

OPINION NO. 71-025

Syllabus:

The offices of an assistant prosecuting attorney and secretary-treasurer of a county law library association, established pursuant to Section 1713.28, Revised Code, within the same county, are incompatible and may not be held concurrently by the same person.

To: David D. Dowd, Jr., Stark County Pros. Atty., Canton, Ohio
By: William J. Brown, Attorney General, May 27, 1971

I have before me your request for my opinion as to whether or not the offices of secretary-treasurer of a county law library association, established and operated pursuant to Section 1713.28, Revised Code, and assistant prosecuting attorney of the same county, are incompatible.

You state in your letter to me:

"The Stark County Law Library Association is a private, non-profit corporation incorporated for the purpose of receiving funds to establish and maintain the Stark County Law Library pursuant to former Section 3757 which is now Revised Code 1713.28. * * *

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"The Association derives its funds from the sources provided by Revised Code 3375.50-.53, inclusive, mainly consisting of fines from municipal courts derived through the prosecuting of traffic misdemeanor cases, and also private funds consisting of dues from the members, sale of stock, notary fees donated by members of

the Stark County Bar Association, bequests,
and interest on investments.

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"The space for the Stark County Law Library Association is provided by the Board of County Commissioners in the Stark County Courthouse in accordance with Revised Code 3375.49. The salaries of librarians, fixed by the Common Pleas Judges, are paid from the Stark County Treasury in the manner prescribed by Revised Code 3375.48, not upon the order of the Association or its Secretary-Treasurer. Neither the Association nor the Secretary-Treasurer have any control over the funds of the County Treasury used in the payment of librarians' salaries.

"The Stark County Prosecutor is in no way the legal counsel for the Stark County Law Library Association.

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Before turning to your precise question, it should be noted that the rules of compatibility respecting the prosecuting attorney have been held to apply with equal force to assistant prosecuting attorneys. (Opinion No. 25, Opinions of the Attorney General for 1963; Opinion No. 1380, Opinions of the Attorney General for 1957).

Chapter 309, Revised Code, specifically states the duties of the county prosecuting attorney. Section 309.02, Revised Code, in particular, lists certain offices with which the office of prosecuting attorney is incompatible; the office of secretary-treasurer of a county law library association, however, not being one enumerated in that list. I find no other specific statutory restriction against a county prosecuting attorney or his assistants serving in such other capacity. Thus, the question of incompatibility must be determined under common law. In Ohio, the general rule on this subject is stated in State, ex rel. Attorney General v. Gebert, 12 Ohio C.C.R. (n.s.) 274 (1909), as follows:

"Offices 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."

I note that Section 117.01, Revised Code, authorizes the Bureau of Inspection and Supervision of Public Offices to examine the account of "every private institution, association, board or corporation receiving public money for its use." A county law library association established and operated pursuant to Section

1713.28, Revised Code, is such an organization, for it receives public money through the operation of Sections 3375.50 and 3375.53, Revised Code, which direct the payment to it of certain fines and forfeitures collected in various courts. Moreover, the use of such funds is regulated by Section 3375.54, Revised Code, directing the money to be expended "in the purchase of law books and in the maintenance of such law library association." By Section 3375.56, Revised Code, the board of trustees is required to file annual reports with the county auditor and, on his certification, return unused funds proportionately to the sources from which they came.

The Bureau of Inspection and Supervision of Public Offices is required to forward its report of such examination to the prosecuting attorney of the county and he is directed to "institute civil actions * * * for the recovery of" money shown in the report to have been "illegally expended", not "accounted for", not "collected" or "converted or misappropriated". (Section 117.10, Revised Code) The same Section also requires the prosecuting attorney to "institute criminal proceedings" where malfeasance or gross neglect of duty is involved.

In this context, then, it appears almost self-evident that an assistant county prosecutor cannot hold the position of secretary-treasurer of a county law library association. As prosecutor, he could be called upon to institute civil action or criminal prosecution against officer and employees of the board of library trustees under which he also serves.

My predecessors have forbidden such assistant to act as legal advisor for a township (Opinion No. 25, supra), and as an employee of a "soldiers' relief commission" when the prosecutor is the legal advisor of the commission. (Opinion No. 4130, Opinions of the Attorney General for 1948). Where mere legal counseling causes incompatibility, the contingent duties of suing and prosecuting are a fortiori incompatible with a position whose principal may be subject to such suit or prosecution.

In specific answer to your question, it is my opinion and you are advised that the offices of assistant prosecuting attorney and secretary-treasurer of a county law library association, established pursuant to Section 1713.28, Revised Code, within a county, are incompatible and may not be held concurrently by the same person.