

**OPINION NO. 84-087****Syllabus:**

1. An assistant county prosecutor may not hold the position of treasurer of the county law library association.
2. Compensation which was paid to a person holding the position of assistant county prosecutor is not recoverable if such compensation was paid in good faith and under color of law for services actually rendered as assistant county prosecutor, even though such person simultaneously served as treasurer of the county law library association.
3. An individual is entitled to be compensated under R.C. 3375.48 only for services rendered to a county law library association as either a law librarian or assistant law librarian. County funds paid pursuant to R.C. 3375.48 to a person who did not serve as the librarian or an assistant librarian of a county law library are recoverable by the county prosecutor.

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**To: Steve C. Shuff, Seneca County Prosecuting Attorney, Tiffin, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, December 21, 1984**

I have before me your request for my opinion on two questions which I have rephrased as follows:

1. May the assistant county prosecutor hold the position of treasurer of the county law library association?
2. If one person may not hold both positions of assistant county prosecutor and treasurer of the county law library association, what are the consequences regarding wages which have been paid by the county auditor to a person serving in both capacities? More specifically, should an action be commenced to recover payments previously made to the individual?

Compatibility questions arise when one individual holds or wishes to hold two

public positions. See 1979 Op. Att'y Gen. No. 79-III. Therefore, it first must be determined whether the positions in question are positions of public service.

An assistant county prosecutor is appointed by the county prosecutor, a county elected officer, see R.C. 309.01, to aid the prosecutor in the performance of his statutory duties, R.C. 309.06, and clearly serves in a public position. See 1983 Op. Att'y Gen. No. 83-042; 1983 Op. Att'y Gen. No. 83-030.

It is my understanding that the Seneca County Law Library Association is a private association,<sup>1</sup> which is governed by a five-member board of trustees, as provided by the Association's by-laws. A county law library association receives funds from court fines and penalties, forfeited deposits and bail bonds, and recognizances taken for appearances. See R.C. 3375.50-.53. Such funds may be used only for those library purposes set forth in R.C. 3375.54. The trustees must make an annual report to the county auditor, verified by the association treasurer detailing the amount of the fines and penalties received and the money expended by the association. R.C. 3375.56. Pursuant to R.C. 3375.49, the board of county commissioners must provide the law library, at county expense, suitable rooms and bookcases. A law library association may also receive funds from private sources, such as contributions, donations, and membership dues. See Van Wert County Law Library Association v. Stuckey, 42 Ohio Op. 1, 94 N.E.2d 32 (C.P. Van Wert County 1949); 1955 Op. Att'y Gen. No. 5308, p. 280; 1955 Op. Att'y Gen. No. 4856, p. 74; 1946 Op. Att'y Gen. No. 1243, p. 698. Pursuant to R.C. 3375.48, the judges of the county common pleas court set the compensation of the librarian of the county law library and his assistants, who are appointed by the board of trustees of the law library association, and such compensation is paid from the county treasury. In sum, while a county law library association receives public funds, it is nonetheless a private entity. Thus, the treasurer of a county law library association is an officer of a private body rather than a public officer or employee.

1971 Op. Att'y Gen. No. 71-025, utilizing a compatibility analysis, addressed the question whether one person could serve as both assistant county prosecutor and secretary-treasurer of a county law library association. Even though I believe that a compatibility analysis is inappropriate in analyzing this question in light of the fact that the position of treasurer of a county law library association is not a public position, it still must be determined whether one person who served as a treasurer of the association and as assistant county prosecutor would act as a check upon himself or be subject to a conflict of interest, see 1984 Op. Att'y Gen. No. 84-053, 1983 Op. Att'y Gen. No. 83-035, and I believe Op. No. 71-025 is instructive on this point.

After noting that an assistant prosecutor is subject to the same restrictions as a prosecutor with regard to other positions he may hold,<sup>2</sup> my predecessor stated in Op. No. 71-025:

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,

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<sup>1</sup> A county law library association may also be organized as a non-profit corporation pursuant to R.C. 1713.28.

<sup>2</sup> See 1983 Op. Att'y Gen. No. 83-030; 1971 Op. Att'y Gen. No. 71-050; 1971 Op. Att'y Gen. No. 71-037; 1970 Op. Att'y Gen. No. 70-022.

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 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[s] and employees of the board of library trustees under which he also serves.

Id. at 2-78 to 2-79. Although Op. No. 71-025 deals with a law library association organized pursuant to R.C. 1713.28 as a non-profit corporation while the Seneca County Law Library Association is an unincorporated association, I find this distinction to be irrelevant for purposes of your question. Both types of law library associations receive public moneys pursuant to R.C. 3375.30-53, both are subject to the restrictions on the use of such moneys pursuant to R.C. 3375.54, and both must file accounts with the county auditor pursuant to R.C. 3375.56. I concur with the conclusion reached in Op. No. 71-025 that one person may not serve as both assistant county prosecutor and treasurer of a county law library association since an assistant prosecutor has the duty pursuant to R.C. 117.10 to institute civil and criminal actions for the misuse of public funds, and in this capacity could be called upon to institute a civil or criminal action against himself, or other officers and employees of the board of trustees under which he serves. Not only does the assistant prosecutor act as a check upon the treasurer of the law library association pursuant to R.C. 117.10, but one person who served in both positions would also be subject to an impermissible conflict of interest.

There are other grounds which support my conclusion that an individual may not simultaneously serve as assistant prosecutor and treasurer of the county law library association. Pursuant to R.C. 309.12, the county prosecutor acts as a check upon the expenditure of county funds, and may institute a civil action to restrain the contemplated misapplication of funds or to recover funds which have been misapplied. See 1951 Op. Att'y Gen. No. 692, p. 417.

