

Note from the Attorney General's Office:

1992 Op. Att'y Gen. No. 92-041 was distinguished
by 2019 Op. Att'y Gen. No. 2019-021.

OPINION NO. 92-041**Syllabus:**

An individual employed as an assistant county prosecuting attorney may also serve within the same county as a mayor's court magistrate in the mayor's court of a village, provided that the individual (1) as mayor's court magistrate does not preside over hearings involving actions prosecuted or defended by the county prosecuting attorney who employs him as an assistant county prosecuting attorney, and (2) is not delegated, as an assistant county prosecuting attorney, responsibility for the prosecution of actions under R.C. Chapter 2733, R.C. 733.73, or R.C. 117.27-.29, the handling of appeals from the mayor's court to the county court or municipal court, the preparation or presentation of the county budget to the county budget commission, or the replacing of the county prosecuting attorney on the county budget commission.

To: Timothy A. Oliver, Warren County Prosecuting Attorney, Lebanon, Ohio
By: Lee Fisher, Attorney General, September 22, 1992

You have asked whether an individual may simultaneously hold the positions of assistant county prosecuting attorney and mayor's court magistrate for a village located in the same county. As a background for discussion of your question, these two positions can be characterized as follows.

I. The Position of Assistant County Prosecuting Attorney

Pursuant to R.C. 309.06, a county prosecuting attorney may appoint "such assistants ... as are necessary for the proper performance of the duties of his office." A duly appointed assistant county prosecuting attorney is authorized to act for, and in place of, the county prosecuting attorney in most matters. *See* R.C. 309.06; *see also* 1971 Op. Att'y Gen. No. 71-050 at 2-172.

II. An Assistant County Prosecuting Attorney Generally May Not Hold Any Position That the County Prosecuting Attorney May Not Hold

Because an assistant county prosecuting attorney may discharge most of the county prosecuting attorney's duties, an assistant county prosecuting attorney is, as a general matter, subject to the same limitations on holding additional employment as the county prosecuting attorney and, therefore, may not hold any position that the county prosecuting attorney may not hold. 1990 Op. Att'y Gen. No. 90-005 at 2-15; 1986 Op. Att'y Gen. No. 86-035 at 2-178. To analyze whether the positions of assistant county prosecuting attorney and mayor's court magistrate are compatible, thus, initially requires an inquiry into the compatibility of the positions of county prosecuting attorney and mayor's court magistrate.

III. The Powers and Duties of a County Prosecuting Attorney

R.C. 309.08(A) sets forth the general duties of a county prosecuting attorney:

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 section 177.03 of the Revised Code or by the attorney general pursuant to section 109.83 of the Revised Code, 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, the prosecuting attorney shall prosecute cases arising in his county in the supreme court, except for those cases required to be prosecuted by a special prosecutor pursuant to section 177.03 of the Revised Code or by the attorney general pursuant to section 109.83 of the Revised Code.

The county prosecuting attorney also serves as legal adviser of the board of county commissioners, the board of elections, and all other county and township officers. R.C. 309.09; *see also* R.C. 309.10. In addition, a county prosecuting attorney is required to prosecute specific legal actions on behalf of the state and various other governmental entities. *See, e.g.,* R.C. 309.12; R.C. 309.14; R.C. 309.17; R.C. 321.42; R.C. 733.73; R.C. 901.25; R.C. 1515.11; R.C. 1719.05; R.C. 1747.11(A); R.C. 2733.04; R.C. 4123.92. A county prosecuting attorney and his assistants are, thus, conferred duties related to the enforcement of the laws of this state and to the provision of legal services to various individuals and governmental entities.

