

March 17, 2014

The Honorable Kelly A. Riddle
Noble County Prosecuting Attorney
406 North Street
Caldwell, Ohio 43724

SYLLABUS:

2014-011

A person may serve simultaneously as a part-time assistant county prosecutor in one county where she exclusively prosecutes misdemeanor cases in county court and as a part-time assistant county prosecutor in another county, provided she does not represent or advise clients regarding matters that align her against the other county in which she works, and further provided she is not the final decision maker when deciding where to prosecute a case when prosecution is appropriate in either county.



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OPINION NO. 2014-011

The Honorable Kelly A. Riddle
Noble County Prosecuting Attorney
406 North Street
Caldwell, Ohio 43724

Dear Prosecutor Riddle:

We have received your request for an opinion whether a person who is serving in one county as a part-time assistant county prosecutor responsible for prosecuting misdemeanor cases before a county court could simultaneously hold a position as a part-time assistant county prosecutor in another county.¹ According to your letter, in Noble County there is no solicitor or law director to which misdemeanor case duties can be assigned. Therefore, the prosecuting attorney's office handles cases before both the common pleas court and the county court.² The common pleas court is in session all week, but the county court is only in session two-and-a-half days per week. Your assistant county prosecutor, thus, need only work part time during the two-and-a-half days when the county court is in session to handle the misdemeanor charges. You believe there are nearby county prosecutor's offices that have similar needs. Subject to the restrictions set forth below, it is our opinion that the two positions are compatible.

The following seven questions are used to determine whether two public positions are compatible. 2011 Op. Att'y Gen. No. 2011-043, at 2-351.

1. Is either of the positions a classified employment for purposes of R.C. 124.57?

¹ Your letter requesting a formal opinion of the Attorney General sets forth two questions. In this opinion, we consider only the compatibility question set forth above. Your remaining question will be addressed in a separate opinion to be issued at a later date.

² See, e.g., R.C. 2938.13; 1999 Op. Att'y Gen. No. 99-042.

2. Does a constitutional provision or statute prohibit the holding of both positions at the same time?
3. Is one position 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 an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances that are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

Id. All seven questions must yield answers in favor of compatibility in order to conclude that two positions are compatible. 1996 Op. Att’y Gen. No. 96-062, at 2-252.

Discussion of R.C. 124.57

The first question of the compatibility analysis asks whether either of the positions is a classified employment within the terms of R.C. 124.57. This statute prohibits, except as provided therein, an officer or employee in the classified service of the state, the several counties, cities, city school districts, and civil service townships from holding partisan political offices and employments. *See* 2A Ohio Admin. Code 123:1-46-02; 2009 Op. Att’y Gen. No. 2009-018, at 2-128. Assistant county prosecutors are in the unclassified service. R.C. 124.11(A)(11) (the unclassified service includes “assistants to county prosecuting attorneys”); *see* 1986 Op. Att’y Gen. No. 86-035, at 2-179 (finding that an assistant prosecuting attorney is not a position of classified employment and therefore not subject to the prohibition of R.C. 124.57). Thus, R.C. 124.57’s prohibitions do not prevent a part-time assistant county prosecuting attorney from serving simultaneously as a part-time assistant county prosecuting attorney in another county. Question one can be answered in the negative.

Applicability of Constitutional Provisions, Statutes, Charter Provisions, Resolutions, Ordinances or Federal, State, or Local Departmental Regulations Prohibiting the Holding of Another Public Position

For ease of discussion, questions two, six, and seven are addressed together. First, question two asks whether a constitutional provision or statute prohibits a person from holding both positions at the same time. No constitutional provision or statutory provision expressly bars a part-time assistant

county prosecutor from simultaneously being employed as a part-time assistant county prosecutor in another county.³