Pursuant to R.C. 5705.27, the county prosecutor serves as a member of the county budget commission. "[I]t is the duty of the budget commission to pass upon and adjust the budget of each taxing authority within the county to the end that the tax rate shall be kept within the limitations provided by law." City of Columbus v. Budget Commission of Franklin County, 144 Ohio St. 437, 439, 59 N.E.2d 367, 368 (1945). See R.C. 5705.27-34. The budget commission has the authority to adjust the amount estimated by the board of county commissioners as necessary to meet the law library's needs as to rooms and bookcases pursuant to R.C. 3375.49. Because an assistant prosecutor may serve on behalf of the prosecutor as a member of the budget commission, an assistant prosecutor could be placed in a position of passing upon the library's budgetary needs.

As a final matter, Op. No. 65-006 concluded that the positions of county court judge and county law librarian are incompatible. The opinion noted that because a percentage of the fines and penalties levied by the judge go to the trustees of the law library pursuant to R.C. 3375.51, "the county judge is in a position to influence the operating budget of the law library in the exercise of his discretion as to whether fines, etc., should be imposed." Op. No. 65-006 at 2-16. Because an assistant prosecutor has discretion as to whether to prosecute crimes, see State v. Wolery, 46 Ohio St. 2d 316, 348 N.E.2d 351 (1976), cert. denied, 429 U.S.

932 (1976), as well as discretion with regard to the recommendation of fines and penalties, an assistant prosecutor would be in a position to influence the budget of the law library in a manner similar to that which caused the positions of county court judge and law librarian to be found incompatible in Op. No. 65-006.

In response to your first question, I conclude that an individual may not simultaneously serve as an assistant prosecutor and treasurer of the county law library association since the county prosecutor and his assistants serve, in several capacities, as a check upon the trustees and officers of the law library association, and since one person who served in both positions would be subject to a conflict of interest.

I turn now to your second question, whether compensation paid to an individual who served as assistant prosecutor and treasurer of a law library association may be recovered.<sup>3</sup> As set forth above, pursuant to R.C. 117.10 and R.C. 309.12, the county prosecutor has certain duties with respect to the recovery of county funds which have been illegally expended, not accounted for, or misapplied. As a general matter, payments of public funds which have been made in good faith and under color of law for services rendered may not be recovered, even though the payments are later determined to be unlawful. See State ex rel. Corrigan v. Seminatore, 66 Ohio St. 2d 459, 472, 423 N.E.2d 105, 114 (1981) ("utilizing basic equitable principles of restitution, in the absence of fraud or mistake, there ordinarily can be no recovery of public funds paid for work actually performed or other benefits actually received"); State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 392, 348 N.E.2d 692, 694 (1976) ("payments [to public officials] which are made in good faith and under color of law cannot ordinarily be recovered, even though the payments are later found to be unconstitutional"); State ex rel. Witten v. Ferguson, 148 Ohio St. 702, 710, 76 N.E.2d 886, 891 (1947) ("in the absence of statutory permission, salary which has been paid a de facto officer cannot be recovered by public authorities, where such officer, acting in good faith, actually rendered the services for which he was paid").

There is no indication that payments of compensation to the individual in question as assistant prosecutor were not made in good faith and under color of law for services rendered as assistant prosecutor. In the absence of such an indication, the payments are not recoverable at this time.

As noted above, a treasurer of a county law library association does not hold a public position, and I am unaware of any statute which provides for a treasurer of a county law library association to be paid from public funds. It is my understanding, however, that the treasurer of the Seneca County Law Library Association was compensated from county funds pursuant to R.C. 3375.48, which provides in part:

The judges of the court of common pleas...upon the appointment by the board of trustees of such [law library] association of a person to act as librarian thereof, or of a person to act as librarian and not more than two additional persons to act as assistant law librarians thereof, shall fix the compensation of such persons, which shall be paid from the county treasury.

In order to be entitled to compensation under R.C. 3375.48, an individual must be appointed a librarian or assistant librarian by the board of trustees of a county law library association, and actually perform the services of librarian or assistant librarian. There are no facts before me which indicate that the individual in question was appointed pursuant to R.C. 3375.48 or performed the duties of a librarian or assistant librarian. If the treasurer of the county law library

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<sup>3</sup> You have informed a member of my staff that the person who served as assistant prosecutor and treasurer of the Seneca County Law Library Association has resigned his position as treasurer. Thus, it is unnecessary at this time for me to address the question whether compensation should continue to be paid to a person holding both of these positions.

association was not properly appointed as law librarian or assistant law librarian by the association's board of trustees and did not perform the duties of a law librarian or assistant law librarian, then the county was without authority to compensate the treasurer pursuant to R.C. 3375.48, and any payments made under that section are recoverable by the prosecutor, since the treasurer did not render the services for which he was paid. I leave, however, the final determination of all relevant facts to those persons who are involved in this matter at the local level.

In conclusion, it is my opinion, and you are advised that:

1. An assistant county prosecutor may not hold the position of treasurer of the county law library association.
2. Compensation which was paid to a person holding the position of assistant county prosecutor is not recoverable if such compensation was paid in good faith and under color of law for services actually rendered as assistant county prosecutor, even though such person simultaneously served as treasurer of the county law library association.
3. An individual is entitled to be compensated under R.C. 3375.48 only for services rendered to a county law library association as either a law librarian or assistant law librarian. County funds paid pursuant to R.C. 3375.48 to a person who did not serve as the librarian or an assistant librarian of a county law library are recoverable by the county prosecutor.