

Note from the Attorney General's Office:

1970 Op. Att'y Gen. No. 70-022 was questioned by
1999 Op. Att'y Gen. No. 99-027.

OPINION NO. 70-022

Syllabus:

The positions of assistant prosecuting attorney and mayor of a municipality are incompatible.

To: Roy H. Huffer, Jr., Pickaway County Pros. Atty., Circleville, Ohio
By: Paul W. Brown, Attorney General, February 26, 1970

You have requested my opinion on the following question: Are the positions of mayor of the City of Circleville and Assistant Prosecuting Attorney of Pickaway County, Ohio, compatible or in conflict?

As defined in Sections 309.08 and 309.09, Revised Code, the prosecuting attorney is the legal adviser for the board of elections and all other county officers and boards. In addition, he is the legal adviser for all township officers. He represents the state in the prosecution of criminal cases within or outside the county and is empowered to investigate crimes.

The prosecuting attorney is given the power to appoint assistants pursuant to Section 309.06, Revised Code, and fix their compensation. While the duties of an assistant prosecuting attorney are not fixed by statute, the name implies that he is chosen to assist his principal in the execution of his office. His appointment implies that he will be under the direction of the prosecuting attorney. The State, ex rel. Thomas v. Henderson et al., 123 Ohio St. 474, 175 N.E. 865 (1931). Opinion No. 184, Opinions of the Attorney General for 1945, page 163, states in pertinent part:

"An 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, including services before the grand jury and prosecution of criminal cases. * * *"

The legislature has seen fit to prohibit a prosecuting attorney from simultaneously holding the municipal office of mayor. Section 309.02, Revised Code, reads in pertinent part:

"No prosecuting attorney shall be a member of the general assembly of this state or mayor of

a municipal corporation." (Emphasis added)

The reasoning which led to the determination by the general assembly that these two offices are incompatible could also be applied to assistant prosecuting attorneys since assistants are under the direction and control of the prosecutor. It has been held that the statutory prohibition against a prosecuting attorney also being a member of the General Assembly (Section 1268, Revised Statutes: now, Section 309.02, supra), is also applicable to assistant prosecuting attorneys. In Official Opinions of the Attorney General for 1846-1906, Volume 4, pages 747-748, it is stated:

"Viewing it from the statutory prohibition, if the office of prosecuting attorney and member of the General Assembly are incompatible, for the many reasons that might be suggested, independent of statute, by a parity of reasoning an assistant prosecutor having all the duties of a prosecutor, would be ineligible as a member of the legislature."

Since Section 309.02, supra, prohibits prosecuting attorneys from holding the office of mayor of a municipality as well as a seat in the legislature, the aforementioned opinion would suggest that an assistant prosecuting attorney "* * * having all the duties of a prosecutor * * *" could not simultaneously hold the office of mayor of a municipality.

Therefore, it is my opinion and you are accordingly advised that the positions of assistant prosecuting attorney and mayor of a municipality are incompatible.