

Note from the Attorney General's Office:

1994 Op. Att'y Gen. No. 94-035 was overruled in part
as a result of legislative enactment
by 2018 Op. Att'y Gen. No. 2018-020.

OPINION NO. 94-035**Syllabus:**

1. A county prosecuting attorney, acting in an official capacity pursuant to R.C. 309.09, may not represent a county-wide park district established under R.C. 1545.01 or a joint ambulance district established under R.C. 505.71.
2. A county prosecuting attorney, acting as a private attorney, may not represent a joint ambulance district formed pursuant to R.C. 505.71, or a county-wide park district formed pursuant to R.C. 1545.01, that appears before the county budget commission on which the prosecuting attorney serves pursuant to R.C. 5705.27.

3. A county prosecuting attorney may privately represent a park or joint ambulance district that does not appear before the budget commission on which the prosecuting attorney sits, provided the scope of such representation is limited to matters that do not involve any parties represented by the prosecuting attorney in the prosecuting attorney's official capacity, and further provided that such representation does not violate any provision of the ethics statutes set forth in R.C. Chapter 102 or R.C. 2921.42-.43, or any provision of the Code of Professional Responsibility, adopted pursuant to Ohio Gov. Bar R. IV §1, governing attorneys and the practice of law.

To: David A. Sams, Madison County Prosecuting Attorney, London, Ohio
By: Lee Fisher, Attorney General, June 2, 1994

You have requested an opinion regarding the following questions:

1) May a county prosecuting attorney, acting either in an official capacity or as a private attorney, represent a county-wide park district existing in the same county?

2) May a county prosecuting attorney, acting either in an official capacity or as a private attorney, represent a joint ambulance district established pursuant to R.C. 505.71?

I. Authority of a County Prosecuting Attorney to Provide Legal Representation in an Official Capacity

A. Authority Is Limited to Powers Expressed or Implied in Statute

A county prosecuting attorney, as the holder of an office created by the General Assembly, exercises only such authority as is expressly conferred by statute or as may be necessarily implied in order to perform express statutory duties. See *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940) (syllabus, paragraph one); *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 128 N.E. 173 (1920). Accordingly, whether characterized as mandatory or discretionary, the authority of a county prosecuting attorney acting in an official capacity to represent either a park or joint ambulance district must be conferred expressly or necessarily implied in order to carry out other express statutory duties.

B. Lack of Express Authority to Represent Park or Joint Ambulance Districts

R.C. 309.09 generally establishes the duties of the county prosecuting attorney with respect to legal representation:

(A) The prosecuting attorney shall be the *legal adviser* of the board of county commissioners, board of elections, and *all other county officers and boards*, including all tax-supported public libraries, 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 section 305.14 of the Revised Code.

(B) Such prosecuting attorney shall be the *legal adviser for all township officers*, unless the township has adopted the limited self-government form of township government pursuant to Chapter 504. of the Revised Code, in which case the township law director, whether serving full-time or part-time shall be the legal adviser for all township officers. (Emphasis added.)

Thus, R.C. 309.09 would impose an express obligation on a county prosecuting attorney to represent a park district or a joint ambulance district or the officers of such districts if either type of district is a county board, or if the officers of either type of district are properly considered to be county or township officers. See generally 1993 Op. Att'y Gen. No. 93-001 at 2-3 (discussing the county prosecuting attorney's obligation, under R.C. 309.09, to be the legal adviser for county officers, county boards, and township officers).

Review of the statutes governing park and joint ambulance districts, however, leads to the conclusion that they are not county boards, nor are their officers county or township officers. A park district is formed from all or part of the territory of a county. R.C. 1545.01.¹ Although the application for creation can be initiated by a board of township trustees or a board of county commissioners, the district is created by order of the probate court, and is governed by a board of park commissioners appointed by the county probate judge. R.C. 1545.02-.05. The board is a "body politic and corporate" with authority to hire and contract for professional services as needed to perform its duties. R.C. 1545.07. The board of park commissioners has taxing authority independent of the county or townships included in its territory. R.C. 1545.20-.21; see also R.C. 5705.01(H) (park district is a taxing unit for purposes of tax levy law). Park districts are specifically identified as political subdivisions for various statutory purposes, see, e.g., R.C. 9.82(B) (risk management and self-insurance programs); R.C. 124.81(F) (employee fringe benefits); R.C. 319.61(C) (levies for special assessments); R.C. 5747.01(Q)(1) and .62(A) (distribution of revenue funds derived from state income tax), and also are generally recognized to be political subdivisions. See *Village of Willoughby Hills v. Board of Park Comm'rs*, 3 Ohio St. 2d 49, 51, 209 N.E.2d 162, 163 (1965) (syllabus) ("this court has found a park district to be a political subdivision of the state of Ohio which performs a function of the state that is governmental in character").

