

**OPINION NO. 90-005****Syllabus:**

An individual employed as an assistant county prosecuting attorney may also serve as a part-time domestic relations referee in an adjoining county without having a common law conflict of interest, provided that the individual does not preside over hearings involving actions prosecuted or defended by the county prosecuting attorney who employs him as an assistant county prosecuting attorney.

---

**To: David E. Bowers, Allen County Prosecuting Attorney, Lima, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, March 9, 1990**

I have before me your request for my opinion as to whether the positions of assistant county prosecuting attorney and part-time domestic relations referee in an adjoining county are compatible. The information provided indicates that the assistant county prosecuting attorney is in charge of school law matters and participates in the civil division of the office of the county prosecuting attorney.

I note initially that a county prosecuting attorney may appoint, pursuant to R.C. 309.06, "such assistants...as are necessary for the proper performance of the duties of his office." Such assistants are empowered to act for, and in place of, the county prosecuting attorney in most matters. See R.C. 309.06; see also 1971 Op. Att'y Gen. No. 71-050 at 2-172 ("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"). Past opinions of the Attorney General have determined, accordingly, that assistant county prosecuting attorneys are subject to the same limitations as the county prosecuting attorney and may not hold any position that the county prosecuting attorney may not hold. See 1989 Op. Att'y Gen. No. 89-007; 1988 Op. Att'y Gen. No. 88-049; 1986 Op. Att'y Gen. No. 86-035; 1983 Op. Att'y Gen. No. 83-030; Op. No. 71-050. "Thus, statutory, as well as common law, restrictions on a prosecuting attorney's outside activities have been held applicable to assistant prosecuting attorneys." Op. No. 88-049 at 2-223; accord Op. No. 86-035 at 2-178; see 1970 Op. Att'y Gen. No. 70-022. Consequently, in considering the compatibility of the two positions about which you have asked I must include an examination of the compatibility of the positions of county prosecuting attorney and part-time domestic relations referee in an adjoining county.

The general powers and duties of a county prosecuting attorney are set forth in R.C. 309.08, which, in part, provides:

The prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute, on

behalf of the state, all complaints, suits, and controversies in which the state is a party, except for those required to be prosecuted by a special prosecutor pursuant to section 177.03 of the Revised Code or by the attorney general pursuant to section 109.83 of the Revised Code, 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, the prosecuting attorney shall prosecute cases arising in his county in the supreme court, except for those cases required to be prosecuted by a special prosecutor pursuant to section 177.03 of the Revised Code or by the attorney general pursuant to section 109.83 of the Revised Code.

In every case of conviction, the prosecuting attorney forthwith shall cause execution to be issued for the fine and costs, or costs only, as the case may be, and he faithfully shall urge the collection until it is effected or found to be impracticable to collect, and forthwith shall pay to the county treasurer all moneys belonging to the state or county which come into his possession.

A county prosecuting attorney also serves, pursuant to R.C. 309.09(A), as legal adviser of the board of county commissioners, board of elections, and all other county and township officers and boards. Cf. R.C. 309.09(B) (a board of county commissioners may employ an attorney other than the prosecuting attorney to represent the board in its official capacity); R.C. 309.10 (a school board, a county board of mental retardation and developmental disabilities, a board of county hospital trustees, and a board of library trustees may, in certain circumstances, employ legal counsel other than the prosecuting attorney).

