OPINION NO. 69-021

Syllabus:

Section 309.08, Revised Code, requires that one elected to the office of prosecuting attorney remain a licensed attorney in order to continue in office.

To: Hamlin C. King, Gallia County Pros. Atty., Gallipolis, Ohio
By: Paul W. Brown, Attorney General, February 14, 1969

I have before me your request for my opinion on the following questions:

> 1. Does Section 309.02, Revised Code, make it necessary to be a licensed attorney only in order to be elected to the office of prosecuting attorney, or does the section, by implication, require that one remain a licensed attorney in order to continue in office?
>
> 2. Assuming that one does need to be a licensed attorney in order to continue in office as prosecuting attorney, does the office become automatically vacant when a prosecuting attorney loses his license to practice law, or is a quo warranto proceeding necessary in order to vacate the office?

The pertinent part of Section 309.02, supra, reads as follows:

> "No person shall be eligible as a candidate for the office of prosecuting attorney, or shall be elected to such office who is not an attorney at law licensed to practice law in this state.* * *"

The powers and duties of the prosecuting attorney are prescribed in Section 309.08, Revised Code, the pertinent part of which reads as follows:

> "The prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, 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. In conjunction with the attorney general, such prosecuting attorney shall prosecute cases arising in his county in the supreme court.* * *"

Section 309.02, supra, and Section 309.08, supra, have not heretofore been interpreted with reference to the questions you pose. In order to answer these questions, it is therefore necessary to examine cases in other jurisdictions in which similar statutes and questions have been considered.

The case of Brown v. Woods, et al., 39 P. 473, 2 Okl. 601, arose because the petitioner therein, who had been the successful

candidate for the office of county attorney, was suspended from the practice of law by the district court of the county in which he was to serve between the time of his election and the time at which he was to assume office. He brought a mandamus action in the Supreme Court of Oklahoma to require the incumbent county attorney to turn the office over to him, and to require the judge of the district court of the county to recognize him as the county attorney. The petitioner contended that, as he had been admitted to practice before the Supreme Court of Oklahoma, he was eligible to enter upon the duties of the office of county attorney, even though he had been suspended from practice by a judgment of the district court of the county. The Supreme Court rejected this contention, for reasons which appear later in this opinion.

Section 1702 of the Laws of Oklahoma of 1893, the laws which were involved in the Brown case, supra, provided in pertinent part as follows:

> "* * *no person shall be eligible to the office of county attorney who is not duly admitted to practice in some court of record in this territory."

Section 1705 of the same laws provided in pertinent part as follows:

> "It shall be the duty of the county attorney of the several counties to appear in the district courts of their respective counties and prosecute and defend, on behalf of the territory, or his county, all actions or proceedings, civil or criminal, in which the territory or county is interested or a party;* * *"

It is apparent that the Oklahoma statutes under consideration in the Brown case, supra, and the Ohio statutes under consideration in this opinion have certain similarities. Both the Oklahoma and Ohio statutes impose the duty on the county or prosecuting attorney to appear in court on behalf of his county, and both statutes require, as a condition of eligibility for the office, that one be admitted to the practice of law. However, neither statute contains an express provision that one who has been elected to the office must remain in good standing as a member of the bar.

The court in the Brown case, supra, expressed the opinion that, even in the absence of a specific statutory provision, it was the intention of the legislature that one who assumes the office of county attorney continues to be of good moral character and that he remain admitted to the practice of law. This position is stated as follows, in 39 P., at page 74:

> "* * *The evident purpose and intention of the legislative act, with reference to the eligibility of a person to the office of county attorney, was not only that he should possess the qualifications to perform the duties of the office of county attorney, but that there should be a judgment and determination of a court that he does possess the moral and mental qualifications of an attorney, - that there should be a determination of a court that he is a person of good moral character, and learned and skilled in the legal profession. It requires that he 'shall have been

duly admitted to practice,' and then specifies the particular duties that he is required to perform. The statute, it is true, does not say, in terms, that he must not have been disbarred from practice in the very court in which the law requires him to perform certain professional duties, but the terms of the act show that this was within the reason and intention of the legislature. It was within the purpose and spirit of the act, and that which is within the reason, purpose, and intention of the language used is as much within the act as though it were a part of the language itself.* * *

"Now, the reason and intention of this act of the legislature, with reference to the eligibility and duties of a person holding the office of county attorney, is not only that he be admitted to practice in a court of record, but that he remain admitted to practice in the court where his duties must be performed;* * *"
(Emphasis added)

The court concluded that it would be absurd to draw another conclusion from the statutes it was considering. In the same manner, and for the reasons stated in the Brown case, supra, it is implied in Section 309.08, supra, that one who assumes the office of prosecuting attorney remain admitted to the practice of law in this state while in office.

The facts disclosed by your letter of request make it unnecessary for me to answer your second question. However, I note the opinion of the court in Commonwealth ex rel. Pike County Bar Association v. Stump, 57 S.W. 2d 524, 247 Ky. 589. In 57 S.W. 2d, at page 525, the court states:

"* * *the loss of the office in case of disbarment is only an incident thereto, which results as a consequence of the loss of the right to practice law, since the prosecuting attorney is, most generally at least, required to be a member of the bar and have license to practice law as a prerequisite to holding his office, and if he is deprived of such license he is no longer qualified to fill the office.* * *"

The loss of the office in case of suspension is, likewise, incident to the suspension, and no separate action would seem to be required to vacate it.

In conclusion, it is my opinion and you are hereby advised that Section 309.08, Revised Code, requires that one elected to the office of prosecuting attorney remain a licensed attorney in order to continue in office.