for purposes of R.C. 731.02.

The Ohio Supreme Court has thus described the standards for determining whether a position is a public office or employment:

> The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him…. *The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such*

> *duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.*
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> ….
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> … [I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state. (Emphasis added.)

State ex rel. Landis v. Board of Comm'rs, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917); *accord State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950) (citing *State ex rel. Landis v. Board of Comm'rs* with approval).

In accordance with these criteria, a public position is a public office, rather than a public employment, if the position is conferred by law with duties that require the exercise of continuing, independent, political, or governmental functions, which constitute a portion of the sovereignty of the state. As stated in the second syllabus paragraph of *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898):

> To constitute a public office … it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else.

Accord State ex rel. Landis v. Board of Comm'rs; *State ex rel. Scarl v. Small*, 103 Ohio App. 214, 145 N.E.2d 200 (Portage County 1956); 1963 Op. Att'y Gen. No. 3548, p. 58, at 61; *see also* 1970 Op. Att'y Gen. No. 70-035 (a deputy sheriff is not a public office).

Applying the traditional criteria used to determine whether a position is a public office, it is clear that a prosecuting attorney, but not his assistants, holds a public office. A prosecuting attorney is elected to that position and serves a fixed term. R.C. 309.01. A prosecuting attorney must give a bond and take an oath of office before entering upon the discharge of his duties. R.C. 309.03; *see also* R.C. 3.22; R.C. 3.23; R.C. 309.02. The duties and powers of the prosecuting attorney are prescribed by statute and constitute a portion of the sovereignty of the state. *See, e.g.,* R.C. 309.08 (the prosecuting attorney shall prosecute criminal cases and all complaints, suits, and controversies in which the state is a party, and, in the case of conviction, he shall cause execution to be issued for the fine and costs, or costs only, as the case may be, and urge the collection of any moneys due the state or county); R.C. 309.09 (the prosecuting attorney shall be the legal adviser to all county and township officers, boards, and commissions); *see also* Code of Professional Responsibility EC 7-13 ("[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. The special duty exists because … the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers"). In discharging his duties, the

prosecuting attorney acts autonomously and independently and is not subject to the direct control and supervision of any other office or entity of government. Therefore, it follows that the position of prosecuting attorney is a public office. *See generally State ex rel. Pogue*, 91 Ohio St. 1, 12, 109 N.E. 477, 480 (1914) (indicating that the prosecuting attorney is a county officer).

In contrast, assistant prosecuting attorneys are neither required nor authorized by law to exercise such independent public duties. Assistant prosecuting attorneys are appointed by, and serve at the pleasure of, the prosecuting attorney. R.C. 309.06(A); *Rose v. Village of Wellsville*, 63 Ohio Misc. 2d 9, 18, 613 N.E.2d 262, 267 (C.P. Columbiana County 1993); *see also* 1991 Op. Att'y Gen. No. 91-011 at 2-58 (persons appointed to positions "in the unclassified service hold their positions at the pleasure of their appointing authority, and are subject to dismissal from their positions without cause"). The duties and responsibilities of assistant prosecuting attorneys are not conferred by statute. Rather, pursuant to R.C. 309.06(A), a prosecuting attorney, in order to properly discharge the functions of his office, delegates responsibilities and duties to his assistants. Assistant prosecuting attorneys thus perform their assigned duties and responsibilities at the direction of the prosecuting attorney. *See State ex rel. Thomas v. Henderson*, 123 Ohio St. 474, 478, 175 N.E. 865, 866 (1931); 1970 Op. Att'y Gen. No. 70-022 at 2-39; 1963 Op. Att'y Gen. No. 25, p. 113, at 114-15; *cf. Thomas v. Board of Comm'rs of Hamilton County*, 88 Ohio St. 489, 493, 104 N.E. 536, 537 (1913) ("[t]he very purpose of having assistants to the [city] solicitor, or any other public officer, is to secure the participation by them in the performance of the duties of the office"). *See generally State ex rel. Myers v. Blake*, 121 Ohio St. 511, 516-17, 169 N.E. 599, 601 (1929) ("[t]he subordinate of one in an official position is necessarily an assistant, looking toward the accomplishment of the common objective"). Accordingly, in the exercise of their duties, assistant prosecuting attorneys do not act independently; assistants merely aid the prosecuting attorney in discharging his statutory responsibilities and functions by performing such duties and functions as may be assigned by the prosecuting attorney.

An assistant prosecuting attorney is subject to the direction and control of the prosecuting attorney, and thus does not exercise independent public duties that constitute a portion of the sovereignty of the state. As explained previously, it is the prosecuting attorney who is invested by law with such duties. The responsibility for exercising a portion of the sovereignty of the state, therefore, rests with the prosecuting attorney, not his assistants.