A joint ambulance district is formed pursuant to R.C. 505.71 from the territories of a combination of townships, municipalities, or both. The district must be given a name different from that of any participating subdivision, and is governed by a separate board of trustees. R.C. 505.71. The board of trustees has authority to levy taxes, issue bonds, hire employees, and contract for certain services. R.C. 505.71-.72. Joint ambulance districts are specifically named as subdivisions for purposes of public securities law, R.C. 133.01(MM)(6), emergency telephone number systems, R.C. 4931.40(D), and tax levy law, R.C. 5705.01(A).

Thus, park and joint ambulance districts function independently of either the county or the townships whose territory is included in the districts. Park districts and joint ambulance

¹ The specific term "county-wide park district" does not appear in the Revised Code. R.C. 1545.01, however, is the only statute that authorizes formation of a park district that includes an entire county. Cf. R.C. 511.18 (township park districts); R.C. 301.26 (allowing the county to acquire parks and form an agency to administer them); 1961 Op. Att'y Gen. No. 2229, p. 276 (holding that R.C. 301.26 does not authorize formation of a park district).

districts are not county or township boards nor are the persons appointed to serve on the governing boards of these districts county or township officers by reason of such appointment. *See, e.g.*, Op. No. 93-001 at 2-6 (persons appointed to serve as members of a regional planning commission, which pursuant to R.C. 713.21 is separate and distinct from the counties and townships that have formed it, are not county or township officers for purposes of R.C. 309.09). Accordingly, R.C. 309.09 does not invest the prosecuting attorney with either a duty or discretionary authority to represent park or joint ambulance districts or the persons appointed to their governing boards. *See* 1979 Op. Att'y Gen. No. 79-039 (joint ambulance district); 1927 Op. Att'y Gen. No. 279, vol. I, p. 489 (park district); *accord* 1993 Op. Att'y Gen. No. 93-050 at 2-243 (joint ambulance district); 1991 Op. Att'y Gen. No. 91-009 at 2-44 (park district); 1919 Op. Att'y Gen. No. 125, vol. I, p. 217 (park district). Further, there are no other statutes that authorize or obligate a county prosecuting attorney to extend legal services or representation specifically to park districts or joint ambulance districts. *Cf.* R.C. 311.29 (authorizing a park district to contract with the county sheriff for police services); R.C. 1545.22 (authorizing a board of park commissioners to receive certain services from the county treasurer and auditor). Thus, a county prosecuting attorney has no express statutory authority to represent park or joint ambulance districts.

C. Lack of Implied Authority to Represent Park or Joint Ambulance Districts

In the absence of express authority to provide representation, such authority may be implied if necessary to perform other statutory duties of the county prosecuting attorney. *See State ex rel. Finley*. Review of the statutes, however, reveals that a county prosecuting attorney has no other statutory duties or authority with respect to either park or joint ambulance districts. That the districts are located in the county, or in townships that are part of the county, is not sufficient to imply such authority. *See* 1992 Op. Att'y Gen. No. 92-060 at 2-247. The resources of a county office, such as that of the prosecuting attorney, cannot be extended to other political subdivisions located in the county absent statutory authority to do so. *See generally City of Cleveland v. Public Library Bd.*, 94 Ohio St. 311, 114 N.E.2d 247 (1916) (fact that two subdivisions are substantially the same in territory and population cannot justify a donation of public funds from one to the other).² Thus there is no basis upon which to imply authority on the part of the prosecuting attorney to represent park districts or joint ambulance districts. In the absence of either express or implied statutory authority, a county prosecuting attorney, acting in an official capacity, has neither a duty nor discretionary authority to represent a county-wide park district formed pursuant to R.C. 1545.01, or a joint ambulance district formed pursuant to R.C. 505.71.

² The principle enunciated in this case would not preclude charging another subdivision for legal service. However, the question of whether one public office has authority to charge another for services cannot arise at all unless the public office providing the service has either a duty or discretionary authority to provide that service to the recipient. *See* 1982 Op. Att'y Gen. 82-011 at 2-36 to 2-37 (stating, in considering the ability to charge for the cost to a county of providing services to its component parts or to a public office independent of the county, that although it is difficult to imply any authority to charge for providing a mandatory service, "if a county officer has discretion to determine whether to perform a particular service, such officer may consider payment to the county as one factor").

