

**OPINION NO. 89-037**

**Syllabus:**

An individual engaged in private business as a criminal bondsman, who does not provide bail bonds for persons accused in matters with which the coroner's office is involved, may simultaneously hold a position as a coroner's investigator pursuant to R.C. 313.05, provided that the

individual is able to perform his official duties to the satisfaction of the coroner and that he is not in violation of any statutory provisions subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08.

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**To: Gregory J. Brown, Ashtabula County Prosecuting Attorney, Jefferson, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, June 8, 1989**

I have before me your request for my opinion regarding the compatibility of the position of coroner's investigator with that of criminal bonds person. You indicate that the individual in question does not provide bail bonds for persons accused in criminal matters with which the coroner's office is involved.

In determining whether two positions are compatible, I have consistently used the seven question analysis formulated by my predecessor as a method of reviewing the statutory and common law elements of compatibility. 1979 Op. Att'y Gen. No. 79-111 at 2-367. See also *Esler v. Summit County*, 39 Ohio Misc. 2d 8, 530 N.E.2d 973 (C.P. Summit County 1985). Since the occupation of bail bonding is a private occupation, however, the common law test of compatibility does not apply to the analysis of these two positions. See, e.g., 1983 Op. Att'y Gen. No. 83-085 at 2-135 ("[b]ecause a director of a county agricultural society holds a private position rather than a public office, the common law analysis of incompatibility is inapplicable"). At common law in Ohio, "[o]ffices are considered incompatible when one is subordinate to, or in any way a check upon, the other, or when it is physically impossible for one person to discharge the duties of both." *State ex rel. Attorney General v. Gebert*, 12 C.C. (n.s.) 274, 275 (Cir. Ct. Franklin County 1909). Questions three and four of the analysis set out in Op. No. 79-111 represent the common law test of incompatibility defined by the court in *Gebert*. Since it is still necessary, however, to determine whether the positions create a conflict of interest or whether there are applicable statutes, local ordinances, or regulations, the remaining five questions in Op. No. 79-111 provide a useful format for examining whether a public and private position may be held simultaneously.<sup>1</sup> Therefore, with some modification of the wording used in Op. No. 79-111 to fit the situation, the five pertinent questions are as follows:

1. Is the public position a classified employment within the terms of R.C. 124.57?
2. Do statutes governing either position limit the outside employment possible?
3. Is there a conflict of interest between the two positions?
4. Are there local charter provisions or ordinances which are controlling?

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<sup>1</sup> See, e.g., 1970 Op. Att'y Gen. No. 70-168 at 2-335 ("the questions of conflict of interest and self dealing by public officers would apply whether or not the other position...is a public or private office"), *overruled on other grounds*, 1981 Op. Att'y Gen. No. 81-100. Accord 1988 Op. Att'y Gen. No. 88-022 at 2-86; 1983 Op. Att'y Gen. No. 83-035; 1981 Op. Att'y Gen. No. 81-078. Statutes, of course, may be applicable to either public or private positions, depending upon the language of each particular statute.

I am aware that some of the above opinions state or imply that all of the questions posed in 1979 Op. Att'y Gen. No. 79-111 are inapplicable when a private position is involved. Nonetheless, these opinions have proceeded to examine conflict of interest issues in detail and to give least cursory attention to statutory prohibitions or the lack thereof. Since these are the substantive areas covered by all but the two common law compatibility questions of Op. No. 79-111, I find that thoroughness and consistency will be served by expressly adopting the remaining five questions as the format for analysis between public and private positions.

5. Is there a federal, state, or local departmental regulation applicable?

Questions number four and five are matters of local concern that must be determined on a case by case basis. See Op. No. 79-111 at 2-368. I assume, for purposes of this opinion, that there are no departmental regulations or local charter provisions or ordinances which prevent the holding of both positions. I note, however, that it is not uncommon for bail bonding to be regulated by municipalities and by local courts. Additionally, since the investigator is an employee of the coroner, he must meet the job performance standards set by the coroner.