This is the case even though an assistant prosecuting attorney is required to exercise his professional judgment when discharging his duties. The exercise of professional judgment on the part of an assistant prosecuting attorney does not arise by virtue of his appointment to that position. Rather, the exercise of discretion by an assistant prosecuting attorney in the discharge of his duties and responsibilities in a particular legal matter is the result of the assistant's being licensed to practice law in Ohio. *See generally* R.C. 4705.01 (before a person may be permitted to practice as an attorney and counselor at law he must be admitted to the bar by order of the Ohio Supreme Court); Ohio Gov. Bar R. I (setting forth provisions concerning the admission to the practice of law). Also, since an assistant prosecuting attorney performs his duties and

responsibilities on behalf of the prosecuting attorney, *see* R.C. 309.06; *State ex rel. Thomas v. Henderson*, 123 Ohio St. at 478, 175 N.E. at 866; 1970 Op. Att'y Gen. No. 70-022 at 2-39; 1963 Op. Att'y Gen. No. 25, p. 113, at 114-15, an assistant's professional judgment is subject to review by the prosecuting attorney. *See generally* 1991 Op. Att'y Gen. No. 91-011 at 2-58 (an unclassified employee serves at the pleasure of his appointing authority). The exercise of professional judgment by an assistant prosecuting attorney thus does not make that position a public office. *See generally State ex rel. Attorney General v. Jennings*, 57 Ohio St. at 428, 49 N.E. at 406 ("[s]kill and experience do not constitute a public office; they are simply requirements of suitableness for the place; and are no more attributes of a public office than of a private employment").

Because an assistant prosecuting attorney does not exercise independent public duties that constitute a portion of the sovereignty of the state, the position of assistant prosecuting attorney is not a public office for purposes of R.C. 731.02. *See generally Rose v. Village of Wellsville*, 63 Ohio Misc. 2d at 18, 613 N.E.2d at 267-68 (an assistant county prosecuting attorney is a public employee). *But see generally* 1973 Op. Att'y Gen. No. 73-082 at 2-311 (for purposes of Ohio Const. art. IV, § 6(B), which prohibits a judge from holding another office of profit or trust, "the office of assistant county prosecuting attorney must be considered a public office, because the assistant is authorized to stand in place of the prosecuting attorney").[1] Accordingly, the language of R.C. 731.02 does not prohibit a member of the legislative authority of a city from serving as an assistant prosecuting attorney.

Although no statute prohibits a person from serving simultaneously in the positions of member of the legislative authority of a city and assistant prosecuting attorney, prior opinions of the Attorneys General have stated that, "because an assistant prosecutor is empowered to act for, and in the place of a prosecutor in most matters, the assistant is subject to the same limitations as the prosecutor, and may not hold any office which a prosecutor may not hold." 1983 Op. Att'y Gen. No. 83-030 at 2-112; *accord* 1992 Op. Att'y Gen. No. 92-041 at 2-159; 1988 Op. Att'y Gen. No. 88-049 at 2-223; 1971 Op. Att'y Gen. No. 71-050 at 2-172. Because the position of prosecuting attorney is a public office, R.C. 731.02 prevents a person from serving concurrently as a member of a city's legislative authority and as a prosecuting attorney. It would, thus, ordinarily follow that R.C. 731.02 similarly prevents a person from serving concurrently as an assistant prosecuting attorney and as a member of the legislative authority of a city. We have not reached that conclusion in this instance, however. Let us explain our reasons for this determination.

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[1] In this opinion we have concluded that the position of assistant prosecuting attorney is not a public office, thus calling into question 1973 Op. Att'y Gen. No. 73-082's assertion that the position of assistant prosecuting attorney is a public office for purposes of Ohio Const. art. IV, § 6(B).

Examination of the opinions that have addressed this issue discloses that a single proposition appears to serve as the basis for extending a restriction such as that found in R.C. 731.02 to a prosecuting attorney's assistants. That proposition is that an assistant prosecuting attorney is authorized to act for and in place of the prosecuting attorney in most matters. 1988 Op. Att'y Gen. No. 88-049 at 2-223; 1983 Op. Att'y Gen. No. 83-030 at 2-112; *see also* R.C. 309.06. Thus, 1971 Op. Att'y Gen. No. 71-050 at 2-172 states that "it has long been the accepted opinion in this state that an assistant is, for all practical purposes, the alter ego of the prosecuting attorney and is authorized to act in his place in almost all matters." *Accord* 1970 Op. Att'y Gen. No. 70-053 at 2-85. For this reason, the prior opinions conclude that an assistant prosecuting attorney is not permitted to hold any position that the prosecuting attorney may not hold. *See, e.g.*, 1983 Op. Att'y Gen. No. 83-030 at 2-112 ("because an assistant prosecutor is empowered to act for, and in the place of a prosecutor in most matters, the assistant is subject to the same limitations as the prosecutor, and may not hold any office which a prosecutor may not hold").