In addition to the powers and duties set forth in R.C. 309.08 and R.C. 309.09(A), county prosecuting attorneys are also responsible for the prosecution of certain legal actions. See, e.g., R.C. 309.12 (the prosecuting attorney shall prosecute actions to restrain the misapplication of county funds or public moneys in the hands of the county treasurer); R.C. 309.14 (the prosecuting attorney shall prosecute persons who in any way unlawfully cut down or injure timber growing on land belonging to the state or any school district); R.C. 309.17 (the prosecuting attorney shall bring actions to recover property of a decedent held by another person, in the instances in which the administration of such decedent's estate has not been commenced); R.C. 321.42 (the prosecuting attorney shall commence action upon the bond of the county auditor or county treasurer in the event such bond is breached); R.C. 901.25 (when directed by the Attorney General, the prosecuting attorney shall institute and prosecute all necessary actions for the enforcement of the agricultural laws); R.C. 1515.11 (the prosecuting attorney of a county in which there is a soil and water conservation district shall be the legal adviser of the district, and shall represent the district in all civil actions); R.C. 1719.05 (the prosecuting attorney may bring an action in court to enforce the administration of a charitable trust); R.C. 1747.11(A) (the prosecuting attorney may bring a forfeiture action against a real estate investment trust that transacts real estate business in the state without authority); R.C. 2733.04 (when directed by the Governor, Ohio Supreme Court, Secretary of State, or General Assembly, the prosecuting attorney shall commence an action in quo warranto); R.C. 4123.92 (when directed by the Attorney General, the prosecuting attorney shall institute and prosecute all necessary actions pertaining to the worker's compensation law).

Domestic relations referees, the other position about which you ask, are appointed pursuant to, and governed in part by, the Ohio Rules of Civil Procedure. Specifically, Ohio R. Civ. P. 75(A) states: "These Rules of Civil Procedure shall apply in actions for divorce, annulment, alimony and related proceedings, with the modifications or exceptions set forth in this rule." Concerning the trial of such matters, Ohio R. Civ. P. 75(C) provides:

In proceedings under this rule there shall be no right to trial by jury. *All issues may be heard either by the court or by a referee* as the court may, on the request of any party or on its own motion, direct. Rule 53 shall apply to all cases or issues directed to be heard by a referee. (Emphasis added.)

Ohio R. Civ. P. 53 provides for the appointment, compensation, and powers of domestic relations referees. The rule states, in part:

(A) Appointment. The court may appoint one or more referees, who shall be attorneys at law admitted to practice in this state, to hear an issue or issues in any case in which the parties are not entitled to a trial by jury or in any case in which the parties consent in writing or in the record in open court, to submit an issue or issues to a court-appointed referee.

....  
(C) Powers. The order of reference to a referee may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of his report. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power to regulate all proceedings in every hearing before him as if by the court and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may summon and compel the attendance of witnesses and may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests and guarantees the costs, and the court so orders, the referee shall make a record of the evidence offered and excluded in the same manner as and subject to the same limitations upon a court sitting without a jury.

*See also* R.C. 3113.21(L)(3) (authorizing a judge in any Title IV-D case to appoint, when necessary, a referee to make findings of fact and recommendations, and setting forth the powers of such referee). The rule further requires a domestic relations referee to prepare and file with the clerk of court a report upon the matters submitted by the order of reference. Ohio R. Civ. P. 53(E)(1). Such referee's report becomes "effective and binding only when approved and entered as a matter of record by the court." Ohio R. Civ. P. 53(E)(5). Domestic relations referees, thus, perform duties which "involve the exercise of judicial powers in hearing and rendering decisions upon the law and the facts" in cases assigned to them. *Burch v. Harte*, 1 Ohio N.P. (n.s.) 477, 490, 14 Ohio Dec. 433, 444 (Cincinnati Super. Ct. 1903).

An examination as to the compatibility of two public positions necessitates the consideration of the following questions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment permissible?
3. Is one office subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368. All seven questions must yield an answer in favor of compatibility before two positions can be found compatible.

The sixth and seventh questions of the compatibility analysis involve in large part matters of local concern and I assume, for purposes of this opinion, that there are no departmental regulations, charter provisions, or ordinances which limit the holding of outside employment by an assistant county prosecuting attorney or part-time domestic relations referee. I note, however, that it is not uncommon for referees to be regulated by local rules of court. There are no applicable state or federal regulations.