Question number one asks whether the public position is a classified employment within the terms of R.C. 124.57. R.C. 124.57 prohibits classified civil servants from taking part in partisan political activities, other than voting or expressing their political opinions. See *Gray v. Toledo*, 323 F. Supp. 1281, 1285 (N.D. Ohio 1971); *Heidtman v. Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955) (syllabus, paragraph two). Coroner's investigators are appointed by the coroner pursuant to R.C. 313.05, which provides, in pertinent part, that "the coroner may appoint...investigators and shall define their duties....[I]nvestigators shall receive salaries fixed by the coroner and payable from the county treasury upon the warrant of the county auditor." You have advised me that this investigator's position in the Ashtabula County coroner's office is unclassified.<sup>2</sup> The position of bail bondsman is not in the civil service at all. Therefore, R.C. 124.57 has no effect on these two positions.

Question two asks whether statutes governing either position limit the outside employment permissible. R.C. 313.05, which authorizes the appointment of coroner's investigators, is silent as to outside employment.<sup>3</sup> Because insuring the appearance of a criminal defendant in court is a matter of public concern, the profession of bail bonding is subject to some statutory restraints. See generally *State ex rel. Howell v. Schiele*, 85 Ohio App. 356, 88 N.E.2d 215 (Hamilton County 1949), *aff'd* 153 Ohio St. 235, 91 N.E.2d 5 (1950). I note, for example, that R.C. 2937.281 requires that an individual bondsman must be an adult resident of the county in which the criminal case is pending. Crim. R. 46(L) prohibits licensed attorneys from being sureties on criminal bail bonds. Domestic or foreign insurance corporations or associations may provide surety on bail bonds. R.C. 3905.42; R.C. 3929.01(B)(4). Bondsmen who are agents or solicitors of the agents of such insurance companies are subject to licensure and regulation by the superintendent of the department of insurance. R.C. 3905.01; R.C. 3905.02. I find no statutes, however, which prohibit a coroner's investigator, or a public employee in general, from being a criminal bondsman. Therefore, the second question can be answered in the negative.

Question number three asks whether there is a conflict of interest between the two positions. A public servant may not simultaneously hold an additional position which would subject him or her to divided loyalties and conflicting duties or to the temptation to act other than in the best interests of the public. Op. No. 79-111 at 2-371. See also *State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902) ("[t]he self interest of the public official and the public

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<sup>2</sup> I assume, for purposes of this opinion, that the position has been properly exempted from the classified civil service. See R.C. 124.11(A)(9) (assistants of elected officers who are authorized to act for or hold a fiduciary relation to their principal are unclassified). See also *State ex rel. Charlton v. Corrigan*, 36 Ohio St. 3d 68, 521 N.E.2d 804 (1988) (examining the nature of the fiduciary relationship exception to classified civil service).

<sup>3</sup> I note that the coroner, his deputy and assistants are statutorily precluded from holding additional positions which would prevent constant availability for their official duties. R.C. 313.06 ("[t]he coroner, his deputy, and assistants shall be available at all times for the performance of their duties"). Pursuant to R.C. 313.05, however, the titles deputy and assistant refer to licensed physicians and pathologists. Thus, while R.C. 313.05 might preclude some types of outside employment, it does not apply to a coroner's investigator and I need not determine the scope of such preclusion here.

interests which he represents, must not be brought into conflict"). Thus, in this instance, I must examine the duties of the two positions in order to determine whether an individual's private interest as a bail bondsman would conflict with the performance of his public duty as a coroner's investigator.