Having examined the law in this area, however, we find ourselves in disagreement with that proposition. While an assistant prosecuting attorney may be empowered to act for and in the place of the prosecuting attorney, an assistant generally does not assume the role of prosecuting attorney or acting prosecuting attorney. *See generally* R.C. 305.02 (a vacancy in the office of the prosecuting attorney is filled by election or appointment by the board of county commissioners or the central committee of a political party, and prior to the filling of such a vacancy, a board of county commissioners may appoint an acting prosecuting attorney). Instead, the role of an assistant prosecuting attorney is limited to aiding or assisting the prosecuting attorney in the performance of his numerous statutory responsibilities. *See State ex rel. Thomas v. Henderson*, 123 Ohio St. at 478, 175 N.E. at 866; 1970 Op. Att'y Gen. No. 70-022 at 2-39; 1963 Op. Att'y Gen. No. 25, p. 113, at 114-15. Assistants enable the prosecuting attorney to perform effectively the duties of his office. *See generally* 1945 Op. Att'y Gen. No. 184, p. 163, at 164 ("[i]t is obvious that in a county where a number of assistants are required, a great many of the duties devolving upon the prosecuting attorney under the law must be performed by his assistants"). Without assistants, a prosecuting attorney would be unable to completely and appropriately perform the duties of his office.

An assistant prosecuting attorney thus performs his duties on behalf of the prosecuting attorney. This means that an assistant prosecuting attorney does not act for or stand in the place of the prosecuting attorney in a particular matter unless so authorized and directed by the prosecuting attorney. An assistant prosecuting attorney is not, by virtue of his appointment to that position, conferred all of the powers, duties, and responsibilities of the prosecuting attorney. Nor is he empowered to act for or in the place of the prosecuting attorney in all matters. Rather, an assistant prosecuting attorney may perform only those duties or functions that the prosecuting attorney assigns to him. *See* R.C. 309.06; *State ex rel. Thomas v. Henderson*, 123 Ohio St. at 478, 175 N.E. at 866; 1970 Op. Att'y Gen. No. 70-022 at 2-39; 1963 Op. Att'y Gen. No. 25, p. 113, at 114-15. Thus, it is only with regard to those duties assigned to him by the prosecuting attorney that an assistant prosecuting attorney acts for or in the place of the prosecuting attorney.

Our review of the case law of Ohio and other jurisdictions also discloses no authority for the more general proposition that statutory restrictions upon the outside employment of a public officer are applicable to his assistants.[2] The general principles of law that govern the conduct of assistants of public officers other than prosecuting attorneys thus do not compel the conclusion that an assistant of a public officer is not permitted to hold a position that his appointing officer is statutorily prohibited from holding. Accordingly, there is no antecedent or contemporary legal support for concluding that an assistant prosecuting attorney may not hold a position that the prosecuting attorney may not hold.

Finally, to conclude that the dual officeholding prohibition in R.C. 731.02 is applicable to an assistant prosecuting attorney would improperly expand that statutory prohibition. Pursuant to R.C. 731.02, a member of the legislative authority of a city may not hold another public office. Because the position of prosecuting attorney is a public office, a member of the legislative authority of a city may not hold the position of prosecuting attorney. However, the position of assistant prosecuting attorney, as explained above, is not a public office. Thus, the plain language of R.C. 731.02 does not prohibit a member of the legislative authority of a city from serving as an assistant prosecuting attorney. Interpreting R.C. 731.02 as prohibiting a member of the legislative authority of a city from serving as an assistant prosecuting attorney leads to a conclusion that the General Assembly did not apparently intend. If the General Assembly had intended to prohibit a member of the legislative authority of a city from serving as an assistant prosecuting attorney, it could easily have stated such intention, having explicitly imposed such a dual officeholding prohibition in other instances. *Compare* R.C. 120.39 (neither a prosecuting attorney nor an assistant prosecuting attorney may serve as court appointed counsel or co-counsel appointed to assist the state public defender or a county or joint county public defender, or hold the position of public defender, county public defender, joint county defender, member of the state public defender commission, member of a county or joint county public defender commission, or member of the office of a public defender, county public defender, or joint county defender) *with* R.C. 3.11 (a prosecuting attorney may not hold the office of county sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, or probate judge) *and* R.C. 309.02 ("[n]o prosecuting attorney shall be a

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[2] Without considering the issue whether a statutory restriction upon a public officer's dual officeholding or outside employment applies to the officer's assistants, at least one opinion has advised that an assistant of a public officer may hold a position that the public officer is otherwise barred from holding. *See* 1993 Op. Att'y Gen. No. 93-016 (the positions of member of the legislative authority of a city and administrative assistant to the county engineer are compatible). *See generally* 1979 Op. Att'y Gen. No. 79-111 (the positions of member of a municipal council and special deputy sheriff are compatible); 1970 Op. Att'y Gen. No. 70-035 (the positions of member of a village council and special deputy sheriff are compatible).

member of the general assembly of this state or mayor of a municipal corporation"). *See generally Carter v. Youngstown*, 146 Ohio St. 203, 65 N.E.2d 63 (1946) (the polestar of statutory interpretation is effecting the intentions of the General Assembly).