The first question of the compatibility analysis asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits classified employees or officers from partaking in partisan political activity other than to vote and express their political views. A county prosecuting attorney, as an elected officer, holds an unclassified position. *See* R.C. 124.11(A)(1); R.C. 309.01. Further, an assistant county prosecuting attorney, pursuant to R.C. 124.11(A)(11), holds an unclassified position. Hence, neither a county prosecuting attorney nor an assistant county prosecuting attorney is subject to the prohibition of R.C. 124.57. Pursuant to R.C. 124.11(A)(10), officers and employees of courts of record are in the unclassified civil service if "the director of administrative services finds it impracticable to determine their fitness by competitive examination." A domestic relations referee, as stated above, is appointed by a court, and thus qualifies as an officer or employee of a court of record. In a telephone conversation with a member of my staff, you indicated that the director of administrative services has determined that the position of part-time domestic relations referee in question is an unclassified position. I assume, for purposes of this opinion, that the position has been appropriately unclassified as required by R.C. 124.11(A)(10). Accordingly, I find that the prohibition set forth in R.C. 124.57 does not apply to the positions of county prosecuting attorney, his assistants, or part-time domestic relations referee.

Question number two of the compatibility analysis asks whether the empowering statutes of either position limit outside employment. There are several statutes which limit a county prosecuting attorney's ability to hold outside employment. Pursuant to R.C. 3.11, "[n]o person shall hold at the same time by appointment or election more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, and probate judge." R.C. 309.02 also states, in part, that, "[n]o prosecuting attorney shall be a member of the general assembly of this state or mayor of a municipal corporation," and "[n]o county treasurer, county auditor, county recorder, county engineer, or sheriff shall be eligible as a candidate for, or elected to, the office of prosecuting attorney." Additionally, county prosecuting attorneys are prohibited from serving on a board of mental retardation and developmental disabilities, *see* R.C. 5126.03(A)(1), and a board of education, R.C. 3313.13. *See also* Op. No. 83-030 at 2-113 (the prohibition contained in R.C. 5126.03(A)(1) also applies to an assistant county prosecuting attorney); 1969 Op. Att'y Gen. No. 69-133 at 2-290 and 2-291 (the prohibition contained in R.C. 3313.13 also applies to an assistant county prosecuting attorney). I am unaware, however, of any statutes that prevent a county prosecuting attorney from also holding the position of part-time domestic relations referee. Additionally, with the exception of R.C. 120.39(C), which prohibits a county prosecuting attorney, city law director, or their assistants and employees from serving on a state public defender commission or any county or joint county public defender commission, there are no other statutes of which I am aware that expressly limit the outside public employment of an assistant county prosecuting attorney. Ohio R. Civ. P. 53 which authorizes the appointment of domestic relations referees is silent as to outside employment. Further, I find no applicable limitations elsewhere in the Ohio Rules of Civil Procedure or the Ohio Revised Code which prevent a part-time domestic relations referee from being an assistant county prosecuting attorney. Hence, absent limitations on outside employment by part-time referees as may appear in the local rules of court, the second question may be answered in the negative.

The third question of the compatibility analysis asks whether one position is subordinate to, or in any way a check upon, the other. *See* Op. No. 79-111. An

assistant county prosecuting attorney is appointed by the county prosecuting attorney, R.C. 309.06, and is, thus, accountable to him. Meanwhile, a part-time domestic relations referee is appointed by the court, pursuant to Ohio R. Civ. P. 53, and is responsible to the court which appoints him. Accordingly, the positions operate independently of each other and neither is subordinate to the other. See *generally Pistole v. Wiltshire*, 22 Ohio Op. 2d 464, 467, 189 N.E.2d 654, 657-58 (C.P. Scioto County 1961) (where one person is responsible to the people who elected him and the other is responsible to his appointing authority, neither position is subordinate to, or a check upon, the other). Additionally, I have been unable to locate an area in which one position would be a check upon the other. Therefore, I conclude that the positions of assistant county prosecuting attorney and part-time domestic relations referee in an adjoining county are not subordinate to, or in any way a check upon, each other.

