

OPINION NO. 71-050

Syllabus:

An assistant prosecuting attorney is not permitted to represent clients in criminal proceedings either within or outside of the county in which he is appointed.

To: James D. Ruppert, Warren County Pros. Atty., Lebanon, Ohio
By: William J. Brown, Attorney General, September 10, 1971

I am in receipt of your request for my opinion which reads as follows:

"As Prosecuting Attorney for Warren County, Ohio, I employ several part-time assistant prosecutors, all of whom are engaged in the private practice of law.

"I respectfully solicit an opinion from your office as to whether a part-time assistant county prosecutor may represent clients in criminal cases outside the county in which said assistant prosecutor is employed, as it relates to misdemeanors, felonies and post conviction procedures."

Your letter, as I interpret it, is an inquiry concerning the professional activities in which an assistant part-time prosecuting attorney is permitted to engage in his free time. Although such assistant, like the prosecuting attorney himself, is permitted to carry on the private practice of law, the very nature of his position necessarily prevents him from engaging in all the activities of a private attorney.

The office of prosecuting attorney carries with it extensive powers and duties which are described in part in Section 309.08, Revised Code. This Section 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. In every case of conviction, he shall forthwith cause execution

to be issued for the fine and costs, or costs only, as the case may be, and he shall faithfully urge the collection until it is effected or found to be impracticable to collect, and shall forthwith pay to the county treasurer all moneys belonging to the state or county which come into his possession." (Emphasis added)

He is also required, under the provisions of Section 309.09, Revised Code, to be the legal adviser to the various county officers. This Section reads, in pertinent part, as follows:

"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.

"Such prosecuting attorney shall be the legal adviser for all township officers.* * *"

The position of assistant prosecuting attorney is provided for in Section 309.06, Revised Code, which is as follows:

"On or before the first Monday in January of each year, the judge of the court of common pleas, or, if there is more than one judge, the judges of such court in joint session, may fix an aggregate sum to be expended for the incoming year for the compensation of assistants, clerks, and stenographers of the prosecuting attorney's office.

"The prosecuting attorney may appoint such assistants, clerks, and stenographers as are necessary for the proper performance of the duties of his office and fix their compensation, not to exceed, in the aggregate, the amount fixed by the judges of such court. Such compensation, after being so fixed, shall be paid to such assistants, clerks, and stenographers monthly, from the general fund of the county treasury, upon the warrant of the county auditor."

In spite of the numerous and ostensible theoretical differences between the position held by a prosecuting attorney

and that held by his assistants, it has long been the accepted opinion in this state that an assistant is, for all practical purposes, the alter ego of the prosecuting attorney and is authorized to act in his place in almost all matters. The Syllabus in Opinion No. 184, Opinions of the Attorney General for 1945, reads, in part, as follows:

"An assistant appointed by the prosecuting attorney may, whenever authorized or directed by him, act for and in the place of such prosecuting attorney in all civil and procedural matters, including services before the grand jury and prosecution of criminal cases;* * *."

Because an assistant prosecuting attorney is authorized to and often does stand in the place of his principal, it is only logical that such an assistant be subject to the same limitations and restrictions placed by law upon the prosecuting attorney. Thus, it has been held several times that an assistant prosecuting attorney, even a specialized one with only limited duties, may not hold concurrently a public office that a prosecuting attorney himself is forbidden to hold. See Official Opinions of the Attorney General for 1846-1906, Volume 4, pages 747-748; Opinion No. 70-022, Opinions of the Attorney General for 1970; Opinion No. 70-053, Opinions of the Attorney General for 1970; and Opinion No. 879, Opinions of the Attorney General for 1964.

Although the great majority of these restrictions pertain to activities in the public sector, some limitations are necessarily extended to the private activities of prosecuting attorneys.

For instance, it was long ago stated in Opinion No. 584, Opinions of the Attorney General for 1923, that a prosecuting attorney may not privately represent clients against the county. Syllabus No. 1 of that Opinion reads as follows:

"A prosecuting attorney may not, after taking office, continue to represent a client in a case in which the interests of such client and of the county are adverse."

There can be little doubt that such prohibition pertains equally to an assistant prosecuting attorney.

Your question, however, specifically relates to the representation of clients in criminal cases. Although I am unable to find any authority concerning the activities of either prosecuting attorneys or assistant prosecuting attorneys in this area, the question has arisen as to whether or not a city solicitor is permitted to handle such clients.

It is important to note that the office of city solicitor is almost identical to that of a prosecuting attorney. A city

solicitor performs substantially the same duties in relation to a municipal corporation as a prosecuting attorney does in relation to a county.

One of my predecessors has held that a city solicitor may not represent defendants in criminal cases in which the State of Ohio is the plaintiff, even though the initial arrest and other preliminary stages were conducted in an area outside of the territorial jurisdiction of the Municipal Court in which such solicitor is employed. Opinion No. 159, Opinions of the Attorney General for 1966, states as follows:

"* * * [T]he answer is set forth clearly in the statutes. Section 309.08, Revised Code, provides that the prosecuting attorney shall 'prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party.' (Emphasis added). Further, said Section 1901.34, supra, clearly requires, "The city solicitor * * * shall prosecute all criminal cases * * * for violation of state statutes * * * occurring within the municipal corporation for which he is a solicitor, * * * The City solicitor * * * shall prosecute all criminal cases brought before said [municipal] court arising in the unincorporated areas within said territory." Also, Section 1901.34, supra, states that 'the city solicitor * * * shall perform the same duties, as far as they are applicable thereto, as are required of the prosecuting attorney of the county.' There are certain violations of state statutes, such as license laws, which are specifically assigned to the prosecuting attorney for enforcement, but the city solicitor must represent the state in all other state cases arising within the territory of his municipal court and he would be precluded from representing the defendants in a criminal case when the State of Ohio is plaintiff."

That general view was adhered to by my immediate predecessor, although he found that the doctrine was not applicable to the facts before him. Opinion No. 70-059, Opinions of the Attorney General for 1970.

The rationale is that an attorney holding a public office, the official duties of which require him to represent the State of Ohio in criminal cases, is necessarily precluded from representing private clients in criminal cases against the State of Ohio.

Since a county prosecuting attorney is required, by statute, to "prosecute, on behalf of the state, all complaints, suits and controversies in which the state is a party," and since the duties of an assistant prosecuting attorney are the same, it may be concluded that an assistant prosecuting attorney is not

permitted to represent clients in criminal cases against the State.

In specific answer to your question, it is my opinion, and you are advised, that an assistant prosecuting attorney is not permitted to represent clients in criminal proceedings either within or outside of the county in which he is appointed.