

May 5, 2021

The Honorable Edward J. Dowd
Miami Township Law Director
8163 Old Yankee Street, Suite C
Dayton, Ohio 45458

SYLLABUS: 2021-010

An appointed part-time city prosecutor may not simultaneously maintain a private practice in which he represents criminal defendants for violations of state law in the surrounding jurisdictions of the served municipal corporation.



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OPINION NO. 2021-010

The Honorable Edward J. Dowd
Miami Township Law Director
8163 Old Yankee Street, Suite C
Dayton, Ohio 45458

Dear Law Director Dowd:

You requested an opinion regarding whether an attorney with a criminal-defense practice may serve as an appointed part-time city prosecutor. You state that the City of Miamisburg and Miami Township entered into an agreement whereby Miami Township agreed to reimburse Miamisburg for the cost associated with hiring an appointed part-time city prosecutor. *See* 2015 Op. Att’y Gen. No. 2015-031. The appointed part-time prosecutor prosecutes criminal cases, including cases involving violations of state law, in the municipal court. The same appointed part-time city prosecutor maintains a private practice in which he represents criminal defendants for violations of state law. The attorney does not conduct his private practice within the served municipal corporation. However, the appointed part-time city prosecutor does represent criminal defendants charged with violations of state law in the surrounding jurisdictions, which include jurisdictions within the same county as the served municipal corporation.

I have framed your question as:

May a part-time city prosecutor, paid for by the township pursuant to an agreement authorized by a resolution of the board of trustees, and hired to

prosecute criminal offenses under state law arising within the unincorporated area of the township, also represent criminal defendants for violations of state law in surrounding jurisdictions of the served municipal corporation?

The answer is “no,” because the positions are not compatible.

An issue of compatibility arises whenever one person wishes to hold simultaneously two or more positions of public service. Five questions are used to determine if a public officer may simultaneously serve in a private position. *See, e.g.*, 2009 Op. Att’y Gen. No. 2009-053, at 2-398 to 2-399. And, relevant here, positions are incompatible if there is “an impermissible conflict of interest ... between the two positions.” 2009 Op. Att’y Gen. No. 2009-053, 2-398 to 2-399; *see* 1995 Op. Att’y Gen. No. 95-044, at 2-234 to 2-235.

Here, the conflict-of-interest question is dispositive. There is a blatant and impermissible conflict of interest when an appointed part-time city prosecutor seeks to simultaneously maintain a private practice in which he represents criminal defendants for violations of state law in the surrounding jurisdictions of the served municipal corporation.

As a general rule, absent certain exceptions, “the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer.” R.C. 1901.34(A). In addition, absent certain exceptions, “the village solicitor, city director of law, or similar chief legal officer of the municipal corporation in which a municipal court is located shall prosecute all criminal cases brought before the court arising in the unincorporated areas within the territory of the

municipal court.” *Id.* As found in 2015 Op. Att’y Gen. No. 2015-031, “[t]his authorization to prosecute criminal cases includes persons appointed as assistants to a chief legal officer of a municipal corporation.” *Id.* at Slip op. at 3; 2-303. “Thus, R.C. 1901.34 requires a chief legal officer of a municipal corporation or her assistants to prosecute in a municipal court all criminal cases arising in the unincorporated areas within the territory of the municipal court.” *Id.*

Given these duties, the conflict of interest here is obvious. All “public officials owe an undivided loyalty to the public, such officials may not hold a private position that would create divided loyalties, conflicting duties, or the temptation to act other than in the public interest.” 2009 Op. Att’y Gen. No. 2009-053, at 2-400. And a prosecutor who maintains a criminal defense practice *will* face the pressures of divided loyalties, because any precedent that is good for one client (the government or criminal defendants) will likely be bad for the other.