IV. The Position of Mayor's Court Magistrate

Pursuant to R.C. 1905.05(A), "[a] mayor of a municipal corporation that has a mayor's court may appoint a person as mayor's court magistrate to hear and determine prosecutions and criminal causes in the mayor's court that are within the jurisdiction of the mayor's court." In hearing and determining prosecutions and criminal causes, a mayor's court magistrate is authorized to award and issue all writs and processes that are necessary to enforce the administration of justice throughout the municipal corporation, R.C. 1905.20, and to suspend or revoke the driver's or commercial driver's license or permit or nonresident operating privilege of any person, R.C. 1905.201. Mayor's court magistrates, thus, perform duties which involve the exercise of judicial powers in hearing and rendering decisions in matters within the scope of their authority and jurisdiction.

V. Compatibility Analysis

1979 Op. Att'y Gen. No. 79-111 sets forth the following seven questions for determining whether two public positions are compatible:

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?

Op. No. 79-111 at 2-367 and 2-368. Before two public positions may be determined to be compatible, all seven questions must yield an answer in favor of compatibility.¹

A. R.C. 124.57

The first question asks whether either of the positions is a classified employment within the purview of R.C. 124.57, which prohibits employees or officers in the classified service from participating in partisan political activities, other than to vote or express their political views. An assistant county prosecuting attorney holds an unclassified position, R.C. 124.11(A)(11), and, therefore, is not subject to the prohibition of R.C. 124.57.

¹ The sixth and seventh questions involve matters of local legislation and departmental regulations. There are no applicable state or federal department regulations. For purposes of this opinion, it is assumed that there are no local departmental regulations, charter provisions, or ordinances that limit the holding of these two positions.

You have stated that the specific mayor's court magistrate at issue is appointed by the mayor of a village. See R.C. 1905.05(A). Individuals in the service of a village do not come within the scope of R.C. 124.57, and thus an individual appointed by the mayor of a village as a mayor's court magistrate is not subject to the prohibition set forth in R.C. 124.57. See generally Ohio Const. art. XV, §10; R.C. 124.01(A); *State ex rel. Giovanello v. Village of Lowellville*, 139 Ohio St. 219, 39 N.E.2d 527 (1942); 1989 Op. Att'y Gen. No. 89-069 at 2-315.

B. No Limitations on Outside Employment

The second question asks whether the empowering statutes of either position limit outside employment. R.C. 1905.05(A), the empowering statute for a mayor's court magistrate, does not limit a mayor's court magistrate's outside employment. R.C. 1905.04, however, provides that no "mayor's court magistrate shall be concerned as counsel or agent in the prosecution or defense of any case before the mayor's court." Accordingly, an individual who simultaneously holds the positions of assistant county prosecuting attorney and mayor's court magistrate may not, as an assistant county prosecuting attorney, prosecute any cases before the mayor's court.

There are several provisions limiting the outside employment of a county prosecuting attorney and his assistants. E.g., R.C. 3.11; R.C. 120.39(C); R.C. 309.02; R.C. 3313.13; R.C. 5126.03(A)(1); see also 1983 Op. Att'y Gen. No. 83-030. None of these statutes, however, prohibits a county prosecuting attorney or his assistants from also serving as a mayor's court magistrate. Hence, the second question may be answered in the negative.

C. Subordination

The third question asks whether one position is subordinate to, or in any way a check upon, the other. As noted above, the mayor's court magistrate is appointed by the mayor of a village. The mayor's court magistrate is, therefore, responsible to the mayor. A county prosecuting attorney, as an elected official, see R.C. 309.01, is responsible to the people who elected him. An assistant county prosecuting attorney is appointed, pursuant to R.C. 309.06, by the county prosecuting attorney, and thus is accountable to the county prosecuting attorney. A mayor's court magistrate and an assistant county prosecuting attorney, therefore, serve different masters and are not subordinate to each other. Furthermore, neither position acts as a check upon the other. See *Pistole v. Wiltshire*, 22 Ohio Op. 2d 464, 467, 189 N.E.2d 654, 657-58 (C.P. Scioto County 1961) (a township trustee is responsible to the people who elected him and a deputy sheriff is responsible to the sheriff who appointed him; neither position is subordinate to, or a check upon, the other).

