

February 4, 2019

The Honorable Brigham M. Anderson
Lawrence County Prosecuting Attorney
111 South 4th Street
Ironton, Ohio 45638

SYLLABUS:

2019-004

1. Neither Section 311.22 of the Ohio Revised Code nor any other rule or statutory provision prohibits an Ohio court of common pleas or a division of such a court from adopting a local rule, in a manner consistent with Rule 5 of the Rules of Superintendence for the Courts of Ohio, providing for the appointment of a regular process server or regular process servers designated to effect personal service of process in civil matters before the court in a manner consistent with the provisions of Rule 4 of the Ohio Rules of Civil Procedure, and the requirements of Rules 4.1 through 4.6.
2. Pursuant to Rule 4.1(B) of the Ohio Rules of Civil Procedure, personal service of process and the complaint, or other documents issuing from the court may be initiated by a party's filing with the clerk a written request for such service, and such request need not be supported by the filing of a motion seeking such method of service or a specific judgment entry in the particular matter.
3. As is provided in Section 311.22 of the Ohio Revised Code, in matters in which a judge of a court of common pleas determines that there is good cause for the appointment of a person, other than a sheriff, to effect the service of a particular process or order, the judge may designate such a person to complete the service. The person so designated may be an individual designated by the court as one of its regular process servers under its local rule, or some other individual whom the court determines to be suitable for that purpose. The directive of the judge or court in this regard may be issued by the court upon the motion of a party or at its own instance, and memorialized by the judge or court in the action.



DAVE YOST

OHIO ATTORNEY GENERAL

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

February 4, 2019

OPINION NO. 2019-004

The Honorable Brigham M. Anderson
Lawrence County Prosecuting Attorney
111 South 4th Street
Ironton, Ohio 45638

Dear Prosecutor Anderson:

By your letter of January 10, 2019, you have requested our opinion on certain matters incident to the discharge of your duties as the Prosecuting Attorney of Lawrence County, Ohio. You indicate in your communication that you are aware that a number of Ohio Courts of Common Pleas have adopted local rules “providing for the standing appointment of special process servers to effectuate service of process in all civil cases coming before the Court.” You refer to Section 311.22 of the Ohio Revised Code which you assert “authorizes the court to appoint a person to serve a particular process or order and that such person may be appointed on the Motion of the party who obtains the process or order.” (Emphasis in original.) On that basis, you ask if Section 311.22 prohibits “a Court from appointing a standing Process Server to serve process in all civil cases for a period of time or must the person be appointed in each particular case on Motion of a party in that case?”

We preface our expressions in response to your request by indicating that “[a] fundamental principle of constitutional law dictates that the legislative, executive, and judicial branches of government are separate and distinct, and that one branch may not impinge upon the rights or authority of the others. *See, e.g., State ex rel. Finley v. Pfeiffer*, 163 Ohio St. 149, 126 N.E. 2d 57 (1955); *Knapp v. Thomas*, 39 Ohio St. 377, 391 (1883) (‘each [branch of government] can best preserve the jurisdiction and power confided to it, by carefully abstaining from all interference with the rightful authority of the others’).” 1992 Op. Att’y Gen. No. 92-038, at 2-148. Section 309.09(A) of the Ohio Revised Code, however, directs that you, as the Prosecuting Attorney of Lawrence County, are to serve as the “legal adviser of ... all ... county officers and boards[,]” and that you provide to any such individual or entity, upon request of the same, “written opinions or instructions ... in matters connected with their official duties.” We offer our opinions in the context of your said obligations and responsibilities.

The Ohio Constitution, Article IV, Section 5(B), a part of a constitutional provision which is commonly known as the “Modern Courts Amendment”, provides that:

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force and effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

Rule 5 of the Rules of Superintendence for the Courts of Ohio provides, in relevant part, that:

(A) Adoption of local rules

(1) Nothing in these rules prevents a court or a division of a court from adopting any local rule of practice that promotes the use of any device or procedure to facilitate the expeditious disposition of cases. Local rules of practice shall not be inconsistent with rules promulgated by the Supreme Court.

(2) A local rule of practice shall be adopted only after a court or a division of a court provides appropriate notice and an opportunity to comment on the proposed rule. If the court or division determines that there is an immediate need for the rule, the court or division may adopt the rule without prior notice and opportunity for comment, but promptly shall afford notice and opportunity for comment.

(B) Filing of local rules upon adoption Upon adoption of a local rule of practice, a court or division of a court shall file the rule with its clerk, the clerk of the Supreme Court, and, if the rule relates to the use of information technology, the Supreme Court Commission on Technology and the Courts.

