

OPINION NO. 89-099**Syllabus:**

Persons employed to prosecute child support enforcement actions under R.C. 2919.21(A)(2) and R.C. 3115.10 act in the capacity of assistant prosecuting attorneys.

To: James A. Philomena, Mahoning County Prosecuting Attorney, Youngstown, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, December 29, 1989

I have before me your opinion request concerning the provision of legal services for the county child support enforcement agency. By way of background, your request letter states:

[T]he Mahoning County Welfare Department Division of Child Support has contracted with local attorneys to provide legal services for the enforcement of delinquent child support. Referees are also appointed by the court to hear such matters.

The duties of these attorneys include "prosecution" of criminal contempt actions under R.C. 2919.21(A)(2). Additionally, the Child

Support Enforcement Agency is responsible for initiating actions under Chapter 3115 of the Ohio Revised Code, the Uniform Reciprocal Enforcement of Support Act. Pursuant to R.C. 3115.10 the prosecuting attorney upon the request of the court shall represent the obligee in any proceeding under sections 3115.01 to 3115.34 of the Revised Code. R.C. 3115.01(11) defines "prosecuting attorney" "as the public official in the appropriate place who has the duty to enforce criminal laws relating to the failure to provide for the support of any person."

These attorneys are also engaged in the representation of criminal defendants in the Mahoning County Court of Common Pleas.

Based upon these facts, you specifically ask:

1. Are the attorneys who receive compensation for representing the county in delinquent child support actions considered prosecuting attorneys? And if so, is it proper for those attorneys to represent criminal defendants in that same county?
2. Does the fact that these attorneys are retained or court appointed to represent defendants make a difference?
3. Is it proper for referees in such matters to represent criminal defendants in that same county?

Your first question concerns the employment status of attorneys who handle actions on behalf of the county's child support enforcement agency. The status of such attorneys was discussed at length in 1988 Op. Att'y Gen. No. 88-094. Like the situation addressed in Op. No. 88-094, in Mahoning County the board of county commissioners apparently has designated the county department of human services as the child support enforcement agency for the county. Unlike the facts considered in Op. No. 88-094, however, the Mahoning County department of human services, in its capacity as the county child support enforcement agency (hereinafter CSEA), has bypassed the prosecuting attorney and has directly hired other attorneys to prosecute child support enforcement actions within the county.¹

As noted in Op. No. 88-094, various statutory methods are provided for the enforcement of child support obligations. Certain actions are brought by the county prosecuting attorney as part of the duties specifically imposed upon his office. *See, e.g.,* R.C. 2301.372. In other instances, however, the prosecuting attorney is directed to bring such actions upon the request of the CSEA. *See, e.g.,* R.C. 2301.38(B). Your concern, however, appears to be focused on the prosecution of actions under R.C. 2919.21(A)(2) (nonsupport of a child) and R.C. Chapter 3115 (reciprocal enforcement of support). I will, therefore, limit my discussion of your first two questions concerning the prosecution of child support enforcement actions to only those duties.

Pursuant to R.C. 309.08:

The prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, except for those required to be prosecuted by a special prosecutor pursuant to [R.C. 177.03] or by the attorney general pursuant to [R.C. 109.83], and such other suits, matters, and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals.

¹ Pursuant to R.C. 2941.63, "[t]he court of common pleas, or the court of appeals, whenever it is of the opinion that the public interest requires it, may appoint an attorney to assist the prosecuting attorney in the trial of a case pending in such court." The appointment of counsel by the court of common pleas, however, does not appear to be the situation with which you are concerned. I will, therefore, not address the operation of R.C. 2941.63.

Since the prosecution of actions under R.C. 2919.21(A)(2) is a criminal prosecution, *see State v. Oppenheimer*, 46 Ohio App. 2d 241, 348 N.E.2d 731 (Franklin County 1975), such action is the responsibility of the county prosecuting attorney under R.C. 309.08.

The second type of action with which you are concerned is one conducted on behalf of an obligee under R.C. Chapter 3115. Pursuant to R.C. 3115.10:

If this state is acting as an initiating state, the prosecuting attorney upon request of the court shall represent the obligee in any proceeding under [R.C. 3115.01-.34]. If the prosecuting attorney neglects or refuses to represent the obligee, the county director of human services may obtain other representation.