Question six and seven concern the applicability of local charter provisions, resolutions, ordinances, or federal, state, or local departmental regulations. Whether there are local charter provisions, resolutions, or ordinances that prohibit a person from holding these two positions is a matter for local officials to determine. 1999 Op. Att’y Gen. No. 99-027, at 2-171. We assume, for purposes of this opinion, that there is no local resolution, ordinance, or regulation that prohibits a person from serving simultaneously as a part-time assistant prosecuting attorney in two counties. We have found no state regulation or federal regulation that prohibits a person from serving as a part-time county prosecuting attorney in two counties. Whether there is an applicable local departmental regulation is a matter for local officials to determine. For purposes of this opinion, we will assume there is no such regulation. *See* 2001 Op. Att’y Gen. No. 2001-040, at 2-238.

Subordination and Control

Question three asks whether one position is subordinate to, or in any way a check upon, the other. Here, neither position is responsible for appointing or removing a person from the other position. Assistant prosecuting attorneys are appointed by the county prosecuting attorney, R.C. 309.06, and are thus accountable to her. 2001 Op. Att’y Gen. No. 2001-040, at 2-240; 1990 Op. Att’y Gen. No. 90-005, at 2-19. Because the positions about which you ask are in different counties, different county prosecuting attorneys would be appointing their respective assistants. Moreover, neither position is required to assign duties to, or supervise, the other. *See* 2001 Op. Att’y Gen. No. 2001-040, at 2-240. Therefore, neither position is subordinate to, or in any way a check upon, the other.

Physical Ability to Perform Duties of Both Positions

The fourth question of the compatibility test asks whether it physically is possible for one person to perform the duties of both positions. This is a factual question that is best addressed by local officials because they may determine more accurately the time constraints and demands imposed upon the positions in question. *See* 2009 Op. Att’y Gen. No. 2009-010, at 2-90. If local officials determine that it is physically possible for a person to perform the duties of both positions, a person may hold both positions at the same time.

Keep in mind, however, during the hours the assistant county prosecuting attorney is scheduled to work for one county, she may not work for the other county. 2009 Op. Att’y Gen. No.

³ R.C. 120.39 limits the outside employment of assistant prosecuting attorneys, but does not limit their ability to serve as assistant prosecuting attorneys in more than one county. R.C. 3.11 prohibits a prosecuting attorney from holding at the same time another position as prosecuting attorney. It does not prohibit an assistant prosecuting attorney from holding the position of assistant prosecuting attorney in multiple counties.

2009-053, at 2-402 n.9. An assistant county prosecuting attorney must take approved vacation, personal, or compensatory leave or leave without pay for any time she engages in legal work for one county during the hours she is scheduled to provide legal services as an assistant county prosecuting attorney for the other county. *Id.*

Conflicts of Interest

Question five asks whether there is a conflict of interest between the two positions.⁴ A person may not hold two public positions simultaneously if he would be subject to divided loyalties, conflicting duties, or the temptation to act other than in the public's best interest. 2009 Op. Att'y Gen. No. 2009-005, at 2-30. The fact that an individual is subject to potential conflicts of interest, however, does not necessarily render two positions incompatible. Rather, each potential conflict requires a determination of the immediacy of the conflict. If the possibility of conflict is remote and speculative, the conflict of interest rule is not violated, and the two positions are compatible. 1997 Op. Att'y Gen. No. 97-026, at 2-154; 1993 Op. Att'y Gen. No. 93-067, at 2-315. The factors used in making this decision include the probability of the conflicts arising, the ability of the person to remove himself from any conflicts that may arise, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position or to financial or budgetary matters. 2006 Op. Att'y Gen. No. 2006-034, at 2-309. Resolution of this question requires an examination of the powers, duties, and responsibilities of the respective positions.