Based on the foregoing reasons, it is our opinion that the fact that an assistant prosecuting attorney may be authorized to act for and in the place of the prosecuting attorney is insufficient in and of itself to find that an assistant prosecuting attorney may not hold a position that the prosecuting attorney may not hold.[3] Accordingly, while R.C. 731.02 prohibits a member of the legislative authority of a city from serving concurrently as a prosecuting attorney, that statute does not prohibit that member from serving as an assistant prosecuting attorney. Question two of the compatibility analysis, therefore, may be answered in the negative.

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[3] The following opinions have found the position of assistant prosecuting attorney incompatible with another position because the prosecuting attorney was statutorily barred from holding the other position: (1) 1983 Op. Att'y Gen. No. 83-030 (assistant prosecuting attorney and member of a county board of mental retardation and developmental disabilities are incompatible, R.C. 5126.03(A)(1), now R.C. 5126.021(A)(1)); (2) 1970 Op. Att'y Gen. No. 70-053 (assistant prosecuting attorney and mayor of a municipal corporation are incompatible, R.C. 309.02); (3) 1970 Op. Att'y Gen. No. 70-022 (assistant prosecuting attorney and mayor of a municipal corporation are incompatible, R.C. 309.02); (4) 1969 Op. Att'y Gen. No. 69-133 (assistant prosecuting attorney and member of a board of education are incompatible, R.C. 3313.13); and (5) 1846-1906 Official Opinions of the Ohio Attorney General, vol. 4, p. 746 (assistant prosecuting attorney and member of the General Assembly are incompatible, R.S. 1268, now R.C. 309.02).

These opinions do not, as a general matter, consider whether the positions in question might be incompatible on other grounds. For instance, the position of assistant prosecuting attorney may be incompatible with another position because the assistant may be subject to an impermissible conflict of interest or because the assistant prosecutor position is subordinate to, or may act as a check upon, the other position. *See generally* 1983 Op. Att'y Gen. No. 83-030 at 2-113 ("[e]ven if an assistant prosecutor were not considered to be within the scope of R.C. 5126.03(A)(1), [now R.C. 5126.021(A)(1),] I find the positions of assistant prosecutor and member of a county board of mental retardation and developmental disabilities to be incompatible under a common law analysis"). This means that the conclusions reached in the foregoing opinions with respect to incompatibility may be warranted, but for reasons different than those enumerated in the opinions. Accordingly, since we have not here reexamined the compatibility of the positions considered in these opinions, we merely question their conclusions and do not summarily overrule them.

Question number three asks whether one position is subordinate to, or in any way a check upon, the other. A member of the legislative authority of a city, as an elected officer of the city, R.C. 731.01, serves and is responsible to the citizens of the city. An assistant prosecuting attorney is appointed by and serves at the pleasure of the prosecuting attorney. R.C. 309.06; *see* R.C. 124.11(A)(11). The positions of member of the legislative authority of a city and assistant prosecuting attorney operate independently of each other, and neither assigns duties or responsibilities to or supervises the other. Thus, neither position is subordinate to, or acts as a check upon, the other.

Question number four asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best answered by the interested local officials who may more precisely determine the time demands imposed upon each position. *See* 1997 Op. Att'y Gen. No. 97-045 at 2-282; 1994 Op. Att'y Gen. No. 94-022 at 2-98. It would appear, however, that one person can competently discharge the duties of assistant prosecuting attorney and member of the legislative authority of a city if there is no direct conflict in the working hours of each position.

The final question asks whether a person may confront a conflict of interest as a result of holding two different positions. A person may not hold two or more public positions simultaneously if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the public. 1985 Op. Att'y Gen. No. 85-042 at 2-150. As stated in our recent opinions, "resolution of the compatibility issue of conflict of interest in the case of an assistant county prosecuting attorney who wishes to hold another public position requires a factual analysis of the particular duties and responsibilities assigned to and to be performed by the individual in each of the two positions."[4] 1997 Op. Att'y

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[4] Several opinions have determined that when incompatibility is based on a conflict of interest, the facts may create an exception to the general rule that an assistant prosecuting attorney may not hold any position that the prosecuting attorney may not hold. 1997 Op. Att'y Gen. No. 97-044; 1997 Op. Att'y Gen. No. 97-034; 1992 Op. Att'y Gen. No. 92-041; *see also Rose v. Village of Wellsville*, 63 Ohio Misc. 2d 9, 613 N.E.2d 262 (C.P. Columbiana County 1993). In this regard, 1992 Op. Att'y Gen. No. 92-041 at 2-164 states:

> [A]n assistant county prosecuting attorney "who performs, on behalf of the prosecuting attorney, only limited duties of a specialized nature, such that his performance of those duties in no way renders his position subordinate to or a check upon the [other position] or conflicts with any of the duties and responsibilities he undertakes" in the other position, may hold the other position even though the county prosecuting attorney may not hold the position. Op. No. 86-035 at 2-184 n.2….