II. Ability of County Prosecuting Attorney to Represent a Park District or a Joint Ambulance District as Part of a Private Legal Practice

Ohio law allows a county prosecuting attorney to maintain a private practice of law while in office. *See* R.C. 325.11(B)(2); *State ex rel. Waite v. Berry*, 11 Ohio St. 3d 53, 463 N.E.2d 386 (1984). The more specific question of whether a prosecuting attorney may simultaneously engage in the private legal representation of a park or joint ambulance district is subject to the analysis established in 1989 Op. Att'y Gen No. 89-037 for determining whether a public officer may simultaneously hold another private position.³ This analysis involves the following questions:

1. Is the public position a classified employment within the terms of R.C. 124.57?
2. Do statutes governing either position limit the outside employment possible?
3. Is there a conflict of interest between the two positions?
4. Are there local charter provisions or ordinances which are controlling?
5. Is there a federal, state, or local departmental regulation applicable?

Op. No. 89-037 at 2-163 to 2-164.

A. Statutory and Regulatory Provisions

Question one can be answered in the negative, as the position of county prosecuting attorney is an elected office, not a classified employment. No statutes governing the county prosecuting attorney or park and joint ambulance districts expressly prohibit a prosecuting attorney from privately representing a county park district or joint ambulance district while in office, so question two also can be answered in the negative. Questions four and five involve matters primarily of local concern that are best determined at the local level on a case-by-case basis. To the extent that question five raises issues of federal and state law, no federal or state regulations control the ability of a county prosecuting attorney to provide private representation to park or joint ambulance districts. The remaining issue, therefore, is whether a common law conflict of interest may confront a prosecuting attorney who, as part of a private practice, provides legal advice or representation to a park or joint ambulance district.

B. Common Law Conflict of Interest

Determination of whether a conflict of interest exists under the common law requires an examination of how the duties and interests involved in each position interrelate. Because public

³ An attorney who represents such districts as part of a private practice is not a public employee or officer of the districts, but rather an independent contractor. *See, e.g.*, 1987 Op. Att'y Gen. No. 87-025 (county coroner who contracts to provide medical services to county home is not an employee of the home). Thus, when a prosecuting attorney is involved, the question is not one of the compatibility of two public positions but of a public and a private position.

officers owe an undivided duty to the public, they may not hold additional positions that would create divided loyalties, conflicting duties, or the temptation to act other than in the public interest. Op. No. 89-037 at 2-164; 1970 Op. Att'y Gen. No. 70-168; *see also State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902) ("the self interest of the public official and the public interests which he represents, must not be brought into conflict"). The statutes governing park districts and joint ambulance districts authorize numerous ways a joint ambulance or park district may interact with governmental entities that a county prosecuting attorney represents pursuant to R.C. 309.09. *See, e.g.*, R.C. 505.72(B) (joint ambulance district may contract with townships and other legal entities for ambulance or emergency medical services); R.C. 1545.14 (park district has authority to cooperate with other public authorities in control of parks); R.C. 1545.131-.132 (park district may contract with other governmental entities for law enforcement); R.C. 1545.27 (county may invest in park district revenue bonds). Further, the county prosecuting attorney serves on the county budget commission, R.C. 5705.27, which rules on the budgets and tax allocations for both types of districts. *See generally* R.C. 5705.01 (definitions); R.C. 5705.28 (duty of subdivisions and taxing units to adopt tax budgets); R.C. 5705.31 (budget commission to adjust tax levies based on budget needs); R.C. 5747.51(B) (allocation of undivided local government fund); R.C. 5747.62 (allocation of undivided local government revenue assistance fund).

Clearly, the common law prohibition against holding additional positions that would create divided loyalties, conflicting duties, or the temptation to act other than in the public interest prevents a prosecuting attorney from privately representing a park district or joint ambulance district in any matter involving the county, a township, or other governmental entity that is represented by that prosecuting attorney acting in an official capacity. *See also* Code of Professional Responsibility DR 5-105 (governing representation of multiple clients). This situation creates a conflict of interest regardless of whether the park or joint ambulance districts are located in the same territory as the county or township involved. When, however, it is possible for a prosecuting attorney to avoid such conflict by limiting the type of legal services provided as a private practitioner, the prosecuting attorney is not completely precluded from private representation of such districts in other matters. *See, e.g.*, 1979 Op. Att'y Gen. No. 79-019 (prosecuting attorney may provide private representation to "multi-county felony bureau" if no conflict with official duties); *see also* Ohio Ethics Commission, Advisory Op. No. 83-009.