D. Physical Constraints

The fourth question asks whether it is physically possible for one individual to discharge the duties of both positions. This is a factual question to be determined at the local level since such persons may more precisely determine the demands of each position. Op. No. 79-111. It seems likely, however, that these two public positions can be filled by the same person if there is no direct conflict in their working hours.

E. Conflict of Interest

The final pertinent question asks whether there is a conflict of interest between the two positions.² A person may not hold two public positions if he

² This opinion does not address potential conflicts of interest that may arise under the ethics provisions of R.C. Chapter 102 or the rules and canons

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. A conflict of interest exists when a person's "responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective." 1980 Op. Att'y Gen. No. 80-035 at 2-149; *see also State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 344 (Ct. App. Butler County 1934).

An examination of the duties of the positions with which you are concerned reveals the existence of several potential conflicts of interest. Pursuant to R.C. 309.08(A), a county prosecuting attorney has a duty to "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party." A potential conflict of interest, thus, exists in that the individual, as a mayor's court magistrate, may be required to preside over prosecutions and criminal causes prosecuted in the mayor's court by the county prosecuting attorney who employs him as an assistant county prosecuting attorney. *See* Op. No. 90-005 at 2-19. *See generally* 1927 Op. Att'y Gen. No. 251, vol. I, p. 438 (syllabus, paragraph four) ("[p]rosecuting attorneys may employ attorneys for the purpose of appearing in courts lower than the common pleas court either for the conducting of preliminary hearings in state cases or for the prosecution of offenses in contravention of state laws"). *But see generally* 1924 Op. Att'y Gen. No. 1446, vol. I, p. 240 at 242 ("[n]o duty is placed upon the prosecuting attorney to prosecute suits before a mayor"). In this situation, it would be difficult for the individual, in his capacity as magistrate, to set aside his loyalty to the county prosecuting attorney. *See* Op. No. 90-005 at 2-19 and 2-20. Such a predisposition of loyalty may affect the ability of the individual to conduct an impartial hearing or to render an impartial decision as magistrate. *See id.* at 2-20; *see also* 1981 Op. Att'y Gen. No. 81-009 at 2-31. Accordingly, the individual, as a mayor's court magistrate, would be required to refrain from presiding over prosecutions and criminal causes prosecuted by the county prosecuting attorney who appoints him as an assistant county prosecuting attorney. *See* Op. No. 90-005 at 2-20; *cf.* Code of Judicial Conduct Canon 3(C)(1) (1992) ("[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned").

A second potential conflict of interest exists in that the individual, as a mayor's court magistrate, may sit in judgment of his own professional work for the county, regardless of the county's or county prosecuting attorney's participation in the controversy. *See* 1991 Op. Att'y Gen. No. 91-010 at 2-55; Op. No. 90-005 at 2-20. Insofar as a mayor's court has jurisdiction only in ordinance cases and traffic violations, *see* R.C. 1905.01, it is unlikely that the individual in question would often be required, as a mayor's court magistrate, to sit in judgment on his own

governing the professional responsibilities of a mayor's court magistrate. The Ohio Ethics Commission is empowered by R.C. 102.08 to render advisory opinions interpreting the provisions of R.C. Chapter 102, while the Board of Commissioners on Grievances and Discipline of the Supreme Court is authorized by Ohio Gov. Bar R. V §2(C) to issue opinion letters concerning the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary of Ohio, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office. Since R.C. 102.08 grants the Ohio Ethics Commission the authority to render advisory opinions concerning the ethical provisions of R.C. Chapter 102 and the Board of Commissioners on Grievances and Discipline of the Supreme Court is authorized to render opinions regarding the professional responsibilities of a mayor's court magistrate, the Attorney General will not also render opinions concerning these matters. *See* 1987 Op. Att'y Gen. No. 87-033.

professional work for, and legal advice to, the county which employs him as an assistant county prosecuting attorney. The potentiality of this type of conflict of interest, therefore, is remote and speculative. See Op. No. 90-005 at 2-20. "Where possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated." Op. No. 79-111 (syllabus, paragraph three). Thus, the conflict of interest rule is not violated.