Gen. No. 97-044 at 2-273 and 2-274; *accord* 1997 Op. Att'y Gen. No. 97-034 at 2-198. Such an examination enables us to determine whether an assistant prosecuting attorney who serves as a member of the legislative authority of a city will confront a conflict of interest when exercising the powers, duties, and responsibilities in each position that is sufficient to prevent him from holding both of these positions simultaneously.

Assistant prosecuting attorneys aid the prosecuting attorney in discharging the duties of his office. *See State ex rel. Thomas v. Henderson*, 123 Ohio St. at 478, 175 N.E. at 866; 1970 Op. Att'y Gen. No. 70-022 at 2-39; 1963 Op. Att'y Gen. No. 25, p. 113, at 114-15. Accordingly, assistant prosecuting attorneys perform those duties assigned to them by the prosecuting attorney. *See generally* 1945 Op. Att'y Gen. No. 184, p. 163 (syllabus) ("[a]n assistant appointed by the prosecuting attorney may, whenever authorized or directed by him, act for and in the place of such prosecuting attorney in all civil and procedural matters").

The general powers and duties of the prosecuting attorney are set forth in R.C. Chapter 309. R.C. 309.08 requires the prosecuting attorney to prosecute criminal cases and all complaints, suits, and controversies in which the state is a party, and, in the case of conviction, he is required to cause execution to be issued for the fine and costs, or costs only, as the case may be, and urge the collection of any moneys due the state or county. R.C. 309.09 requires the prosecuting attorney to serve as the legal adviser to all county and township officers, boards, and commissions. A prosecuting attorney is also required to prosecute actions to restrain the misapplication of county funds or public moneys in the hands of the county treasurer, R.C. 309.12, prosecute persons who in any way unlawfully cut down or injure timber growing on land belonging to the state or any school district, R.C. 309.14, and bring actions to recover property of a decedent held by another person, R.C. 309.17. In addition to the powers and duties set forth in R.C. Chapter 309, a prosecuting attorney is authorized to commence an action upon the bond of the county auditor or county treasurer in the event such bond is breached, R.C. 321.42, bring an action in court to enforce the administration of a charitable trust, R.C. 1719.05, bring a forfeiture action against a real estate investment trust that transacts real estate business in the state without authority, R.C. 1747.11(A), commence an action in quo warranto, R.C. 2733.04; R.C. 2733.05, institute and prosecute all necessary actions pertaining to the workers' compensation law, R.C. 4123.92, and sit on the county budget commission, R.C. 5705.27.

The legislative authority of a city exercises the legislative power of the city. R.C. 731.01; R.C. 731.05; *see also* R.C. 731.17 (granting the legislative authority of a city the authority to pass ordinances and resolutions). In order to govern the city, the legislative authority of a city has the power to subdivide the city into wards, R.C. 731.06, determine the number of officers, clerks, and employees in each city department, R.C. 731.08, adopt standard ordinances and codes, R.C. 731.231, manage and control the finances and property of the city, R.C. 731.47, and adopt an annual tax budget, R.C. 5705.28. Additionally, the legislative authority of a city is invested with a variety of specific powers to provide for the public safety of its citizens. *See, e.g.*, R.C. 9.60 (acquisition of fire protection); R.C. 737.021 (establishment of a division of traffic engineering and safety); R.C. 737.04 (acquisition of police protection); R.C.

737.051 (establishment of an auxiliary police unit within the police department); R.C. 737.21 (establishment of a fire department and regulations to guard against the occurrence of fires and protect the property and lives against damage and accidents resulting from fires); R.C. 737.28 (regulation of houses and business structures); R.C. 737.37 (regulation of public buildings).

Let us now consider whether a person who holds the positions of member of the legislative authority of a statutory city and assistant prosecuting attorney is subject to a conflict of interest. An examination of the statutory powers, duties, and responsibilities inherent in each of these positions discloses that a person who serves simultaneously in these two positions may be confronted with several conflicts of interest.

As an assistant prosecuting attorney, the person may be required to bring a civil or criminal action against himself as a member of the legislative authority of a city. Pursuant to R.C. Chapter 2733, a prosecuting attorney is permitted, R.C. 2733.05, or, in certain circumstances, required, R.C. 2733.04, to bring an action in quo warranto against "a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military," or "a public officer, civil or military, who does or suffers an act which, by law, works a forfeiture of his office." R.C. 2733.01. In addition, R.C. 733.73 requires a prosecuting attorney to prosecute a city officer for misfeasance or malfeasance in office, when the city has no law director. *See generally* R.C. 733.72 (setting forth the charges that may be brought against a municipal officer). Thus, since the position of member of the legislative authority of a city is a public office, *State ex rel. v. Kearns*, 47 Ohio St. 566, 568, 25 N.E. 1027, 1028 (1890); *State ex rel. v. O'Brien*, 47 Ohio St. 464, 25 N.E. 121 (1890), an assistant prosecuting attorney who is required to bring quo warranto actions under R.C. 2733.04 or R.C. 2733.05 or misconduct in office prosecutions under R.C. 733.73 may have to bring such an action or prosecution against himself as a member of the legislative authority of a city.