Pursuant to R.C. 313.05, an investigator for the county coroner performs such duties as are prescribed by the coroner and is paid from the county treasury. The coroner's primary duty is the investigation and determination of the cause, manner, and mode of any unexplained death in the county. See R.C. 313.19. To accomplish this, the coroner has authority to perform autopsies, to gather information at the death scene, and to interview and subpoena witnesses. See generally R.C. 313.11; 313.13; 313.17. The coroner and local law enforcement officials are permitted or required to cooperate in certain circumstances. See, e.g., R.C. 313.12 (requiring a member of a law enforcement agency who "obtains knowledge" of an unexplained death in the course of his duties to notify "the office of the coroner of the known facts concerning the time, place, manner, and circumstances of such death, and any other information which is required pursuant to...[R.C.] 313.01 to 313.22"); R.C. 313.21 (providing that "[t]he coroner may use or may allow the use of the coroner's laboratory and facilities...for law enforcement-related testing, and may direct his assistants and other personnel to perform such testing in addition to testing performed in execution of their duties"). See generally 1989 Op. Att'y Gen. No. 89-016 (discussing duties of part-time coroner's investigator); 1988 Op. Att'y Gen. No. 88-035 (discussing which duties of the coroner may be delegated to his subordinates). You have indicated that, within this framework, the assigned duties of this particular investigator include going to all death scenes and taking control of the body,<sup>4</sup> interviewing witnesses for information regarding the cause, mode, and manner of death, conveying pertinent information between the coroner's office and law enforcement officers, and testifying in court when needed. Because of these duties, the coroner's investigator has a close working relationship with law enforcement agencies and has access to sensitive law enforcement information.

A professional bondsman was described by the court in *State ex rel. Nathan v. Weyand*, 13 Ohio N.P. (n.s.) 198 (C.P. Hamilton County 1912) as "one who was willing and did sign the bonds of accused persons for hire." In return for compensation from the accused, the bondsman pledges either his personal assets or the assets of an insurance company as security for the accused's bail bond. Pursuant to Crim. R. 46(A), "[t]he purpose of bail is to insure that the defendant appears at all stages of the criminal proceedings." Thus, "[t]he surety by posting bail bond, guarantees that it will produce the defendant in court when called." *State v. Stevens*, 30 Ohio St. 3d 25, 27, 505 N.E.2d 972, 974 (1987) (quoting *State ex rel. Howell v. Schiele*, 85 Ohio App. 356, 88 N.E.2d 215 (1949), *aff'd* 153 Ohio St. 235, 91 N.E.2d 5 (1950)). Concomitant with this duty to produce the defendant in court, the bondsman also assumes responsibility for knowing when the defendant is required to appear in court and for knowing the whereabouts of the defendant. *Stevens*, 30 Ohio St. 3d at 27, 505 N.E.2d at 974.

A bondsman receives no public funds for performing this duty. He is paid by the defendant; the amount, generally, is a percentage of the total bond required. If the defendant fails to appear in court, the bondsman may forfeit the entire amount of the bail. See R.C. 2937.35 through 2937.40 (dealing with forfeiture of bail). Thus by posting the bail, the bondsman acquires a personal pecuniary interest in insuring that the defendant appears in court as ordered. Stated conversely, "[t]he escape of a defendant is the business risk of a bail surety." *State v. Ohayon*, 12 Ohio App. 3d 162, 165, 467 N.E.2d 908, 911 (Cuyahoga County 1983). In order to protect his interest, the bondsman has authority to apprehend the defendant and

<sup>4</sup> I assume, for purposes of this opinion, that this duty involves assisting the coroner or his deputy with this task and that the investigator has not been given sole responsibility therefor. See 1988 Op. Att'y Gen. No. 88-035 (syllabus, paragraph six) ("[o]nly the coroner and the deputy coroner have the authority to 'go to a dead body and take charge of it' pursuant to R.C. 313.13").

return him to the court at any time. R.C. 2937.40(A)(1). *See also Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, at 371-372 (1873) ("[w]hen bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge"); *Maynard v. Kear*, 474 F. Supp. 794 (N.D. Ohio 1979).

