

OPINION NO. 98-024

Syllabus:

1. For purposes of R.C. 325.11 and R.C. 325.111, the appointment of an individual to fill a vacancy in the office of prosecuting attorney constitutes "the commencement of [a] new term of office," so that the appointee may elect to engage or not to engage in the private practice of law.
2. An individual who is appointed to fill a vacancy in the office of prosecuting attorney and elects not to engage in the private practice of law may, in accordance with R.C. 325.11 and R.C. 325.111 and without any dimi-

nution of salary, engage in the private practice of law for a period of six months after taking office, for the purpose of concluding the affairs of the private practice of law.

To: Jonathan P. Hein, Darke County Prosecuting Attorney, Greenville, Ohio
By: Betty D. Montgomery, Attorney General, August 11, 1998

We have received your request for an opinion on the question whether an individual who is appointed to fill a vacancy in the office of prosecuting attorney is empowered to elect whether to engage in the private practice of law. Your specific questions are these:

1. As the phrase is used both in R.C. 325.11 and R.C. 325.111, does the appointment of a prosecuting attorney to fill a vacancy in that office constitute "the commencement of each new term of office," such that the appointee may elect to engage or not to engage in the private practice of law?
2. If such an appointee may, and does, elect not to engage in the private practice of law, may he engage in the private practice of law for a period of six months after taking office, without any diminution of salary?

Your questions arise from the fact that you have filed a petition to become a candidate for judge of the Darke County Court of Common Pleas. If you are elected in November, it will be necessary for you to resign your position as prosecuting attorney with two years remaining in your statutory term. If that should occur, the Darke County Republican Central Committee would be authorized to appoint your successor. *See* R.C. 305.02. Individuals who are interested in the position, however, have indicated that the extent of their interest "is necessarily dependent upon whether they may elect the full or part-time status with its respective salary."

You have informed us that, prior to the commencement of your present term, you notified the board of county commissioners that you intended to engage in the private practice of law. The basic issue is whether a successor appointed to serve the remainder of the statutory term is bound by your notification of intent to engage in the private practice of law, or whether the appointee may make an independent election on that matter.

To answer your question, let us look first at the statutes that establish the salaries of the county prosecuting attorneys. R.C. 325.11 classifies each prosecuting attorney, for salary purposes, according to the population of the county that the prosecutor serves. R.C. 325.11(A); *see also* R.C. 1.59(D); 1982 Op. Att'y Gen. No. 82-047. The counties are divided into fourteen classes. Class 3 covers counties with a population range of 40,001 to 55,000 and, as you have stated, currently includes Darke County. R.C. 325.11 establishes salary figures, including annual increases, for the prosecuting attorneys of the various classes of counties. R.C. 325.11(A)-(B).

Higher salary figures are established for prosecuting attorneys who do not engage in the private practice of law. R.C. 325.11(B)(2) establishes those figures for counties in population classes 5 through 14, and R.C. 325.111(B) establishes those figures for counties in population classes 1 through 4. An election to engage in the private practice of law must be made, before taking office, by notifying the board of county commissioners of the intention so to practice. R.C. 325.11(B)(2); R.C. 325.111(B)(1).

With respect to the decision whether to engage in the private practice of law, the statutes state that a prosecuting attorney “may elect to engage or not to engage in the private practice of law before the commencement of each new term of office.” R.C. 325.11(B); R.C. 325.111(C). A prosecuting attorney who elects not to engage in the private practice of law may engage in the private practice of law for a period of six months after taking office, without any diminution of salary, for the purpose of concluding the affairs of the private practice of law. *Id.*

The time when a prosecuting attorney may elect whether to engage in the private practice of law is, by statute, “before the commencement of each new term of office.” R.C. 325.11(B); R.C. 325.111(C). Your first question is whether the appointment of an individual to fill a vacancy in the office of prosecuting attorney constitutes the commencement of a new term of office, so that the appointee may elect whether to engage in the private practice of law.