Moreover, as an assistant prosecuting attorney, the person may have to institute and conduct a civil action against himself as a member of the legislative authority of a city to recover misused or misappropriated public moneys or property. R.C. 117.28 provides as follows:

> Where an audit report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving the certified copy of the report pursuant to [R.C. 117.27][5] may, within one hundred twenty days after receiving

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[5] Pursuant to R.C. 117.27, an audit report is filed "with the officer required by state law, municipal or county charter, or municipal ordinance to act as legal counsel to the officers of the public office."

> the report, institute civil action in the proper court in the name of the public office to which the public money is due or the public property belongs for the recovery of the money or property and prosecute the action to final determination. (Footnote added.)

If no officer is required to act as legal counsel for the audited public office, a copy of the audit report is "filed with the prosecuting attorney of the county within which the fiscal office of the public office is located." R.C. 117.27. A prosecuting attorney thus could be responsible for bringing prosecutions under R.C. 117.28 to recover misused or misappropriated city moneys or property. Also, if the audit report sets forth any malfeasance or gross neglect of duty on the part of a city official for which a criminal penalty is provided, the prosecuting attorney must institute criminal proceedings against the city official. R.C. 117.29. Accordingly, an assistant prosecuting attorney who is responsible for bringing prosecutions under R.C. 117.28 to recover misused or misappropriated city moneys or property or criminal prosecutions against city officials pursuant to R.C. 117.29 may have to initiate and conduct such a prosecution against himself as a member of the legislative authority of a city.

An assistant prosecuting attorney that is required to conduct a legal proceeding pursuant to R.C. 117.27-.29, R.C. 733.73, R.C. 2733.04, or R.C. 2733.05 against himself as a member of the legislative authority of a city is subject to a potential conflict of interest. In such a situation, the assistant prosecuting attorney is exposed to the temptation of acting other than in the best interest of the public.

The fact that an assistant prosecuting attorney who serves in another public position is subject to a potential conflict of interest, however, does not per se require a determination that the assistant may not serve in the other position. *Rose v. Village of Wellsville*; 1997 Op. Att'y Gen. No. 97-044; 1997 Op. Att'y Gen. No. 97-034; 1992 Op. Att'y Gen. No. 92-041. Rather, if an examination of the particular duties and responsibilities assigned to an assistant prosecuting attorney reveals that the potential conflict of interest is remote and speculative, common law incompatibility or conflict of interest rules are not violated. *Rose v. Village of Wellsville*; 1997 Op. Att'y Gen. No. 97-044; 1997 Op. Att'y Gen. No. 97-034; 1992 Op. Att'y Gen. No. 92-041; *see* 1979 Op. Att'y Gen. No. 79-111 (syllabus, paragraph three).

With respect to your specific inquiry, it is only speculative whether the person, as an assistant prosecuting attorney, will be required to conduct a legal proceeding pursuant to R.C. 117.27-.29, R.C. 733.73, R.C. 2733.04, or R.C. 2733.05 against himself as a member of the legislative authority of a city. Moreover, a member of your staff has informed us that the person in his capacity as an assistant prosecuting attorney is not required to review or prosecute such proceedings against city officers, and that the delegation of such authority to the assistant is not contemplated at this time. The potential conflict of interest thus is remote. Therefore, since the conflict of interest is remote and speculative, the conflict does not prevent an assistant prosecuting attorney from serving as a member of the legislative authority of a city, provided he is not required to prosecute an action under R.C. 117.27-.29, R.C. 733.73, R.C. 2733.04, or R.C.

2733.05 against himself as a member of the legislative authority. *See* 1997 Op. Att'y Gen. No. 97-044; 1997 Op. Att'y Gen. No. 97-034; 1992 Op. Att'y Gen. No. 92-041.

An additional conflict of interest also exists in that a person who serves simultaneously as an assistant prosecuting attorney and member of the legislative authority of a city may be subject to undue influence if the city and an entity represented by him as an assistant prosecuting attorney enter into a contract, *see, e.g.,* R.C. 9.60(C) (a county may contract with a city to obtain fire protection); R.C. 505.43 (in order to obtain police protection, a township may enter into a contract with a city); R.C. 1901.34(D) (a prosecuting attorney may enter into an agreement with a city whereby the prosecuting attorney prosecutes all criminal cases brought before the municipal court), or are opposing parties in the same legal proceeding, *see, e.g.,* R.C. 309.12 (recovery of county moneys); R.C. 709.033 (city may appeal the denial of a petition for annexation made by the board of county commissioners). In such a situation, a person's responsibilities as a member of the legislative authority may influence the performance of his duties as an assistant prosecuting attorney, thereby subjecting him to influences that may prevent his legal advice as an assistant from being completely objective and disinterested. *See* 1980 Op. Att'y Gen. No. 80-035 at 2-149.