With respect to park or joint ambulance districts that have territory within the county, however, the fact that the prosecuting attorney serves as a member of the county budget commission presents a type of conflict that cannot be resolved simply by declining to represent a park or joint ambulance district on budget or tax matters.⁴ The compensation paid to the prosecuting attorney as the private legal counsel of a park or joint ambulance district is part of that district's budget. Part of the function of the county budget commission is to examine each budget presented and distinguish the actual needs of the governmental unit from merely claimed needs or wants. Based on this determination and the relative needs of each governmental unit involved, the budget commission then determines the distribution of inside millage and other funds to each entity. *See generally City of Canton v. Stark County Budget Comm'n*, 40 Ohio St. 3d 243, 533 N.E.2d 308 (1988); *Board of County Comm'rs v. Village of Willoughby Hills*, 12 Ohio St. 2d 1, 230 N.E.2d 314 (1967). This process, therefore, would require a prosecuting attorney, as a member of the county budget commission, to make decisions that affect the funds

⁴ Neither 1979 Op. Att'y Gen. No. 79-019 nor Ohio Ethics Commission, Advisory Op. No. 83-009 considered how a county prosecuting attorney's duties on the budget commission would affect his or her ability to provide private representation.

available to provide that prosecuting attorney's private compensation.⁵ Recusal from ruling on the park or joint ambulance district budgets is not adequate in this situation because effects of the budget determinations are so interrelated that it is impossible to avoid conflict by abstaining only on one or two particular budgets. Further, because the commission has only three members, the need for the prosecuting attorney to recuse himself on a constant and recurring basis from making such decisions would likely impair the functioning of the commission. *See, e.g.*, 1990 Op. Att'y Gen. No. 90-083 at 2-358 (impractical and laborious for member of three person board of township trustees to abstain from recurring tax and budget decisions that created frequent conflict of interest). Accordingly, a county prosecuting attorney, acting as a private attorney, may not represent a park or joint ambulance district that appears before the county budget commission on which that prosecuting attorney sits.

C. Ethics Statutes and Code of Professional Responsibility

This opinion does not consider any questions regarding the applicability of the ethics statutes, R.C. Chapter 102; R.C. 2921.42-.43, or the Code of Professional Responsibility governing attorneys, adopted pursuant to Ohio Gov. Bar R. IV §1. The interpretation of these provisions is, respectively, within the jurisdiction of the Ohio Ethics Commission and the Board of Commissioners on Grievance and Discipline of the Ohio Supreme Court. R.C. 102.08; Ohio Gov. Bar R. V §2(C). *See generally* 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three) (Attorney General will abstain from rendering opinion when another governmental entity has jurisdiction to render advisory opinions). Although activities that create a common law conflict of interest may also violate provisions of the ethics statutes and the Code of Professional Responsibility, differing penalties attach. *See* R.C. 102.99 (criminal penalties for violation of ethics provisions); Ohio Gov. Bar R. V §6 (reprimand, suspension or disbarment for violation of Code of Professional Responsibility). Additionally, activities that are permissible under the common law may be prohibited by specific statutory or regulatory provisions. Thus, you may wish to request additional guidance from the Ohio Ethics Commission and the Ohio Board of Commissioners on Grievance and Discipline regarding the application of the ethics statutes and the Code of Professional Responsibility to your second question.

III. Conclusions

It is, therefore, my opinion and you are hereby advised that:

1. A county prosecuting attorney, acting in an official capacity pursuant to R.C. 309.09, may not represent a county-wide park district established under R.C. 1545.01 or a joint ambulance district established under R.C. 505.71.
2. A county prosecuting attorney, acting as a private attorney, may not represent a joint ambulance district formed pursuant to R.C. 505.71, or a county-wide park district formed pursuant to R.C. 1545.01, that appears

⁵ It might be argued that the prosecuting attorney, as a member of the county budget commission, is placed in a similar position of conflict with respect to approval of the county budget. That situation is different, however, since the prosecuting attorney's compensation with respect to statutory duties is set by statute. Thus, the prosecuting attorney does not have a private contractual relationship with the county or a private pecuniary interest in the county budget.

before the county budget commission on which the prosecuting attorney serves pursuant to R.C. 5705.27.

3. A county prosecuting attorney may privately represent a park or joint ambulance district that does not appear before the budget commission on which the prosecuting attorney sits, provided the scope of such representation is limited to matters that do not involve any parties represented by the prosecuting attorney in the prosecuting attorney's official capacity, and further provided that such representation does not violate any provision of the ethics statutes set forth in R.C. Chapter 102 or R.C. 2921.42-.43, or any provision of the Code of Professional Responsibility, adopted pursuant to Ohio Gov. Bar R. IV §1, governing attorneys and the practice of law.