A third potential conflict of interest exists because, under R.C. Chapter 2733, a county 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, *inter alias*, "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. Furthermore, a county prosecuting attorney is required, pursuant to R.C. 733.73, to appear on behalf of a complainant in the prosecution of a cause against an officer of a municipal corporation for misfeasance or malfeasance in office, when the municipal corporation has no village solicitor. See generally R.C. 733.72 (setting forth the charges that may be brought against an officer of a municipal corporation). Since the position of mayor's court magistrate is a public office of a municipal corporation,³ a county prosecuting attorney may have to determine whether to institute a legal action under either R.C. Chapter 2733 or R.C. 733.73 against himself as a mayor's court magistrate.

In addition to the foregoing legal actions, a county prosecuting attorney may also have to determine whether to institute a civil action against himself as a mayor's court magistrate to recover misused or misappropriated public moneys or property. Pursuant to R.C. 117.28,

³ In *State ex rel. Landis v. Board of Comm'rs of Butler County*, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917), the Ohio Supreme Court stated:

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.

....

... [I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state.

A mayor's court magistrate is appointed by the mayor of the municipal corporation. R.C. 1905.05(A). A magistrate's compensation is set by the legislative authority of the municipal corporation. *Id.* In addition, the powers and duties of a mayor's court magistrate are prescribed by law, see, e.g., R.C. 1905.05; R.C. 1905.20; R.C. 1905.201, and involve the exercise of judicial powers. The exercise of judicial powers is clearly a sovereign function of government. See *State ex rel. Newman v. Skinner*, 128 Ohio St. 325, 191 N.E. 127 (1934). The powers and duties of a mayor's court magistrate, thus, involve in their performance the exercise of some portion

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]⁴ may, within one hundred twenty days after receiving 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.)

Where no officer is required to act as legal counsel of 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. Moreover, if the audit report sets forth any malfeasance or gross neglect of duty on the part of any public official⁵ for which a criminal penalty is provided, the county prosecuting attorney is required to institute criminal proceedings against the public official. R.C. 117.29. The provisions of R.C. 117.27-29, accordingly, could place a county prosecuting attorney in the position of determining whether to institute legal proceedings against himself, as a mayor's court magistrate, in the recovery of misused or misappropriated public moneys or property.

The provisions of R.C. Chapter 2733, R.C. 733.73, and R.C. 117.27-29, thus, could place an individual who serves simultaneously in the positions of county prosecuting attorney and mayor's court magistrate in the untenable position of conducting a legal action against himself. See Op. No. 86-035 at 2-185 n.4; see also 1984 Op. Att'y Gen. No. 84-087; Op. No. 83-030 at 2-113. Therefore, such positions are incompatible. As noted above, if the positions of county prosecuting attorney and mayor's court magistrate are incompatible due to an impermissible conflict of interest, the positions of assistant county prosecuting attorney and mayor's court magistrate are generally also incompatible.

When incompatibility is based on subordination of positions or a conflict of interest, however, the facts can create an exception to the general rule that an assistant county prosecuting attorney may not hold any position that the county prosecuting attorney may not hold. Op. No. 86-035 at 2-184 n.2; see also 1916 Op. Att'y Gen. No. 2115, vol. II, p. 1919. This exception provides that an 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; see, e.g., 1988 Op. Att'y Gen. No. 88-086 (syllabus, paragraph three) ("[a]n assistant prosecuting attorney

of the sovereign power of government. Accordingly, the position of mayor's court magistrate is a public office of the municipal corporation. Cf. 1990 Op. Att'y Gen. No. 90-089 at 2-381 and 2-382 (the position of municipal court referee is a public office).