An examination of the foregoing conflict of interest indicates that the conflict is remote and speculative. It seems unlikely that there will be many occasions in which the city and an entity represented by the assistant prosecuting attorney will enter into a contract or be opposing parties in the same legal proceeding. It is also speculative whether the person, as an assistant prosecuting attorney, will be required to advise or represent the entity in a matter or legal proceeding involving the city. Information provided to us in this instance indicates that the person will not be assigned any matters or legal proceedings involving the city. Finally, if it becomes necessary in a matter or legal proceeding, it would not be difficult for the person, as an assistant prosecuting attorney, to remove himself from participation in the matter or proceeding. As an assistant prosecuting attorney, the person has an ethical duty to withdraw from any matter or proceeding in which he might not be able to act in the best interest of his employer or client.[6]

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[6] The authority to render interpretations of the ethical provisions of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43 and the rules and canons set forth in the Supreme Court Rules for the Government of the Bar of Ohio and the Code of Professional Responsibility is vested in the Ohio Ethics Commission, R.C. 102.08(A), and the Board of Commissioners on Grievances and Discipline of the Supreme Court, Ohio Gov. Bar R. V § 2(C); *see also* R.C. 102.08(A), respectively. Because the authority to render such interpretations is vested in the Ohio Ethics Commission and the Board of Commissioners on Grievances and Discipline of the Supreme Court, we believe that it is proper to refrain from interpreting such ethical provisions, canons, and rules by way of a formal opinion. *See* 1997 Op. Att'y Gen. No. 97-034 at 2-200 n.2. *See generally* 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three) ("[t]he Attorney General will abstain from rendering an opinion where another governmental entity has been granted the

See Code of Professional Responsibility DR 5-101(A)(1) ("[e]xcept with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests"); 1997 Op. Att'y Gen. No. 97-026 at 2-155 (a public official has a duty to abstain from participating in any matter that would impair his objectivity). Accordingly, if the person, as an assistant prosecuting attorney, does not represent an entity on behalf of the prosecuting attorney in matters or legal proceedings involving the city he serves as a member of the legislative authority, the person is not subject to an impermissible conflict of interest.

A final conflict of interest may exist because of the competition for inside millage generated by the unvoted property tax. Pursuant to R.C. 5705.28-.32, the legislative authority of a city and the board of county commissioners, as taxing authorities, *see* R.C. 5705.01(C), must prepare, adopt, and submit an annual tax budget to the county budget commission. The county budget commission is statutorily required to revise and adjust the estimate of balances and receipts from all sources for each fund within each subdivision's tax budget. R.C. 5705.32; *see* R.C. 5705.31. After revising and adjusting the estimates, the county budget commission then adjusts the levies of the county, cities, and other taxing units within the limits of the law. R.C. 5705.31.

Because the determinations of the county budget commission directly affect the amount of inside millage the county, cities, and other taxing units receive, these entities are permitted to directly address the county budget commission. R.C. 5705.32(E)(2) provides that, "[b]efore the final determination of the amount to be allotted to each subdivision from any source, the commission shall permit representatives of each subdivision … to appear before it to explain its financial needs."

Pursuant to R.C. 5705.27, the prosecuting attorney is a member of the county budget commission. As explained previously, the county budget commission has a duty to determine a city's portion of the inside millage generated by the unvoted property tax. R.C. 5705.31. Because an assistant prosecuting attorney may be required to serve on behalf of the prosecuting attorney as a member of the county budget commission,[7] an assistant could be placed in a position of passing upon the budgetary needs of the city he serves as a member of its legislative authority. *See* 1984 Op. Att'y Gen. No. 84-087 at 2-301.

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authority to render advisory opinions concerning the relevant subject matter"). It is, therefore, recommended that you contact these entities for advice concerning the ethical and professional responsibilities of an assistant prosecuting attorney in the situation you have described.

[7] 1943 Op. Att'y Gen. No. 6186, p. 363 determined that an assistant prosecuting attorney may sit in place of the prosecuting attorney on the county budget commission.

In addition, a person who serves as an assistant prosecuting attorney and member of the legislative authority of a city may be required to prepare both the county's and city's tax budget and explain them to the county budget commission. As a member of the legislative authority of a city, he is required to prepare and adopt a tax budget for the city and may be asked to explain the budget to the county budget commission. R.C. 5705.28. Similarly, as an assistant prosecuting attorney, he may be required to prepare the county's tax budget and explain it to the county budget commission. *See* 1992 Op. Att'y Gen. No. 92-041 at 2-165. If the same person prepares both the county's and city's tax budgets and explains them to the county budget commission, a conflict of interest is present because he must advocate a position on behalf of one to the potential detriment of the other. *See* 1993 Op. Att'y Gen. No. 93-048 at 2-236. An argument that the county or city is entitled to a certain level of funds means a reduced level of funds are available for the other's use. Accordingly, the competition for advantageous budget decisions could subject a person who holds the positions of assistant prosecuting attorney and member of the legislative authority of a city to influences that may prevent him from making completely objective decisions. *See* 1996 Op. Att'y Gen. No. 96-008 at 2-33; 1993 Op. Att'y Gen. No. 93-048 at 2-236.