In the exercise of their duties, assistant prosecuting attorneys "aid the prosecuting attorney in discharging his statutory responsibilities and functions by performing such duties and functions as may be assigned by the prosecuting attorney." 1999 Op. Att'y Gen. No. 99-027, at 2-174. Thus, we must examine the duties of a prosecuting attorney in order to determine the potential duties of an assistant prosecuting attorney. R.C. Chapter 309 sets forth the general powers and duties of the prosecuting attorney. The prosecuting attorney is required to prosecute criminal cases and all complaints, suits, and controversies in which the state is a party. R.C. 309.08. In the case of conviction, he is required to cause execution to be issued for the fines and costs and urge collection of those fines and costs. R.C. 309.08. The prosecuting attorney is the legal adviser to county and township officers, boards, and commissions. R.C. 309.09. In certain circumstances, the prosecuting attorney may be the legal advisor for a park district, a joint fire district, joint ambulance district, joint

⁴ The Ohio Ethics Commission, rather than the office of the Attorney General, is required by R.C. 102.08 to address the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. We will, therefore, refrain from interpreting and applying these provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph 3). Questions concerning the interpretation and application of these provisions in your particular situation should instead be directed to the Ohio Ethics Commission. *See, e.g.*, Ohio Ethics Comm'n, Advisory Op. No. 88-005, slip op. at 3. You may also want to consult the Board of Commissioners on Grievances and Discipline, which is responsible for interpreting the provisions of the Ohio Rules of Professional Conduct. Gov. Bar. R. V §2; R.C. 102.08(A); *see* 2001 Op. Att'y Gen. No. 2001-027, at 2-153 n.4; 1994 Op. Att'y Gen. No. 94-035, at 2-180.

emergency medical services district, and a fire and ambulance district. R.C. 309.09(D)-(H).⁵ You have informed us that the assistant prosecuting attorney in Noble County only prosecutes misdemeanor cases in county court.

Because the county prosecutor, and therefore the assistant county prosecutor, acts as the legal adviser to all county and township officers, boards, and commissions, a potential conflict may arise when the assistant county prosecutor in Noble County is asked to represent or advise a county or township in a misdemeanor matter that aligns her against the other county prosecuting attorney's office in which she is also acting as an assistant county prosecutor. *See* 2009 Op. Att'y Gen. No. 2009-053, at 2-400. In such a situation, the assistant prosecutor's responsibilities in one county may be influenced by the performance of her duties as the assistant prosecutor in the other county, thereby subjecting her to influences that may prevent her from being objective. *See* 1999 Op. Att'y Gen. No. 99-027, at 2-181.

The existence of a conflict of interest, however, does not bar an assistant prosecuting attorney from holding another position when she is able to avoid the conflict. 2009 Op. Att'y Gen. No. 2009-053, at 2-401; *see, e.g.*, 2001 Op. Att'y Gen. No. 2001-040; 2001 Op. Att'y Gen. No. 2001-027; 1999

⁵ "Numerous other provisions throughout the Revised Code also elaborate upon specific duties of the prosecuting attorney with respect to his representation of various governmental entities, the actions he may take on their behalf, and his membership on certain boards and commissions." 1986 Op. Att'y Gen. No. 86-035, at 2-181; *see* 1999 Op. Att'y Gen. No. 99-027, at 2-178 to 2-179; *see also* R.C. 177.03 (detailing prosecuting attorneys role in prosecution of organized criminal activity); R.C. 309.11 (the prosecuting attorney shall prepare the official bonds for all county officers); R.C. 309.12 (the prosecuting attorney may seek to restrain misapplication of county funds, to restrain the completion of illegal contracts, to recover misapplied public moneys, or to recover damages resulting from the execution of illegal contracts); R.C. 309.14 (prosecuting attorney prosecutes any person who unlawfully cuts down or injures timber growing on land belonging to the state or any school district); R.C. 309.17 (the prosecuting attorney may bring actions to recover property of a decedent held by another person); R.C. 321.42 (prosecuting attorney shall commence an action on the bond of a delinquent officer); R.C. 327.01 (prosecuting attorney shall serve on the board of trustees of the sinking fund and be the board's president); R.C. 733.73 (prosecuting attorney may be responsible for prosecuting charges against municipal officers brought under R.C. 733.72); R.C. 901.25 (the prosecuting attorney shall aid in any investigation, hearing, or trial under the laws which the Department of Agriculture or its Director is required to administer); R.C. 1515.11 (prosecuting attorney is legal advisor for soil and water conservation district); R.C. 1719.05 (the prosecuting attorney may enforce administration of trust); R.C. 1747.11 (prosecuting attorney shall bring forfeiture actions against real estate investment trust that transacts real estate business in state without authority); R.C. 2733.04 (prosecuting attorney shall commence an action in quo warranto); R.C. 4123.92 (prosecuting attorney will institute and prosecute actions for enforcement of workers' compensation laws under R.C. Chapter 4123); R.C. 5705.27 (prosecuting attorney shall serve on the county budget commission).

