

OPINION NO. 2009-049**Syllabus:**

2009-049

1. A county prosecuting attorney may not appoint himself to the county law library resources board.
2. An assistant county prosecuting attorney may serve as a member of the county law library resources board that is established in his county, provided he is not required as an assistant county prosecuting attorney to (1) participate in civil or criminal proceedings against the members of the county law library resources board, (2) represent or provide legal advice to the county law library resources board, (3) assist in preparing the county's budget, or (4) substitute for the county prosecuting attorney on the county budget commission.
3. A member of a county law library resources board who also serves as an assistant county prosecuting attorney in the same county may not participate in deliberations, discussions, negotiations, or votes concerning a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium.

To: Scott A. Haselman, Fulton County Prosecuting Attorney, Wauseon, Ohio

By: Richard Cordray, Ohio Attorney General, December 3, 2009

You have requested an opinion concerning service on a county law library resources board. Specifically, you ask:

1. May a county prosecuting attorney appoint himself to the county law library resources board?
2. May an assistant county prosecuting attorney serve on the county law library resources board that is established in his county?

Pursuant to R.C. 307.51(B), "[t]here is hereby created in each county a county law library resources board," which shall consist of five members appointed as provided in R.C. 307.511. Appointments to the county law library resources board are made in the following manner:

[A](1) The prosecuting attorney of the county shall appoint one member whose initial term shall expire on December 31, 2010.

(2) The administrative judges or presiding judges of all municipal courts and county courts within the county shall meet to appoint one member who is an attorney licensed to practice law in the state and in good standing before the supreme court of Ohio and whose initial term shall expire on December 31, 2011.

(3) The administrative judge or presiding judge of the court of common pleas of the county shall appoint one member who is an attorney licensed to practice law in the state and in good standing before the supreme court of Ohio and whose initial term shall expire on December 31, 2012.

(4) The board of county commissioners shall appoint one member whose initial term shall expire on December 31, 2013.

(5) The board of county commissioners shall appoint one member whose initial term shall expire on December 31, 2014.

(C) During the period of July 1, 2009, through December 31, 2010, the county law library resources board shall consist of seven members and shall include members appointed pursuant to division (A) of this section and two members who are residents of the county appointed for this period by the board of trustees of the law library association within the county that, prior to the effective date of this section, receives fines, penalties, and moneys arising from forfeited bail pursuant to [R.C. 3375.50-.53], as amended and repealed by this act. (Emphasis added.)

R.C. 307.511. A county prosecuting attorney thus is responsible for appointing one person to the county law library resources board.

In Ohio, it is a well-settled legal tenet that “a public officer is disqualified from serving on a board or commission to which he makes appointments, unless a statute authorizes the officer to hold the other position.” 2007 Op. Att’y Gen. No. 2007-020 at 2-209; *accord* 2001 Op. Att’y Gen. No. 2001-034 at 2-204; 1998 Op. Att’y Gen. No. 98-009 at 2-51; 1979 Op. Att’y Gen. No. 79-086 at 2-277; 1936 Op. Att’y Gen. No. 5114, vol. I, p. 71, at 75; *see State ex rel. Louthan v. Taylor*, 12 Ohio St. 130, 134 (1861). Adherence to the foregoing tenet “serves to avoid conflict of interest situations that arise when an officer is responsible for supervising his own actions in another public position and is consistent with the common law compatibility principle that prohibits a person from holding two public positions simultaneously when one is subordinate to, or a check upon, the other.” 2007 Op. Att’y Gen. No. 2007-020 at 2-209; *accord* 1994 Op. Att’y Gen. No. 94-062 at 2-303.

No statute authorizes a county prosecuting attorney, directly or indirectly, to appoint himself to the county law library resources board. A county prosecuting attorney, therefore, may not appoint himself to the county law library resources

board.¹ *Cf.* 2007 Op. Att’y Gen. No. 2007-020 (insofar as a board of county commissioners appoints persons to the board of trustees of a community college district that includes the county, a commissioner may not serve on such a board of trustees); 1979 Op. Att’y Gen. No. 79-086 (syllabus, paragraph 1) (“[w]here the charter of a municipality vests the power to appoint the director of public safety in the mayor, . . . the mayor may not serve as the director of public safety”).