However, for the following reasons, the potential for conflicts of interest involving budgetary matters is remote and speculative. You have stated that the person's duties, as an assistant prosecuting attorney, do not include the preparation of the county's tax budget or the explanation of it to the county budget commission, nor will he substitute for the prosecuting attorney on the county budget commission. Also, the delegation of such duties is not contemplated at this time. Thus, as an assistant prosecuting attorney, this person is not subject to conflicts of interest involving budgetary matters.

Because this person, as an assistant prosecuting attorney, is not responsible for preparing the county's tax budget or explaining it to the county budget commission, he will not, as a member of the city's legislative authority, be subject to influences that may prevent him from making completely objective decisions when preparing the city's tax budget or explaining it to the commission. As an assistant prosecuting attorney, he will not be responsible for obtaining tax moneys from the county budget commission. The positions of assistant prosecuting attorney and member of the legislative authority are not in competition for the same moneys; thus, any conflicts of interest involving budgetary matters are remote and speculative.

In addition, the fact that a member of the legislative authority holds an office or employment with a political subdivision that adopts a tax budget and explains it to the county budget commission is, in and of itself, an insufficient reason to find that the member is subject to an impermissible conflict of interest. If such reason were sufficient, a member of a political subdivision that adopts a tax budget and presents it to the county budget commission would not be permitted to hold any office or employment with a political subdivision that also adopts a tax budget and presents it to the commission. Moreover, even though the person, as a member of the city's legislative authority, is required to prepare the city's tax budget, and may be required to

explain it to the county budget commission, it is unlikely that he would use less than his best judgment in preparing the budget or explaining it to the commission. *See generally State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph ten) ("[i]n the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully"). This is especially true in light of the fact that while the county and city each submit a tentative tax budget, it is the county budget commission that actually allocates tax moneys to the county and city after adjusting the rates of taxation, fixing the amount of taxes to be levied, and adjusting the estimates of balances and receipts from available sources. *See* R.C. 5705.31-.32. Therefore, since the potential for a conflict of interest involving budgetary matters is remote and speculative, the possibility that such a conflict may occur does not prevent an assistant prosecuting attorney from serving as a member of the legislative authority of a city, provided that as an assistant prosecuting attorney he is not responsible for preparing the county's tax budget or presenting it to the county budget commission or substituting for the prosecuting attorney on the county budget commission.

Based on the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously as an assistant prosecuting attorney and member of the legislative authority of a statutory city, provided that as an assistant prosecuting attorney he does not prepare the county budget or present it to the county budget commission, substitute for the prosecuting attorney on the county budget commission, or prosecute an action under R.C. 117.27-.29, R.C. 733.73, R.C. 2733.04, or R.C. 2733.05 against himself as a member of the legislative authority. In addition, as an assistant prosecuting attorney he may not advise or represent an entity on behalf of the prosecuting attorney in a matter or legal proceeding involving the city he serves as a member of its legislative authority. (1983 Op. Att'y Gen. No. 83-030; 1970 Op. Att'y Gen. No. 70-053; 1970 Op. Att'y Gen. No. 70-022; 1969 Op. Att'y Gen. No. 69-133; 1846-1906 Official Opinions of the Ohio Attorney General, vol. 4, p. 746, questioned.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General

March 22, 1999

The Honorable Robert A. Fry
Hancock County Prosecuting Attorney
222 Broadway, Room 104
Findlay, Ohio 45840

SYLLABUS: 99-027

A person may serve simultaneously as an assistant prosecuting attorney and member of the legislative authority of a statutory city, provided that as an assistant prosecuting attorney he does not prepare the county budget or present it to the county budget commission, substitute for the prosecuting attorney on the county budget commission, or prosecute an action under R.C. 117.27-.29, R.C. 733.73, R.C. 2733.04, or R.C. 2733.05 against himself as a member of the legislative authority. In addition, as an assistant prosecuting attorney he may not advise or represent an entity on behalf of the prosecuting attorney in a matter or legal proceeding involving the city he serves as a member of its legislative authority. (1983 Op. Att'y Gen. No. 83-030; 1970 Op. Att'y Gen. No. 70-053; 1970 Op. Att'y Gen. No. 70-022; 1969 Op. Att'y Gen. No. 69-133; 1846-1906 Official Opinions of the Ohio Attorney General, vol. 4, p. 746, questioned.)