(C) Annual filing of local rules On or before the first day of February of each year, each court or division of a court shall do one of the following:

(1) File with the clerk of the Supreme Court a complete copy of all local rules of practice of the court or division in effect on the immediately preceding first day of January;

(2) Certify to the clerk of the Supreme Court that there were no changes in the immediately preceding calendar year to the local rules of practice of the court or division.

Rule 4.1 of the Ohio Rules of Civil Procedure indicates that “[a]ll methods of service within this state, except service by publication as provided in Civ.R. 4.4(A), are described in this rule.” Rule 4.1(B) of the Ohio Rules of Civil Procedure, under the title “Personal service”, provides that “[w]hen

the plaintiff files a written request with the clerk for personal service, service of process shall be made by that method.” The Rule directs, in relevant part, that:

When process issued from a ... court of common pleas ... is to be served personally under this division, the clerk of the court shall deliver the process and sufficient copies of the process and complaint, or other documents to be served, to the sheriff of the county in which the party to be served resides or may be found.... In the alternative, process issuing from any of these courts may be delivered by the clerk to any person not less than eighteen years of age, who is not a party and who has been designated by order of the court to make personal service of process under this division.

Civ.R. 4.1(B).

As you indicate in your communication to me, R.C. 311.22 provides that:

The court or judge may, for good cause, appoint a person to serve a particular process or order, and such person shall have the same power to execute such process or order which the sheriff has. Such person may be appointed on the motion of the party who obtains the process or order, and the return must be verified by affidavit. He shall be entitled to the fees allowed to the sheriff for similar services.

Although you do not allude to Section 311.08(A) of the Ohio Revised Code, I note that it indicates that:

(A) The sheriff shall, except as provided in division (B) of this section, execute every summons, order, or other process directed to him by a proper and lawful authority of this state or issued by a proper and lawful authority of any other state, make return thereof, and exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law.

In an action in which the sheriff is a party, or is interested, process shall be directed to and executed by a person appointed by the court of common pleas or a judge of the court of common pleas.

Subsection (B) of Section 311.08 has no relevance to your inquiry.

In *Proctor vs. Kardassilaris*, 115 Ohio St. 3d 71, 2007-Ohio-4838, 873 N.E.2d 872, at ¶ 17, the Ohio Supreme Court held that:

The Modern Courts Amendment empowers this court to create rules of practice and procedure for the courts of this state, including the Rules of Civil Procedure. Section 5(B), Article IV, Ohio Constitution. However, it expressly states that rules created in this manner “shall not abridge, enlarge, or modify any substantive right.” *Id.* Thus, if a rule created pursuant to Section 5(B), Article IV conflicts with a statute, the rule will control for procedural matters, and the statute will control for matters of substantive law. See *Boyer v. Boyer* (1976), 46 Ohio St. 2d 83, 86, 75 O.O.

2d 156, 346 N.E. 2d 286. We have defined “substantive” in this context as “that body of law which creates, defines and regulates the rights of parties.” See *Krause v. State* (1972), 31 Ohio St. 2d 132, 145, 60 O.O.2d 100, 285 N.E.2d 736, overruled on other grounds, *Schenkowski v. Cleveland Metroparks Sys.* (1981), 67 Ohio St. 2d 31, 21 O.O.3d 19, 426 N.E.2d 784, paragraph one of the syllabus.

The Ohio Court of Appeals for the Tenth District, Franklin County, held in *Winnestaffer v. Smith*, 10th Dist. No. 07AP-440, 2007-Ohio-7002, 2007 Ohio App. LEXIS 6145, at ¶ 9, that R.C. 311.22 is a “complementary section” to Civil Rule 4.1(B). As such, neither provision is in conflict with or has derogatory effect upon the other.

We have secured examples of the type of local rules which you describe in your letter pursuant to which Ohio courts of common pleas or divisions of such courts provide for the service of process and the appointment of special process servers. We have reviewed such examples promulgated by the Domestic Relations Division of the Montgomery County Common Pleas Court (Rule 4.13 Service of process and special process servers); the General Division of the Montgomery County Common Pleas Court (Rule 2.05C); the Domestic Relations Division of the Summit County Common Pleas Court (Rule 3.02 Appointment of process servers); the Family Court Division of the Stark County Common Pleas Court (Rule DR 11.03 Process server (One-time appointment) and Rule DR 11.04 Process server (Continuing appointment)); the Warren County Common Pleas Court, Juvenile Division (Rule 12(I) Orders of the court and service, Special process server: Case specific Appointment, and Rule 12(J) Special process server; Continuing appointment); and the Domestic Relations Division of the Warren County Common Pleas Court (Rule 1.8A Process servers, One-time appointment, and Rule 1.8B Process servers; Continuing appointment).