Your second question asks whether an assistant county prosecuting attorney may serve on the county law library resources board that is established in his county.² The following seven-part test is used to determine whether an assistant county prosecuting attorney may hold another public position at the same time:

¹ Even if a county prosecuting attorney were allowed to appoint himself to the county law library resources board, the county prosecuting attorney could not serve on the board insofar as a county prosecuting attorney may not serve on a board that he has a duty to advise. *See* 1983 Op. Att’y Gen. No. 83-030 at 2-113; 1948 Op. Att’y Gen. No. 4130, p. 594, at 597. *See generally* note 5, *infra* (pursuant to R.C. 309.09, the county prosecuting attorney represents and advises the county law library resources board).

² Older Attorney General opinions determined that, insofar as an assistant county prosecuting attorney is authorized to act for, and in the place of, the county prosecuting attorney, an assistant county prosecuting attorney is not permitted to hold any position that the county prosecuting attorney may not hold. *See, e.g.*, 1988 Op. Att’y Gen. No. 88-049; 1983 Op. Att’y Gen. No. 83-030; 1970 Op. Att’y Gen. No. 70-022. Recent opinions, however, have declined to endorse this principle and stated that “the fact that an assistant prosecuting attorney may be authorized to act for and in the place of the prosecuting attorney is insufficient in and of itself to find that an assistant prosecuting attorney may not hold a position that the prosecuting attorney may not hold.” 1999 Op. Att’y Gen. No. 99-027 at 2-176 and 2-177; *accord* 2001 Op. Att’y Gen. No. 2001-040 at 2-241 and 2-242; 2001 Op. Att’y Gen. No. 2001-027 at 2-154 and 2-155; 1997 Op. Att’y Gen. No. 97-044 at 2-274 n.5; *see also* *Rose v. Village of Wellsville*, 63 Ohio Misc. 2d 9, 20-22, 613 N.E.2d 262 (C.P. Columbiana County 1993).

Instead, the resolution of the compatibility issue in the case of an assistant county prosecuting attorney who wishes to hold another public position now requires a determination whether any statutory or constitutional outside-employment restriction imposed upon a county prosecuting attorney applies to his assistants and a factual analysis of the particular duties and responsibilities assigned to and to be performed by a person in each of the two positions. *See, e.g.*, 2001 Op. Att’y Gen. No. 2001-040; 2001 Op. Att’y Gen. No. 2001-027; 1999 Op. Att’y Gen. No. 99-027; 1997 Op. Att’y Gen. No. 97-044. Thus, the fact that a county prosecuting attorney may not serve on the county law library resources board does not in and of itself foreclose an assistant county prosecuting attorney from serving as a member of the county law library resources board.

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Does a constitutional provision or statute prohibit the holding of both positions at the same time?
3. Is one position 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 an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2009 Op. Att’y Gen. No. 2009-018 at 2-127 and 2-128; *see also* 2 Ohio Admin. Code 123:1-46-02.

Question one of the test asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits, except as provided therein, persons in the classified service of a county from holding partisan political offices. *See* rule 123:1-46-02(C)(1), (6). Neither the position of assistant county prosecuting attorney nor member of the county law library resources board is in the classified civil service. *See* R.C. 124.11(9); R.C. 124.11(A)(11); R.C. 307.51(C). The prohibition of R.C. 124.57 therefore does not operate to prevent a person from serving in the positions of assistant county prosecuting attorney and member of the county law library resources board at the same time.

Question two of the test asks whether a constitutional provision or statute prohibits a person from holding both positions at the same time. No constitutional provision or statute bars a person from serving simultaneously in the positions of assistant county prosecuting attorney and member of the county law library resources board. Thus, the second question of the test may be answered in the negative.

Question three of the test asks whether one position is subordinate to, or in any way a check upon, the other. Neither position is responsible for appointing or removing a person from the other position. *See* R.C. 307.511; R.C. 309.06. Also, the positions of assistant county prosecuting attorney and member of the county law library resources board operate independently of each other, and neither is required to assign duties to, or supervise, the other. Accordingly, neither position is subordinate to, or in any way a check upon, the other.

Question four of the test asks whether it is physically possible for one person to perform the duties of both positions. This is a question of fact that must be addressed at the local level by those officials familiar with the particular time constraints and demands that would be imposed upon the person as an assistant

county prosecuting attorney and member of the county law library resources board. It seems likely, however, that the duties of both positions can be discharged competently by the same person if there is no direct conflict in the working hours of each position.³

Question five of the test asks whether there is a conflict of interest between the two positions.⁴ A person may not serve simultaneously in two public positions if the “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.” 1980 Op. Att’y Gen. No. 80-035 at 2-149.