⁴ R.C. 117.27 requires the filing of an audit report "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."

⁵ "Public official," for purposes of R.C. 117.29, "means any officer, employee, or duly authorized representative or agent of a [municipal corporation]." R.C. 117.01(E). As stated in footnote three, *supra*, a mayor's court magistrate is an officer of a municipal corporation.

whose only duty is to prosecute criminal cases may also serve as an assistant city law director employed for the exclusive purpose of prosecuting criminal cases in municipal court). *See generally* 1988 Op. Att'y Gen. No. 88-017 at 2-68 (the determination whether an individual who simultaneously holds two public positions is subject to an impermissible conflict of interest is limited to an analysis of the particular duties performed by the respective positions). Hence, for purposes of this opinion, it is sufficient to confine an analysis on this point to the particular factual situation described in your request.

You have indicated that the assistant county prosecuting attorney involved in your case is not required to review or institute cases under R.C. Chapter 2733, R.C. 733.73, or R.C. 117.27-.29. Furthermore, you have stated that the imposition of such duties upon the individual is not contemplated. Therefore, because this assistant county prosecuting attorney's duties are limited so as not to conflict with his duties as a mayor's court magistrate, the conflict of interest rule is not violated.

A fourth potential conflict of interest exists in that the individual, as an assistant county prosecuting attorney, may have to prosecute an appeal from the mayor's court in the county court or municipal court having jurisdiction within the village. *See* R.C. 309.08(A); R.C. 1905.22; 1927 Op. No. 251. You have stated that the individual's duties as an assistant county prosecuting attorney do not include appellate work in the county courts and that the imposition of such duties upon the individual is not contemplated. This potential conflict of interest, thus, does not render incompatible the specific positions with which you are concerned.

A final potential conflict of interest exists due to the competition for tax moneys and advantageous budget decisions. This type of potential conflict of interest was addressed in 1989 Op. Att'y Gen. No. 89-007, relative to the compatibility of the positions of assistant county prosecuting attorney and village solicitor. Op. No. 89-007 identified two budgetary situations that subject an assistant county prosecuting attorney who holds, within the same county, another public position with a political subdivision that must go before the county budget commission to an impermissible conflict of interest: (1) the preparation and presentation, as an assistant county prosecuting attorney, of the county's budget to the county budget commission, and, (2) the ability of an assistant county prosecuting attorney to sit on the budget commission in the absence of the county prosecuting attorney. *See* Op. No. 84-087 at 2-301. *See generally* 1943 Op. Att'y Gen. No. 6186, p. 363 (an assistant county prosecuting attorney may sit in place of the county prosecuting attorney on the county budget commission).

Information provided in connection with your request states that the duties of the assistant county prosecuting attorney in question do not include the preparation or presentation of the county budget to the county budget commission, or the replacing of the county prosecuting attorney on the county budget commission, and that the delegation of such duties is not contemplated at this time. Therefore, since the assistant county prosecuting attorney does not prepare or present the county's budget to the county budget commission, or replace the county prosecuting attorney on the county budget commission, the potential conflict of interest that results from the competition for tax moneys and advantageous budget decisions does not render incompatible the positions of assistant county prosecuting attorney and mayor's court magistrate.

VI. Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised that an individual employed as an assistant county prosecuting attorney may also serve within the same county as a mayor's court magistrate in the mayor's court of a village, provided that the individual (1) as mayor's court magistrate does not preside over hearings involving actions prosecuted or defended by the county prosecuting

attorney who employs him as an assistant county prosecuting attorney, and (2) is not delegated, as an assistant county prosecuting attorney, responsibility for the prosecution of actions under R.C. Chapter 2733, R.C. 733.73, or R.C. 117.27-.29, the handling of appeals from the mayor's court to the county court or municipal court, the preparation or presentation of the county budget to the county budget commission, or the replacing of the county prosecuting attorney on the county budget commission.