

Note from the Attorney General's Office:

1970 Op. Att'y Gen. No. 70-053 was questioned by
1999 Op. Att'y Gen. No. 99-027.

OPINION NO. 70-053

Syllabus:

1. Either a peace officer, or a private citizen having knowledge of the facts, may file an affidavit charging a person with committing an offense in this state.

2. The position of assistant prosecuting attorney, even though he serves in a limited capacity as a special assistant prosecutor, is incompatible with the position of mayor of a municipality.

To: Roy H. Huffer, Jr., Pickaway County Pros. Atty., Circleville, Ohio
By: Paul W. Brown, Attorney General, May 1, 1970

I have before me your request for my opinion with respect to two questions. The first of these queried the validity of a position taken by a city solicitor in a letter directed to the clerk of a municipal court. This letter reads:

"In order to insure in the future that all affidavits filed with your office are sanctioned by some proper authority I will personally initial and date each affidavit coming from this office. Since Ohio law does not permit the indiscriminate filing of criminal charges by private citizens it is imperative that you permit the filing of these affidavits that come from the Sheriff's Office, the Police Department, Highway Patrol, Prosecutor's Office, Solicitor's Office, or other duly designated law enforcement officer such as game warden or dog warden."

Section 2935.09 of the Revised Code, gives both peace officers and private citizens alternative methods of filing an affidavit charging an offense. It provides:

"In all cases not provided by sections 2935.02 to 2935.08, inclusive, of the Revised Code, in order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer, or a private citizen having knowledge of the facts, shall file with the judge or clerk of a court of record, or with a magistrate, an affidavit charging the offense committed, or shall file such affidavit with the prosecuting attorney or attorney charged by law with the prosecution of offenses in court or before such magistrate, for the purpose of having a complaint filed by such prosecuting or other authorized attorney."

As the Court pointed out in State v. Hamilton House, 118 Ohio App. 63, 66 (1963):

"The procedure provided in Section 2935.09, Revised Code, permits a choice by a peace officer

or a private citizen, having knowledge of the facts, in charging an offense and causing an arrest. Such peace officer or private citizen 'shall file with the judge or clerk of a court of record, * * * an affidavit charging the offense committed' or 'shall file such affidavit with the prosecuting attorney * * *, for the purpose of having a complaint filed.' An affidavit must first be filed, and clearly, the affidavit may be filed either with the clerk or with the prosecuting attorney. If with the latter, an additional step becomes necessary in the procedure following the filing of the affidavit, to wit, the filing of a complaint by the prosecutor."

It then becomes a matter within the provision of the judge, clerk or magistrate to determine what action is appropriate under the provisions of Section 2935.10 of the Revised Code.

Your second question and your opinion thereon is:

"I am also requesting your opinion in reference to opinion number 70-022 as to whether or not a Mayor of a municipality could not serve in a limited capacity as a special assistant prosecutor, as opposed to a fully authorized assistant? I think he could."

The Syllabus of Opinion No. 70-022, Opinions of the Attorney General for 1970, held:

"The positions of assistant prosecuting attorney and mayor of a municipality are incompatible."

The foregoing conclusion was based on the statutory prohibition against a prosecuting attorney also being a mayor of a municipal corporation as contained in Section 309.02 of the Revised Code and that an assistant prosecuting attorney, having all the duties of a prosecutor, is essentially the alter ego of the prosecuting attorney. Although a case might be made for exempting an individual serving in a limited capacity he is nevertheless the alter ego of the prosecutor in this area, although it is limited, and the same rationale would apply.

It is therefore my opinion and you are advised that:

1. Either a peace officer, or a private citizen having knowledge of the facts, may file an affidavit charging a person with committing an offense in this state.
2. The position of assistant prosecuting attorney, even though he serves in a limited capacity as a special assistant prosecutor, is incompatible with the position of mayor of a municipality.