See generally R.C. 3115.01 (B)(2) ("['i]nitiating state' means any state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced"). Pursuant to this provision, the responsibility for representation of the obligee, upon the request of the court, is imposed initially upon the prosecuting attorney. The statute further provides that only where the prosecuting attorney neglects or refuses to represent the obligee may the county director of human services obtain other representation. Thus, where this state is the initiating state, R.C. 3115.10 initially charges the prosecuting attorney, upon the request of the court, with the responsibility for representing the obligee in any proceeding under R.C. 3115.01-.34.

In this regard, I note that, R.C. 309.09(A) states in part:

The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards...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 [R.C. 305.14].* (Emphasis added.)

The manner in which counsel, other than the county prosecutor, may act on behalf of county officers or entities is prescribed by R.C. 305.14 which states in pertinent part:

(A) The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

(B) The board of county commissioners may also employ legal counsel, as provided in [R.C. 309.09], to represent it in any matter of public business coming before such board, and in the prosecution or defense of any action or proceeding in which such board is a party or has an interest, in its official capacity.

See generally State ex rel. Corrigan v. Seminatore, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981) (syllabus, paragraph one). Thus, it appears that where the prosecuting attorney does not represent the obligee as specified in R.C. 3115.10, R.C. 309.09(A) requires the county director of human services to obtain other counsel in the manner prescribed by R.C. 305.14(A).

Pursuant to R.C. 309.08, the prosecuting attorney is under a duty to prosecute actions under R.C. 2919.21(A)(2). Since the prosecution of such actions is the responsibility of the prosecuting attorney, only those persons serving as assistant prosecuting attorneys may do so in the prosecutor's stead. *See Seminatore*; *see generally* Op. No. 88-094 (syllabus, paragraph one) ("[w]here a county department of human services, as the child support enforcement agency for the county, has entered into an agreement with the county prosecuting attorney for the provision of legal services, assistant prosecuting attorneys who perform legal services for the child support enforcement agency are 'employees,' for purposes of R.C. Chapter 2744, and

are thereby entitled to the defenses, immunities and protections granted employees by that chapter"). In the representation of obligees in reciprocal enforcement of support actions, the prosecutor is acting upon request of the court under the authority of R.C. 3115.10. Only when the prosecutor neglects or refuses to represent an obligee does R.C. 3115.10 permit the director of the county department of human services to seek other representation for the obligee in accordance with R.C. 305.14; such other counsel would then be acting in the capacity of an assistant prosecuting attorney. *See Seminatore.*

Further, I note that the county department of human services is a creature of statute and may, therefore, exercise only those powers conferred upon it by statute. No statute of which I am aware authorizes a county department of human services independently to hire legal counsel other than the prosecuting attorney. Rather, if counsel other than the prosecuting attorney is to be obtained, the county department of human services must do so in accordance with R.C. 309.09 and R.C. 305.14. *See* 1989 Op. Att'y Gen. No. 89-015 (syllabus, paragraph one) ("[w]ith respect to child support enforcement actions, the county prosecuting attorney must perform those duties expressly imposed by statute upon his office and, where the county department of human services has been designated under R.C. 2301.35 as the child support enforcement agency for the county, such duties as may be required of his office by R.C. 309.09(A)"); 1983 Op. Att'y Gen. No. 83-078 (syllabus) ("[a] county director of welfare [now county director of human services] may not employ an attorney to represent the department of [human services] in juvenile court proceedings or to perform other legal services on behalf of the department. Pursuant to R.C. 305.14, however, a court of common pleas, upon application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to act on behalf of the county welfare department [now county department of human services]").²

Since the prosecution of actions under R.C. 2919.21(A)(2) and the representation of an obligee upon request of the court in accordance with R.C. 3115.10 are duties of the prosecuting attorney, only those persons hired by the prosecuting attorney under R.C. 309.06 or persons appointed in accordance with R.C. 305.14 and R.C. 309.09, may perform such services for the county CSEA. *See* Op. No. 88-094.