³ A member of the county law library resources board must attend at least three-fifths of the regular and special meetings held by the board during any two-year period. *See* R.C. 307.512 (the county law library resources board “shall meet at least four times a year, as determined by the chairperson or at any other time as determined by a majority of the board”); *see also* R.C. 3.17 (a member of a board “who fails to attend at least three-fifths of the regular and special meetings held by that board . . . during any two-year period forfeits [his] position on that board”). If a member of a county law library resources board who is employed as an assistant county prosecuting attorney is required to attend the board’s meetings during his regular work hours as an assistant county prosecuting attorney, the member must take approved vacation or personal leave or leave without pay for the time he is absent from his duties as an assistant county prosecuting attorney.

⁴ The conduct of an assistant county prosecuting attorney who serves as a member of a county law library resources board must comport with the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43 and the rules set forth in the Supreme Court Rules for the Government of the Bar of Ohio and the Rules of Professional Conduct. The authority to issue advisory opinions concerning the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43 is conferred upon the Ohio Ethics Commission pursuant to R.C. 102.08. In addition, the Board of Commissioners on Grievances and Discipline of the Supreme Court is vested with the authority to issue advisory opinions regarding the rules set forth in the Supreme Court Rules for the Government of the Bar of Ohio and the Rules of Professional Conduct. R.C. 102.08; Ohio Gov. Bar R. V, § 2(C).

In light of the foregoing authority granted to the Ohio Ethics Commission and the Board of Commissioners on Grievances and Discipline of the Supreme Court, we believe that it is proper to refrain from interpreting and applying, by way of a formal opinion, the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43 and the rules set forth in the Supreme Court Rules for the Government of the Bar of Ohio and the Rules of Professional Conduct. Instead, we recommend that you consult with the Ohio Ethics Commission and the Board of Commissioners on Grievances and Discipline of the Supreme Court for guidance concerning the ethical and professional responsibilities that will confront an assistant county prosecuting attorney who serves as a member of a county law library resources board.

A review of the powers, duties, and responsibilities of the respective positions discloses several instances in which potential conflicts of interest exist between the positions. As an assistant county prosecuting attorney, the person may be required to participate in civil or criminal proceedings against the members of the county law library resources board, *see, e.g.*, R.C. 117.27-.29; R.C. 309.12; R.C. 2733.04; R.C. 2733.05, represent or provide legal advice to the county law library resources board, *see* R.C. 309.09,⁵ assist in preparing the county's budget, *see* R.C. 307.513; R.C. 5705.28, or substitute for the county prosecuting attorney on the county budget commission, *see* R.C. 5705.27; 1943 Op. Att'y Gen. No. 6186, p. 363. If the person, as an assistant county prosecuting attorney, were required to (1) participate in civil or criminal proceedings against the members of the county law library resources board; (2) represent or provide legal advice to the county law library resources board; (3) assist in preparing the county's budget;⁶ or (4) substitute for the county prosecuting attorney on the county budget commission, it might be difficult for him to perform his duties and exercise his discretion as an assistant county prosecuting attorney in a completely objective and disinterested manner because of his position on the county law library resources board.

Although conflicts of interest may arise between the two positions, recent opinions of the Attorney General have determined that, "where the facts in a particular situation demonstrate that an assistant prosecuting attorney performs, on behalf

⁵ Insofar as a county law library resources board is a county board for purposes of R.C. 309.09, *see* R.C. 307.51-.514, the board is entitled to legal representation and advice from the county prosecuting attorney. *See generally* 1999 Op. Att'y Gen. No. 99-028 at 2-186 ("[a]lthough the term 'county board' is not defined by statute, it has been interpreted, for purposes of R.C. 309.09, by numerous opinions of the Attorneys General. These opinions have consistently limited the meaning of 'county board' to entities that are 'essentially a subdivision of the county or a subordinate department of the county.' In determining whether a particular entity is 'essentially a subdivision of the county or a subordinate department of the county,' the opinions have considered three factors: (1) whether the boundaries of the entity are coextensive with the boundaries of the county; (2) whether the county is responsible for the organization, operation, or supervision of the entity; and, (3) whether the entity is funded by or through the county" (citations omitted)).