The fourth question of the compatibility analysis asks whether it is physically possible for one person to discharge the duties of both positions. Past opinions of the Attorney General have determined that physical possibility is a question of fact, best answered by the concerned parties. 1989 Op. Att'y Gen. No. 89-052.

The fifth question of the compatibility analysis concerns the possibility of a conflict of interest between the two positions. An individual is prohibited from simultaneously holding two public positions if he would be subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public. 1985 Op. Att'y Gen. No. 85-042; Op. No. 79-111. It is, therefore, necessary to examine the powers and duties of the respective positions to determine whether an individual holding both positions would be subject to conflicting interests or divided loyalties. 1988 Op. Att'y Gen. No. 88-017 at 2-68. The fact that a conceivable conflict of interest exists does not per se render the two positions incompatible. Each compatibility question should be decided on its particular facts, and where the possibility of conflict is remote and speculative, the conflict of interest rule is not violated. Op. No. 89-052; Op. No. 79-111.

A county prosecuting attorney, as indicated above, has a duty to "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,<sup>1</sup> and court of appeals." R.C. 309.08 (emphasis and footnote added); see also R.C. 309.09 (requiring a county prosecuting attorney to be the legal adviser of various public officials and boards). As a result, a situation may arise where the county prosecuting attorney is required to prosecute an action before the domestic relations referee employed by him as an assistant county prosecuting attorney.

Ohio courts have recognized that a conflict of interest occurs when the duties of one position may be administered or discharged in such a way as to result in favoritism and preference being accorded the other position. *State ex rel. Baden v. Gibbons*, 17 Ohio L. Abs. 341, 344 (Butler County 1934); cf. 1980 Op. Att'y Gen. No. 80-035 at 2-149 ("[a]n individual who serves in dual public positions faces a situation which poses a conflict of interests when his responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective"). Hence, a conflict of interest arises when an individual, as part-time domestic relations referee, discharges or administers his duties in the hearing of an action prosecuted or defended by the county prosecuting attorney who employs him as an assistant county prosecuting attorney in such a way as to result in favoritism and preference being accorded to such prosecuting attorney. Even if the individual, as assistant county prosecuting attorney, were not involved in prosecuting or

---

<sup>1</sup> A domestic relations court is a part of the court of common pleas. See *generally* R.C. 3105.01 ("[t]he court of common pleas may grant divorces"); R.C. 3105.011 ("[t]he court of common pleas including divisions of courts of domestic relations, has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters").

defending the action himself, it would be difficult for such individual, in his capacity as referee to set aside his loyalty to the county prosecuting attorney. Such a predisposition of loyalty may affect the ability of an individual holding both positions to render an impartial hearing or decision as referee. Therefore, I find that the part-time domestic relations referee must refrain from presiding over hearings involving actions prosecuted or defended by the county prosecuting attorney who employs him as an assistant county prosecuting attorney.

I note further that past opinions of the Attorney General have found two positions, one of which is a judicial or quasi-judicial position, incompatible, regardless of an individual's ability to remove himself from the possibility of granting favoritism. For example, in 1964 Op. Att'y Gen. No. 1023, p. 2-185, my predecessor determined that the positions of part-time municipal court judge and part-time village solicitor are incompatible where the jurisdiction of the municipal court includes the village which the solicitor serves, since the individual, as judge, may sit in judgment of his own professional work for the municipal corporation, regardless of the municipal corporation's participation in the controversy. More specifically, the opinion states, in part:

In the case presented by your question, although the village solicitor is prohibited by ordinance from appearing in the court in which he is a judge, still, considering that the village is within the jurisdiction of the court in question, it would appear probable that matters upon which the solicitor has worked or involving policies or positions adopted by the village in reliance on his professional advice as solicitor eventually will come before that court. It has been suggested that, in such cases, the solicitor-judge could disqualify himself; and I have no doubt that the gentleman in question would do so, but that is not the point. In this case there appears to be a substantial probability of the municipal judge being presented with situations where he *could* sit in judgment on his own professional work for, and legal advice to, the village which he serves as solicitor.