Op. Att’y Gen. No. 99-027. Case law and prior Attorney General opinions advise that an assistant county prosecuting attorney is permitted to simultaneously engage in a separate law practice, whether public or private, when her duties are limited so that she is not involved in matters where a conflict would arise. *See Waite v. Berry*, 11 Ohio St. 3d 53, 463 N.E.2d 386 (1984) (a county prosecutor also may maintain a separate law practice); *Rose v. Vill. of Wellsville*, No. 92-CIV-571, 63 Ohio Misc. 2d 9, 613 N.E.2d 262 (C.P. Columbiana County 1993) (finding positions of legal counsel and assistant county prosecutor compatible); 2009 Op. Att’y Gen. No. 2009-053 (assistant county prosecuting attorney may engage in the private practice of law); 1997 Op. Att’y Gen. No. 97-034 (assistant county prosecuting attorney may also serve within the same county as a village solicitor); 1994 Op. Att’y Gen. No. 94-035 (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); 1988 Op. Att’y Gen. No. 88-086 (assistant prosecuting attorney may also serve as an assistant city law director). *But see* 1989 Op. Att’y Gen. No. 89-007 (village solicitor and assistant county prosecuting attorney are incompatible) (clarified by 1997 Op. Att’y Gen. No. 97-034); 1963 Op. Att’y Gen. No. 25, p. 113 (assistant county prosecuting attorney is incompatible with legal counsel for a township within the same county) (questioned by 2001 Op. Att’y Gen. No. 2001-027). This reasoning is equally applicable where the assistant county prosecuting attorney is acting as an assistant county prosecuting attorney in another county. Thus, a part-time assistant county prosecutor who prosecutes misdemeanor cases in county court may simultaneously hold a position as a part-time assistant county prosecutor in another county, provided she is not assigned to represent or advise clients in matters involving parties represented by the county prosecuting attorney in the other county. *See* 2009 Op. Att’y Gen. No. 2009-053, at 2-401.

In addition, an assistant county prosecuting attorney who serves simultaneously in two counties may confront a conflict of interest when making the choice whether to prosecute a case that could be prosecuted in both counties in which she serves. There may be reasons why officials in one or both counties want the case to be prosecuted in one particular county rather than another county. There may also be a personal benefit to the assistant prosecuting attorney if her pay would be greater in one county versus the other depending on her hours worked. *See* 1988 Op. Att’y Gen. No. 88-086, at 2-413 to 2-414. These conflicts could place the assistant prosecuting attorney in a position where she is unable to be objective. This situation is easily avoided, however, by allowing the prosecuting attorney or another assistant county prosecuting attorney to make the decision regarding where cases should be prosecuted when either county has the appropriate jurisdiction.

Conclusion

For the reasons discussed above, it is my opinion, and you are hereby advised that a person may serve simultaneously as a part-time assistant county prosecutor in one county where she exclusively prosecutes misdemeanor cases in county court and as a part-time assistant county prosecutor in another county, provided she does not represent or advise clients regarding matters that align her against the other county in which she works, and further provided she is not the final decision maker when deciding where to prosecute a case when prosecution is appropriate in either county.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General