Having concluded that the performance of the duties under R.C. 2919.21(A)(2) and R.C. 3115.10 are the responsibility of the county prosecuting attorney and assistant prosecuting attorneys, I turn to the portion of your request concerning the permissibility of such assistants, in their private practices, also representing criminal defendants in common pleas court in the same county. As noted in 1987 Op. Att'y Gen. No. 87-033 at 2-234 through 2-235: "Pursuant to Gov. Bar R. sec. V(2)(b), the Supreme Court Board of Commissioners on Grievances and

² The regulations issued by the Department of Human Services pursuant to R.C. 2301.35(D) concerning the operation of child support by a CSEA in fact recognize the relationship between the county prosecutor and the CSEA as follows:

IV-D cooperative a[greements] shall be executed with the county prosecuting attorney whenever possible. The agreement must cover legal services for establishing parentage, child support, and medical support in Uniform Reciprocal Support Enforcement Act actions as well as in-county actions. It shall also cover other legal services to the local IV-D program.

(B) If legal services are to be provided by a source other than the county prosecutor, the CSEA must follow the provisions of sections 305.14 and 309.09 of the Revised Code. It is suggested the agency seek the assistance of the prosecuting attorney in following this procedure. (Emphasis added.)

Discipline of the Bar is empowered to render advisory opinions relating to the ethical obligations of members of the bar." It has come to my attention that the Board has issued an opinion, the syllabus of which states:

A part time prosecutor, whose duty it is to represent the State of Ohio in criminal cases, may not represent criminal defendants against the State of Ohio in his or her private practice. There are very limited instances, which are set forth in this opinion, when a part time city or municipal prosecutor may represent criminal defendants in his or her private practice. When a member of a law firm may not accept employment pursuant to DR 5-105, then other members of that law firm are likewise precluded from accepting such employment.

Board of Commissioners on Grievances & Discipline Op. No. 88-008 (June 1988).³ The Board has also opined with respect to both part-time and full-time referees about whom you ask in your third question, as follows:

Referees are considered judges for purposes of complying with the Code of Judicial Conduct. In this regard, part-time referees may not practice before the court division on which they serve or before the judge or judges to whom they owe their appointment. However, part-time referees serving the domestic relations division of common pleas court may practice law before other judges in the general, probate and juvenile divisions of that court so long as they avoid the appearance of impropriety.

Board of Commissioners on Grievances & Discipline Op. No. 87-014 (June 1987) (syllabus). With respect to full-time referees, the Board has concluded that Canon 5F of the Code of Judicial Conduct precludes such referees from practicing law. Board of Commissioners on Grievances & Discipline Op. No. 88-36 (December 1988). In light of these determinations, it would be inappropriate for me to address the limitations pertaining to the private practice of law by assistant prosecuting attorneys or referees.

With respect to other possible ethical considerations, I note that R.C. 102.06 empowers the Ohio Ethics Commission to investigate alleged violations of R.C.

³ In this regard, I note that R.C. 120.39 sets forth the following limitation:

(A) Except as provided in division (B) of this section, counsel appointed by the court, co-counsel appointed to assist the state public defender or a county or joint county public defender, and any public defender, county public defender, or joint county defender, or member of their offices, shall not be a partner or *employee of any prosecuting attorney*, city director of law, village solicitor, or similar chief legal officer.

(B) 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, assist a public defender, or serve as public defender in any criminal proceedings in which the village solicitor is not acting as prosecuting attorney. (Emphasis added.)

Thus, those persons enumerated in R.C. 120.39(A) may not serve as employees of any prosecuting attorney. If a person is appointed as defense counsel or co-counsel in the circumstances enumerated therein, he may not also serve as an assistant prosecuting attorney. See *Cain v. Calhoun*, 61 Ohio App. 2d 240, 244, 401 N.E.2d 947, 950 (Gallia County 1979) (R.C. 120.39 "was intended to and proscribes only the appointment of such partner or employee of the enumerated officers [prosecuting attorney, city law director, or other similar officer]. It does not proscribe expressly, or by implication, the appointment of the enumerated officers themselves").

Chapter 102 which restricts the activities of various public officers and employees. I must, therefore, decline to opine as to such matters. See 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three).

It is, therefore, my opinion, and you are hereby advised, that, persons employed to prosecute child support enforcement actions under R.C. 2919.21(A)(2) and R.C. 3115.10 act in the capacity of assistant prosecuting attorneys.