From the above review it can be seen that both a coroner's investigator and a criminal bondsman are peripheral actors in the criminal justice system. It is predictable that if one individual holds both jobs, some of the other persons involved in the system will at times deal with that individual in his capacity as investigator and at other times in his capacity as bondsman. While this may be confusing, it does not establish a conflict of interest in and of itself. Neither the coroner's investigator nor the coroner have any responsibility or authority regarding the custody of accused persons or the setting of bond, either directly or through interaction with court and law enforcement officials. *See Op. No. 88-035 at 2-163* ("coroners do not have the authority to determine whether the law has been broken, or to determine that a particular person is guilty of violating the law"). *See also State v. Cousin*, 5 Ohio App. 3d 32, 449 N.E.2d 32 (Seneca County 1982); 1969 Op. Att'y Gen. No. 69-036. *Compare* 1968 Op. Att'y Gen. No. 68-112 (individual's duty as deputy sheriff to fix bail by objective standards conflicts with his pecuniary interest as a bondsman in maximizing the amount). The coroner's investigator may uncover evidence which leads to the subsequent arrest and charging of an individual. Such evidence may also affect the amount of bail which is required. In most instances, the accused will then become a potential customer of the bondsman. To the extent that this can be viewed as an opportunity for self-dealing, the potential for conflict is cured in your case by the bondsman's voluntary abstention from providing bonds to persons accused in criminal matters where the coroner's office has been involved.

It also may happen that the investigator's duties will involve contact with an individual for whom he has posted bail in some earlier unrelated matter. I cannot say that in such a scenario the bondsman's interest in protecting his profit, i.e. preventing the individual's escape, is necessarily, or even probably, adverse to the performance of his duties as a coroner's investigator. Thus there is no direct conflict involved in holding both positions. The true issue, in such a circumstance, is whether the investigator's prior contact with the individual impairs his ability to perform an objective investigation. However, contacts which impair objectivity could arise from any outside activity of the investigator. An effort to avoid even the potential for conflict would disqualify anyone from holding the position. I do not find that contacts made in the criminal bonding business pose any inherent or predictable threat to the objectivity of a coroner's investigator. The potential for conflict is remote and speculative and can be dealt with by the coroner and the investigator on a case by case basis should the need arise, since it is the coroner, not the investigator, who gives directions and is responsible for decisions regarding an investigation under R.C. 313.15. *See Op. No. 86-016. See generally Esler*, 39 Ohio Misc. 3d at 10, 530 N.E.2d at 975; *Op. No. 79-111* (discussing the factors relevant in assessing a potential conflict). *But see Chronister v. Trumbull County Prosecuting Attorney*, 39 Ohio Misc. 2d 10, 12, 531 N.E.2d 785, 786 (C.P. Trumbull County 1988) (holding that mere possibility of conflict prevents holding simultaneous positions).

You have expressed a concern that a potential conflict of interest may exist because a coroner's investigator has access to law enforcement information which would be unavailable to him in his capacity as a bail bondsman and, I presume, is of some benefit to him in the bonding business. This is not a situation, however, which serves to benefit the investigator's private interests to the detriment of his public responsibilities. Rather, it is a situation which calls into question his use of the authority or influence of his public employment. With respect to this issue, there are various statutes governing the ethical conduct of public employees of which a coroner's investigator who works as a criminal bail bondsman should be aware. Among other things, these statutes concern the use of confidential information acquired in the course of official duties, R.C. 102.03(B), the use of one's public position for personal gain, R.C. 102.03(D), and the solicitation or acceptance of anything of value that manifests substantial improper influence with respect to public duties, R.C. 102.03(E). Pursuant to R.C. 102.08, the authority to render

advisory opinions on the provisions of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43 governing ethics, conflict of interest and financial disclosure is vested in the Ohio Ethics Commission. In light of this express statutory grant of power, I have held that it is inappropriate for the Attorney General to render opinions on these statutes. *See, e.g.*, 1987 Op. Att'y Gen. No. 87-025 (syllabus, paragraph three). *Accord* 1989 Op. Att'y Gen. No. 89-022 at n.2. I note additionally that, pursuant to R.C. 102.08, an individual acting in justified reliance on an advisory opinion of the Ethics Commission receives immunity from criminal prosecution, civil actions, and actions for removal from office based on facts and circumstances covered by the opinion. I recommend, therefore, that you contact the Ethics Commission for an analysis of the situation you have described.

Accordingly, it is my opinion and you are hereby advised that an individual engaged in private business as a criminal bondsman, who does not provide bail bonds for persons accused in matters with which the coroner's office is involved, may simultaneously hold a position as coroner's investigator pursuant to R.C. 313.05, provided that the individual is able to perform his official duties to the satisfaction of the coroner and that he is not in violation of any statutory provisions subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08.