

Note from the Attorney General's Office:

1983 Op. Att'y Gen. No. 83-030 was questioned by
1999 Op. Att'y Gen. No. 99-027.

1983 Op. Att'y Gen. No. 83-030 was questioned by
2001 Op. Att'y Gen. No. 2001-027.

OPINION NO. 83-030**Syllabus:**

An assistant county prosecutor may not serve as a member of a county board of mental retardation and developmental disabilities.

To: John A. Pfefferle, Erie County Prosecuting Attorney, Sandusky, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 10, 1983

I have before me your request for my opinion concerning whether an assistant county prosecutor may serve on a county board of mental retardation and developmental disabilities.

R.C. 5126.03(A) reads in part: "The following individuals shall not serve as members of county boards of mental retardation and developmental disabilities: (1) Elected public officials, except for those excluded from the definition of public official or employee in division (B) of section 102.01 of the Revised Code."¹ Prosecuting attorneys clearly fall within the prohibition of R.C. 5126.03(A)(1). See R.C. 309.01. Assistant prosecutors, however, are not elected to office, but are appointed by the prosecutor, see R.C. 309.06, and thus do not fit neatly within the terms of R.C. 5126.03(A)(1).

There is, however, authority for the proposition that, because an assistant prosecutor is empowered to act for, and in the place of a prosecutor in most matters, the assistant is subject to the same limitations as the prosecutor, and may not hold any office which a prosecutor may not hold. See 1971 Op. Att'y Gen. No. 71-050; 1971 Op. Att'y Gen. No. 71-037; 1971 Op. Att'y Gen. No. 71-025; 1963 Op. Att'y Gen. No. 25, p. 113; 1945 Op. Att'y Gen. No. 184, p. 163. Statutory, as well as common law, restrictions on a prosecutor's outside activities have been held applicable to assistant prosecutors. 1970 Op. Att'y Gen. No. 70-022 concluded that,

¹ R.C. 102.01(B) reads:

"Public official or employee" means any person who is elected or appointed to an office or is an employee of any public agency. "Public official or employee" does not include a person elected or appointed to the office of precinct, ward, or district committee member under section 3517.03 of the Revised Code, any presidential elector, or delegate to a national convention. "Public official or employee" does not include a person who is a teacher, instructor, professor, or any other kind of educator whose position does not involve the performance of, or authority to perform, administrative or supervisory functions.

because a prosecutor is prohibited by R.C. 309.02 from serving as a mayor of a municipality, an assistant prosecutor is also prohibited from serving as a mayor.² In 1970 Op. Att'y Gen. No. 70-053, this conclusion was extended to a special assistant prosecuting attorney with limited duties. Under the analysis applied in these opinions, R.C. 5126.03(A)(1) prohibits assistant county prosecutors from serving on a county board of mental retardation and developmental disabilities.

Even if an assistant prosecutor were not considered to be within the scope of R.C. 5126.03(A)(1), I find the positions of assistant prosecutor and member of a county board of mental retardation and developmental disabilities to be incompatible under a common law analysis. See 1979 Op. Att'y Gen. No. 79-111 (a common law analysis includes determining whether there is a conflict of interest between the two positions and whether one position is a check upon the other). As noted above, an assistant prosecutor may not hold an office which a prosecutor may not hold. If an office is incompatible with that of prosecutor, it is also incompatible with that of assistant prosecutor. See Op. No. 71-037; Op. No. 71-025.

Pursuant to R.C. 309.09, the county prosecutor is the legal adviser of all county officers and boards. Neither a prosecutor nor an assistant prosecutor may serve on a board when the prosecutor has the duty to advise such board. The reasoning behind this prohibition is that if a prosecutor or his assistant were able to serve as a county board member, he would be able to advise the board in his own interest. See Op. No. 71-037; 1957 Op. Att'y Gen. No. 1380, p. 715; 1948 Op. Att'y Gen. No. 4130, p. 594. A county board of mental retardation and developmental disabilities is a board which the county prosecutor has a duty to advise pursuant to R.C. 309.09. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981); see R.C. 5126.02. Thus, I conclude that, neither a prosecutor nor an assistant prosecutor may serve on a county board of mental retardation and developmental disabilities.

There are other grounds which support my conclusion that neither a prosecutor nor an assistant prosecutor may serve on a county board of mental retardation and developmental disabilities. Pursuant to R.C. 309.12, the county prosecutor acts as a check upon the financial and contractual operations of other county officers and boards. See 1951 Op. Att'y Gen. No. 692, p. 417. In addition, the prosecutor, as a member of the budget commission, acts as a check upon the financial requests of county boards. See 1951 Op. No. 692. Finally, pursuant to R.C. 117.10 the prosecutor has the authority to institute civil and criminal proceedings against county officers and boards for the misapplication of county money or property, and thus acts as a check upon county boards. See Op. No. 71-025.

In conclusion, it is my opinion, and you are advised, that an assistant county prosecutor may not serve as a member of a county board of mental retardation and developmental disabilities.

² R.C. 3313.13 prohibits a "prosecuting attorney, city director of law, or other official acting in a similar capacity" from serving on a board of education. In 1969 Op. Att'y Gen. No. 69-133, it was concluded that because a prosecutor could not serve on a school board, an assistant prosecutor, having the same responsibilities as the prosecutor, was also prohibited from serving. In 1979 Op. Att'y Gen. No. 79-100, my predecessor concluded that an assistant city solicitor could not serve on a school board. This conclusion, however, was based on the fact that an assistant city solicitor is an "official acting in a similar capacity" to a solicitor.