Each of these rules contains a mechanism pursuant to which a party to an action may move the court for the appointment of a special process server in the particular matter by filing a motion which identifies the person to be so appointed and represents that the named individual is eighteen years of age or older, and is not a party to the action or an attorney for a party to the action. In addition, the rules of these courts include provision for the appointment by the court of process servers under a continuing appointment. These provisions require that any such applicant file with the clerk of the court an application or “motion” requesting such designation which sets out the applicant’s name, address, and telephone number, and representations that the individual is eighteen years of age or older, that the applicant will not attempt to effect service in any case in which he or she is a party or the attorney for a party, and that the applicant will follow the requirements of Rules 4 through 4.6 of the Ohio Rules of Civil Procedure. It is our understanding that, as a matter of common practice, designations of appointments of general process servers are evidenced by orders of the court or a division of a court and entered upon its general docket or journal.

In *Catudal v. Catudal*, 10th Dist. No. 15AP-1092, 2016-Ohio-8498, 2016 Ohio App. LEXIS 5343, the court dealt with a matter in which a litigant in a civil action filed with the clerk a request for personal service of the complaint and summons. Service was effected by one Jon Krukowski, an individual who had been designated a general process server, on the basis of a motion previously filed by Jon Krukowski and Associates requesting that the court designate the movant as “process servers

for the court.” *Id.* at ¶ 4. No motion was filed with the court in the matter seeking appointment of Mr. Krukowski, his business, or any other entity or individual as process server for the particular action. In determining that process had been properly served, the court held that:

Civ.R. 4.1(B), however, does not obligate the plaintiff to file a separate motion asking the court to designate a process server. Rather, the rule only requires that the plaintiff file a “written request with the clerk for personal service.” Civ.R. 4.1(B). Once the plaintiff makes a written request for personal service, service “shall be made by that method.” Civ.R. 4.1(B). Regarding the process server, the rule requires only that, in the alternative to the sheriff, the process server be a person who is “not less than eighteen years of age, who is not a party and who has been designated by order of the court to make personal service of process under this division.” Civ.R. 4.1(B).

In the February 11, 2014 entry, the common pleas court observed that “Jon M. Krukowski and all Associates are qualified individuals over the age of 18 and are not parties to any actions being served.” (Nov. 10, 2014 Am. Reply, Ex. B.) The February 11, 2014 entry designated Jon Krukowski & Associates to serve process in cases before the court for one year. Accordingly, the February 11, 2014 entry established that Jon Krukowski & Associates were individuals who were over 18, not a party to any case, and had “been designated by order of the court to make personal service of process under this division.” Civ.R. 4.1(B).

Catudal v. Catudal at ¶22-23.

On the basis of the foregoing, therefore, and, in specific response to your question, it is our opinion and you are advised hereby that:

1. Neither Section 311.22 of the Ohio Revised Code nor any other rule or statutory provision prohibits an Ohio court of common pleas or a division of such a court from adopting a local rule, in a manner consistent with Rule 5 of the Rules of Superintendence for the Courts of Ohio, providing for the appointment of a regular process server or regular process servers designated to effect personal service of process in civil matters before the court in a manner consistent with the provisions of Rule 4 of the Ohio Rules of Civil Procedure, and the requirements of Rules 4.1 through 4.6.
2. Pursuant to Rule 4.1(B) of the Ohio Rules of Civil Procedure, personal service of process and the complaint, or other documents issuing from the court may be initiated by a party’s filing with the clerk a written request for such service, and such request need not be supported by the filing of a motion seeking such method of service or a specific judgment entry in the particular matter.
3. As is provided in Section 311.22 of the Ohio Revised Code, in matters in which a judge of a court of common pleas determines that there is good cause for the appointment of a person, other than a sheriff, to effect the service of a particular process or order, the judge may designate such a person to complete

the service. The person so designated may be an individual designated by the court as one of its regular process servers under its local rule, or some other individual whom the court determines to be suitable for that purpose. The directive of the judge or court in this regard may be issued by the court upon the motion of a party or at its own instance, and memorialized by the judge or court in the action.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive, flowing style with a large initial "D" and a long, sweeping tail on the "y".

DAVE YOST
Ohio Attorney General