To answer this question, it is necessary to consider the meaning of the words “each new term of office.” It is not clear from the language of the statute whether a “new term of office” is the four-year period established by statute, *see* R.C. 309.01, or whether it is the period for which a particular individual serves. The words used in R.C. 325.11 and R.C. 325.111, thus, are ambiguous. Accordingly, it is appropriate to consider the object sought to be attained and the consequences of a particular construction. *See* R.C. 1.49(A), (E).

As used with reference to a county prosecuting attorney, the word “term” can apply to the term of office established by statute. *See* Ohio Const. art. II, § 20 (“[t]he general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers”); R.C. 309.01. Thus, an appointee who fills a vacancy can be considered appointed to complete an unexpired term or to hold office until a successor is elected and qualified. *See* R.C. 3.02; R.C. 305.02; 1984 Op. Atty Gen. No. 84-063.

The concept of a “term,” however, can be applied also to the portion of a statutory term for which a particular individual serves. For example, the language of Ohio Const. art. II, § 20 that prohibits a change in the salary of any officer during his existing term applies “strictly to the term to which the officer is appointed or elected and not to the period constituting the statutory term of the office.” *State ex rel. Glander v. Ferguson*, 148 Ohio St. 581, 76 N.E.2d 373 (1947) (syllabus, paragraph 1); *see also, e.g.*, 1983 Op. Att’y Gen. No. 83-015.

In the same manner, a “new term of office,” for purposes of R.C. 325.11 and R.C. 325.111, appears to refer to the period for which an individual is appointed or elected, and not to the statutory term of the office. The sense of the statutes in question is that a decision whether to engage in the private practice of law accrues to each individual who holds the office of prosecuting attorney. The determination whether to engage in private practice is a personal one, and it is appropriate for the rights and obligations that follow from such a determination to attach to the individual, rather than to the office. Because the decision whether to engage in the private practice of law is made for each “new term of office,” the word “term” is most reasonably construed as referring to the “term” served by a particular individual. Therefore, for purposes of R.C. 325.11 and R.C. 325.111, the appointment of an individual to fill a vacancy in the office of prosecuting attorney constitutes “the commencement of [a] new term of office,” so that the appointee may elect to engage or not to engage in the private practice of law.

Let us turn now to your second question, which asks whether an appointee who fills a vacancy in the office of prosecuting attorney and elects not to engage in the private

practice of law may engage in private practice for a period of six months after taking office without any diminution of salary. The answer to this question follows directly from the analysis set forth above. Even as each appointee to the office of prosecuting attorney has the right to determine whether to engage in the private practice of law, so also each appointee has the opportunity to use a period of six months to conclude the affairs of the private practice of law, upon a determination not to continue that practice while serving as prosecuting attorney.

It is evident that, if an individual is appointed to serve for a small portion of a statutory term, the six-month period allowed for the conclusion of private practice may constitute a substantial proportion of that person's term, or may even exceed the length of time that the appointment is expected to cover. The statutes, however, do not establish the period for concluding private practice on a percentage basis. Instead, they set forth a specific time period, presumably reflecting the judgment of the General Assembly that six months is a reasonable period for concluding the affairs of the private practice of law. Again, it appears that the provision applies to each individual who serves as prosecuting attorney, and to each new term served by such an individual, rather than simply to the statutorily-established term. Therefore, an individual who is appointed to fill a vacancy in the office of prosecuting attorney and elects not to engage in the private practice of law may, in accordance with R.C. 325.11 and R.C. 325.111 and without any diminution of salary, engage in the private practice of law for a period of six months after taking office, for the purpose of concluding the affairs of the private practice of law.

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. For purposes of R.C. 325.11 and R.C. 325.111, the appointment of an individual to fill a vacancy in the office of prosecuting attorney constitutes "the commencement of [a] new term of office," so that the appointee may elect to engage or not to engage in the private practice of law.
2. An individual who is appointed to fill a vacancy in the office of prosecuting attorney and elects not to engage in the private practice of law may, in accordance with R.C. 325.11 and R.C. 325.111 and without any diminution of salary, engage in the private practice of law for a period of six months after taking office, for the purpose of concluding the affairs of the private practice of law.