I am cognizant of the fact that this sort of problem might arise in the case of any judge who is permitted to carry on a private practice and that, in the case of part-time municipal judge, such private practice is authorized. But, in this case more than mere private practice is involved; another public office is involved, that of solicitor for a village within the territorial jurisdiction of the court. In such a situation there is, in my opinion, a sufficient risk of the duties of one office being so administered and discharged that favoritism and preference could be shown the other that the offices in question must be deemed incompatible and may not, therefore, be held by the same person.

*Id.* at 2-187; *accord* 1980 Op. Att'y Gen. No. 80-015 (the positions of full-time city law director and referee of the small claims division of the municipal court before which he practices in his capacity as city director of law are incompatible).

With respect to your specific inquiry, you have indicated in your letter that the individual in question is employed as an assistant county prosecuting attorney in a county adjacent to that in which he would serve as a part-time domestic relations referee. It would seem very unusual that the county prosecuting attorney would have occasion to litigate domestic relations matters in an adjacent county. The possibility of a conflict would, therefore, appear to be remote and speculative, and the conflict of interest rule would not be violated. Op. No. 89-052; Op. No. 79-111. I find, accordingly, that an individual who serves as an assistant county prosecuting attorney is not barred by conflict of interest from accepting an appointment as a part-time domestic relations referee in an adjoining county, provided that the individual does not preside over hearings involving actions prosecuted or defended by the county prosecuting attorney who employs him as an assistant county prosecuting attorney.

As a final matter I note that my consideration of the question of conflict of interest does not constitute an opinion on the applicability of the provisions of R.C.

Chapter 102, R.C. 2921.42, or R.C. 2921.43 governing ethics, conflicts of interest, or financial disclosure with regard to positions of the public service. Pursuant to R.C. 102.08, the Ohio Ethics Commission is empowered to render advisory opinions on these sections of the Revised Code. *See, e.g.*, 1987 Op. Att'y Gen. No. 87-025 (syllabus, paragraph three) ("[b]ecause R.C. 102.08 grants the Ohio Ethics Commission the authority to render advisory opinions interpreting R.C. 2921.42, the Attorney General will not also render opinions construing R.C. 2921.42").

In addition, the Supreme Court Board of Commissioners on Grievances and Discipline of the Bar "may issue informal, nonbinding advisory opinion letters in response to prospective or hypothetical questions regarding the application of these rules, the Rules of the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office, in response to any inquiry directed to the Board." Ohio Gov. Bar R. V(2)(b). It has come to my attention that the Board has determined that "[r]eferees are considered judges for purposes of complying with the Code of Judicial Conduct." Board of Commissioners on Grievances & Discipline Op. No. 87-038 (June 1987) (syllabus); *accord* Board of Commissioners on Grievances & Discipline Op. No. 87-014 (June 1987) (syllabus). Consequently, it would be improper for me to render an opinion concerning the professional responsibilities of a part-time domestic relations referee under the Ohio Code of Judicial Conduct, since the Supreme Court Board of Commissioners on Grievances and Discipline of the Bar is empowered to render such opinions. *See* 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three) ("[t]he Attorney General will abstain from rendering an opinion where another governmental entity has been granted the authority to render advisory opinions concerning the relevant subject matter").

Accordingly, it is my opinion and you are hereby advised that, an individual employed as an assistant county prosecuting attorney may also serve as a part-time domestic relations referee in an adjoining county without having a common law conflict of interest, provided that the individual does not preside over hearings involving actions prosecuted or defended by the county prosecuting attorney who employs him as an assistant county prosecuting attorney.