That conclusion is consistent with past opinions from my office. One opinion, for example, determines that “[a] city solicitor [now city law director] may not represent defendants in a criminal case wherein *the State of Ohio* is plaintiff.” 1966 Op. Att’y Gen. No. 66-159, at paragraph four of the syllabus. (Emphasis added). In accordance with the 1966 opinion, 1967 Op. Att’y Gen. No. 67-112 found that a part-time city solicitor cannot represent a criminal defendant in the court of common pleas because the solicitor “would in essence be aligning himself against his at least part-time employer.” *Id.* at 2-177. Regarding assistants to a city law director, “an assistant city law director, who is authorized to act on behalf of the city law director, may not hold a position the law director is prohibited from holding.” 1986 Op. Att’y Gen. No. 86-035, at 2-178. As already stated, both a law director and the assistants to a law director prosecute criminal cases pursuant to R.C. 1901.34. *See* 2015 Op. Att’y Gen. No

2015-031, Slip op. at 3; 2-303. Thus, for the matter at issue, the appointed part-time city prosecutor is acting on behalf of the city law director when prosecuting criminal cases pursuant to R.C. 1901.34. And any case prosecuted in that capacity risks creating precedent that may harm the prosecutor's paying clients. That risk creates a clear conflict of interest.

Consider also the incompatibility determination found in 1971 Op. Att'y Gen. No. 71-050. In the 1971 opinion, my office addressed a question of compatibility for a part-time assistant county prosecutor simultaneously conducting a private criminal defense practice outside the jurisdiction of the served county. *Id.* at 2-170. The opinion noted that an assistant prosecuting attorney is both authorized to and often does act in the place of the prosecutor. *Id.* at 2-172. Given that determination, the 1971 opinion stated that an assistant prosecutor, *even one that is specialized and possess limited duties*, cannot simultaneously hold a position that the prosecutor is barred from holding. *See id.* Due to the determination that a city law director is almost identical to that of a prosecuting attorney, the 1971 opinion applied the findings of 1966 Op. Att'y Gen. No. 66-159. 1971 Op. Att'y Gen. No. 71-050, 2-172 to 2-173. In applying 1966 Op. Att'y Gen. No. 66-159, the 1971 opinion concluded that “[a]n assistant prosecuting attorney is not permitted to represent clients in criminal proceedings either within or outside of the county in which he is appointed.” 1971 Op. Att'y Gen. No. 71-050, at the syllabus. In coming to this conclusion, the 1971 opinion stated that “[t]he 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.*” *Id.* at 2-173 (Emphasis added); *See also* 2009 Op. Att'y Gen. No. 2009-053, at 2-400 (a division of loyalty occurs when an assistant county prosecutor, “as a private practitioner, represents a person in a criminal proceeding brought by the state or a municipal corporation that has

entered into an agreement with the county prosecuting attorney whereby the county prosecuting attorney prosecutes criminal cases for the municipal corporation”); *See also* Board of Commissioners on Grievance & Discipline Op. No. 2008-005 (August 15, 2008) (city director of law or an assistant city director of law is prohibited from representing criminal defendants in proceedings in which the state is a plaintiff); *Compare* Board of Commissioners on Grievance & Discipline Op. No. 2008-006 (December 05, 2008) (modifying No. 2008-005 to clarify certain instances in which a city director of law or assistant city director law who has no legal duty to represent the state of Ohio may represent criminal defendants).

That same logic applies with full force here. And so, in accordance with my office’s prior opinions, an impermissible conflict of interest exists. Thus, the positions are incompatible.

I conclude with a caveat: my analysis above is limited to compatibility, and expresses no view on whether holding these two positions simultaneously would constitute a breach of professional ethics. Questions pertaining to ethics or the rules of professional conduct for attorneys are outside the scope of this opinion. *See e.g.*, 2009 Op. Att’y Gen. No. 2009-053, at 2-402 to 2-403. Therefore, if you have any questions pertaining to ethics or the rules of professional conduct for attorneys, I recommend that you contact the Ohio Ethics Commission or the Board of Commissioners on Grievance and Discipline of the Ohio Supreme Court. *See id*; *see also* R.C. 102.08; *see also* Ohio Gov. Bar R. V, §2(D).

Conclusion

Accordingly, it is my opinion, and you are hereby advised that:

An appointed part-time city prosecutor may not simultaneously maintain a private practice in

which he represents criminal defendants for violations of state law in the surrounding jurisdictions of the served municipal corporation.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive style with a large, looping "D" and "Y".

DAVE YOST
Ohio Attorney General