⁶ The members of a county law library resources board prepare and submit an annual budget to the board of county commissioners. R.C. 307.513. This budget, along with the other budgets submitted to the board of county commissioners, is used in preparing the county's tax budget, making appropriations, and distributing the revenue of the county. R.C. 5705.28(C)(1). If an assistant county prosecuting attorney were to participate in the preparation of the county's budget, the assistant could take part in deliberations or discussions that could affect the amount of revenue the county provides to the county law library resources board. In such a situation, if an assistant county prosecuting attorney were also a member of the county law library resources board, the assistant could be tempted to influence the budget decisions of the board of county commissioners so as to increase the amount of revenue made available for distribution to the county law library resources board.

of the prosecuting attorney, duties that are confined to certain categories of cases or matters, or certain clients of the prosecuting attorney, that in no way conflict with any of the duties and responsibilities the assistant undertakes in the other position, then the assistant may hold the other position.” 2001 Op. Att’y Gen. No. 2001-027 at 2-155; *accord* 2001 Op. Att’y Gen. No. 2001-040 at 2-242; *see* 1999 Op. Att’y Gen. No. 99-027 at 2-178. Accordingly, the conflicts of interest that exist between the positions of assistant county prosecuting attorney and member of the county law library resources board do not prevent a person from holding these two positions simultaneously, provided the person, as an assistant county prosecuting attorney, is not required to (1) participate in civil or criminal proceedings against the members of the county law library resources board, (2) represent or provide legal advice to the county law library resources board, (3) assist in preparing the county’s budget, or (4) substitute for the county prosecuting attorney on the county budget commission.

An additional conflict of interest between the positions of assistant county prosecuting attorney and member of the county law library resources board may arise because the board may have to consider a proposal from the county prosecuting attorney regarding his procurement of the use of “legal research or reference materials available in print, audio, visual, or other medium or . . . equipment necessary to support the utilization of that medium.” R.C. 307.51(G). If the board were required to deliberate, discuss, negotiate, or vote on such a proposal, it might be difficult for a member who also serves as an assistant county prosecuting attorney to perform his duties and exercise his discretion in a completely objective, disinterested manner because of his position as an assistant county prosecuting attorney.

While such a conflict may arise between the positions, the mere possibility of it occurring does not prohibit a person from holding both of the positions at the same time, provided the person is able to avoid the conflict by abstaining from participating in deliberations, discussions, negotiations, and votes pertaining to such a proposal. *See, e.g.*, 2006 Op. Att’y Gen. No. 2006-003 at 2-29 and 2-30; 2004 Op. Att’y Gen. No. 2004-051 at 2-445 and 2-446. With respect to your particular situation, we believe that it is likely that a member of a county law library resources board can avoid participating in deliberations, discussions, negotiations, and votes pertaining to such a proposal.

No statute requires a county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium. Thus, the occasions in which a person who serves as a member of the county law library resources board and an assistant county prosecuting attorney would be required to discuss, deliberate, negotiate, or vote on a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium should be infrequent. Also, a member of the county law library resources board may remove himself from any such deliberations, discussions, negotiations, and votes should they arise without impairing the board’s ability to consider such a proposal from the county prosecuting attorney. *See generally* 2003 Op. Att’y Gen.

No. 2003-006 at 2-37 and 2-38 (in a matter in which the objectivity of a public officer is impaired, the officer has a duty to abstain from participating in the matter). Accordingly, the conflict of interest that may arise when a county prosecuting attorney makes a proposal to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium does not prohibit a person from serving simultaneously as a member of the county law library resources board and assistant county prosecuting attorney in the same county, provided the person, as a member of the board, does not participate in deliberations, discussions, negotiations, or votes concerning such a proposal.

The final two questions of the test concern the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No federal or state regulation prohibits a person from serving simultaneously in the positions in question. Whether an applicable local charter provision, resolution, ordinance, or departmental regulation prohibits a person from serving in two positions at the same time is a question for local officials to answer. Therefore, absent a local charter provision, resolution, ordinance, or departmental regulation rendering the positions of assistant county prosecuting attorney and member of the county law library resources board that is established in his county incompatible, the positions are compatible, provided the person, as an assistant county prosecuting attorney, is not required to (1) participate in civil or criminal proceedings against the members of the county law library resources board, (2) represent or provide legal advice to the county law library resources board, (3) assist in preparing the county's budget, or (4) substitute for the county prosecuting attorney on the county budget commission. In addition, as a member of the county law library resources board, the person may not participate in deliberations, discussions, negotiations, or votes concerning a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium.

In conclusion, it is my opinion, and you are hereby advised as follows:

1. A county prosecuting attorney may not appoint himself to the county law library resources board.
2. An assistant county prosecuting attorney may serve as a member of the county law library resources board that is established in his county, provided he is not required as an assistant county prosecuting attorney to (1) participate in civil or criminal proceedings against the members of the county law library resources board, (2) represent or provide legal advice to the county law library resources board, (3) assist in preparing the county's budget, or (4) substitute for the county prosecuting attorney on the county budget commission.
3. A member of a county law library resources board who also serves as an assistant county prosecuting attorney in the same county may not participate in deliberations, discussions, negotiations, or votes

concerning a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium.