

Note from the Attorney General's Office:

1997 Op. Att'y Gen. No. 97-034 was approved and followed by 2019 Op. Att'y Gen. No. 2019-012.

OPINION NO. 97-034**Syllabus:**

An individual appointed as an assistant county prosecuting attorney may also serve within the same county as a village solicitor, provided that the individual is not delegated, as an assistant county prosecuting attorney, responsibility for prosecuting actions under R.C. Chapter 2733, R.C. 733.73, or R.C. 309.12, preparing the county budget or presenting it to the county budget commission, or replacing the county prosecuting attorney on the county budget commission. In addition, the individual may not represent the village in legal proceedings against an entity represented by the county prosecuting attorney or represent an entity on behalf of the county prosecuting attorney in legal proceedings against the village. (1989 Op. Att'y Gen. No. 89-007, clarified.)

To: Russell V. Leffler, Huron County Prosecuting Attorney, Norwalk, Ohio
By: Betty D. Montgomery, Attorney General, June 23, 1997

You have requested an opinion whether the positions of assistant county prosecuting attorney and village solicitor are compatible. You have indicated that the village is located in the county in which the assistant county prosecuting attorney is appointed and that the village operates under the general statutory form of government.

1979 Op. Att'y Gen. No. 79-111 established a seven question test for determining the compatibility of two public positions. The seven questions read as follows:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment permissible?
3. Is one office 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 a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

Id. at 2-367 and 2-368. The sixth and seventh questions raise issues of local concern, and it is assumed, for purposes of this opinion, that there are no departmental regulations, charter provisions, or ordinances that limit the holding of outside employment by an assistant county prosecuting attorney or village solicitor. There are no applicable state or federal regulations.

Question number one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits officers or employees in the classified service from participating in partisan political activities, other than to vote or express their political opinions. The position of assistant county prosecuting attorney is in the unclassified service. R.C. 124.11(A)(11). Officers and employees of a village are not in the classified service, *see* 1989 Op. Att'y Gen. No. 89-069 at 2-315; thus, the position of village solicitor is not a classified employment within the terms of R.C. 124.57. Accordingly, the prohibition of R.C. 124.57 does not prohibit an assistant county prosecuting attorney from serving simultaneously as a village solicitor.

Question number two asks whether the empowering statutes of either position limit outside employment. Prior opinions of the Attorney General have determined that statutory restrictions on a county prosecuting attorney's outside activities are applicable to assistant county prosecuting attorneys. 1983 Op. Att'y Gen. No. 83-030 at 2-112 and 2-113; 1970 Op. Att'y Gen. No. 70-

022. Research discloses, however, no statute that prohibits a county prosecuting attorney or his assistants from serving as a village solicitor. *See, e.g.*, R.C. 3.11; R.C. 120.39(C); R.C. 309.02; R.C. 3313.13; R.C. 5126.021(A)(1). Thus, the second question may be answered in the negative.

Question number three asks whether one position is subordinate to, or in any way a check upon, the other. An assistant county prosecuting attorney is appointed by and serves at the pleasure of the county prosecuting attorney. R.C. 309.06. A village solicitor, under the general statutory form of government, is employed pursuant to a contract by the legislative authority of the village, R.C. 733.48, and is directly responsible to the legislative authority that employs him. A village solicitor and an assistant county prosecuting attorney thus serve different masters and neither position is subordinate to the other. *Rose v. Village of Wellsville*, 63 Ohio Misc. 2d 9, 19, 613 N.E.2d 262, 268 (C.P. Columbiana County 1993). In addition, "neither of these positions acts as a check upon the other." *Id.*

Question number four asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question, which is best answered by the interested individuals because they may more precisely determine the time demands of each position. *See, e.g.*, 1996 Op. Att'y Gen. No. 96-008 at 2-32. It is possible that these two positions can be filled competently by the same person if there is no direct conflict in the working hours of each position. *See Rose v. Village of Wellsville*, 63 Ohio Misc. 2d at 19, 613 N.E.2d at 268.

Question number five asks whether there is a conflict of interest between the two positions. An individual may not serve simultaneously in two public positions if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the public. 1985 Op. Att'y Gen. No. 85-042 at 2-150.

In 1989 Op. Att'y Gen. No. 89-007, one of my predecessors addressed the compatibility of the positions of village solicitor and assistant county prosecuting attorney and concluded that these positions are incompatible because the potential for conflict is not remote and speculative. My predecessor found that potential conflicts exist because of the competition between a county and a village for tax moneys and advantageous budget decisions. He identified two specific situations in which an assistant county prosecuting attorney who holds simultaneously the position of village solicitor would be subject to divided loyalties or the temptation to act other than in the best interest of the public: (1) the preparation and presentation of the county's or village's budget to the county budget commission, and, (2) the ability of an assistant county prosecuting attorney to sit on the budget commission in the absence of the county prosecuting attorney.

In finding that these potential conflicts rendered the positions of village solicitor and assistant county prosecuting attorney incompatible, my predecessor stated:

The work of the county budget commission contemplates significant input from the village and county. The village solicitor and assistant county prosecuting attorney may be called upon to assist in or make the presentation to the budget commission on behalf of the village legislative authority or the board of county commissioners, respectively. An impermissible inherent conflict of interest is present where one person who owes loyalty to two governmental entities must advocate a position on behalf of one to the potential detriment of the other. An argument that a village is entitled to a certain level of funds means a reduced level of funds are available for the county's potential use.

In Op. No. 88-011, I determined that a potential conflict before the budget commission lacks a sufficient "degree of remoteness" to make the positions compatible since the competition for funds and favorable budget decisions arises on an annual basis. In Op. No. 88-033, I noted that the subdivisions appearing before the budget commission are in adversarial positions and a person serving both subdivisions would be confronted with a conflict of interest. The inconsistent loyalties that result when one person represents conflicting subdivisions in seeking the same funds from the budget commission present a sufficiently serious conflict of interest to make the positions incompatible. Additional conflicts over the decision to seek levies or bond issues for more funds from the electorate also present conflict of interest considerations. *See, e.g.*, Op. No. 88-011.

An additional factor affecting the compatibility of the two positions is the ability of an assistant county prosecuting attorney to sit on the budget commission in the absence of the prosecuting attorney. *See* 1943 Op. No. 6186. A member of the county budget commission has a duty to render unbiased determinations. The duty of a village solicitor is to advocate the interests of the village which hired him. The judgment of an assistant prosecuting attorney who sits on the budget commission while he is a village solicitor may, thus, be improperly influenced. Avoidance of exposure to the temptation to act in a manner counter to the interest of the public by making a biased determination requires that one person not hold two such public positions. *See* Op. No. 79-111 at 2-371.

1989 Op. Att'y Gen. No. 89-007 at 2-29 and 2-30.

In contrast, the court in *Rose v. Village of Wellsville* concluded that an individual may simultaneously hold the positions of village solicitor and assistant county prosecuting attorney. The primary issue before the court in *Rose v. Village of Wellsville* was a prayer for a declaratory judgment that the duties of the village's legal counsel cannot be limited so as to avoid conflicts of interest with the position of assistant county prosecuting attorney. In determining that the legislative authority of a village may employ legal counsel with contractual limitations upon the scope of representation, the court reasoned as follows:

The determination of whether an individual who simultaneously holds two public positions is subject to an impermissible conflict of interest is limited to a factual analysis of the particular duties he performs in his respective positions (1988 Ohio Atty. Gen. Ops. No. 017, at 2-68). *"Where possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated."* (Emphasis added.) 1979 Ohio Atty. Gen. Ops. No. 111, at 2-367.

As a general rule, an assistant county prosecutor is subject to the same limitations on holding additional employment as is the county prosecutor himself. The assistant may not hold any position that the county prosecutor is prohibited from holding (1992 Ohio Atty. Gen. Ops. No. 041, at 2-159). However, "when incompatibility is based on subordination of positions or a conflict of interest, *** the facts can create an exception to the general rule. ***" (*Id.* at 2-164.)

Of importance to our analysis of conflict of interest is 1916 Ohio Atty. Gen. Ops. No. 2115, at 1919, which, construing the employment of a *county prosecuting attorney* as village legal counsel under G.C. 4220 (*now R.C. 733.48*),

held that such employment was *not* prohibited provided that "it would be proper to place *in the contract of employment* a provision to the effect that the employment by the village council shall not extend to any matter which may directly or indirectly conflict with the performance of the official duties of such prosecuting attorney." (Emphasis added.) *Id.* at 1921. Under these *factual, contractual circumstances*, a county prosecutor himself may be employed under R.C. 733.48 as a village's "legal counsel." Accordingly, if the prosecutor can hold these two positions, then it follows so may his assistant. The Attorney General, in his Opinion No. 2115, *supra*, has impliedly recognized, if not expressly, that potential "conflicts of interest," *including those relating to taxes, budgets, or matters involving a county budget commission*, may, *in the absence of authority to the contrary*, be "drafted away" in an R.C. 733.48 employment contract. This is exactly what the Wellsville-Beech contract provides for (see Exhibit B, Paragraph No. 2). The consequence, to which plaintiffs herein object, that Wellsville *may*, at some time, find it necessary to employ other, or additional, R.C. 733.48 "legal counsel" to represent it in such matters does not render the Beech contract invalid or an impermissible abuse of legislative discretion. See 1992 Ohio Atty. Gen. Ops. No. 041, *supra*, permitting an assistant county prosecutor to act as a mayor's court magistrate within the same county with similar limitations imposed.

Id. at 20-21, 613 N.E.2d at 269.

The court in *Rose v. Village of Wellsville*, thus followed recent opinions of the Attorneys General that have concluded that the mere possibility of a conflict of interest does not automatically render two public positions incompatible. See 1979 Op. Att'y Gen. No. 79-111 at 2-372. Instead, the specific duties of each position must be examined to determine whether an individual who simultaneously holds two public positions is subject to an impermissible conflict of interest. See 1988 Op. Att'y Gen. No. 88-017 at 2-68. In this regard, 1992 Op. Att'y Gen. No. 92-041 at 2-164 and 2-165, which examined the compatibility of the positions of assistant county prosecuting attorney and mayor's court magistrate, stated:

When incompatibility is based on subordination of positions or a conflict of interest, however, the facts can create an exception to the general rule that an assistant county prosecuting attorney may not hold any position that the county prosecuting attorney may not hold. Op. No. 86-035 at 2-184 n.2; *see also* 1916 Op. Att'y Gen. No. 2115, vol. II, p. 1919. This exception provides that an assistant county prosecuting attorney "who performs, on behalf of the prosecuting attorney, only limited duties of a specialized nature, such that his performance of those duties in no way renders his position subordinate to or a check upon the [other position] or conflicts with any of the duties and responsibilities he undertakes" in the other position, may hold the other position even though the county prosecuting attorney may not hold the position. Op. No. 86-035 at 2-184 n.2; *see, e.g.*, 1988 Op. Att'y Gen. No. 88-086 (syllabus, paragraph three) ("[a]n assistant prosecuting attorney whose only duty is to prosecute criminal cases may also serve as an assistant city law director employed for the exclusive purpose of prosecuting criminal cases in municipal court[']").

Accordingly, resolution of the compatibility issues of subordination of position and conflict of interest in the case of an assistant prosecuting attorney who wishes to hold another public

position requires a factual analysis of the particular duties and responsibilities assigned to and to be performed by the individual in each of the two positions. *Rose v. Village of Wellsville*; 1992 Op. Att'y Gen. No. 92-041. 1989 Op. Att'y Gen. No. 89-007 concluded that the positions of assistant prosecuting attorney and village solicitor are incompatible because an individual who serves in both positions may be required to prepare the county's or village's budget and present it to the county budget commission, or to sit on the county budget commission in the prosecuting attorney's absence. In so concluding the opinion did not evaluate the issues of subordination of position and conflict of interest from the standpoint of the particular duties and responsibilities assigned to and to be performed by the individual who would serve in each of those positions. It is, therefore, appropriate to reexamine the compatibility of these positions in light of the foregoing analysis, as endorsed by the court in *Rose v. Village of Wellsville* and elucidated in 1992 Op. Att'y Gen. No. 92-041.

With respect to your specific inquiry, you have stated that the assistant county prosecuting attorney in question is not specifically delegated the task of preparing the county budget or presenting it to the county budget commission, or required to serve in place of the county prosecuting attorney on the county budget commission. Additionally, it is not known whether the employment contract between the village and the village solicitor would require the solicitor to prepare or present the village's budget to the county budget commission. Thus, the potential conflicts of interest that result from the competition for tax moneys and advantageous budget decisions are remote and speculative. "Where possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated." 1979 Op. Att'y Gen. No. 79-111 (syllabus, paragraph three). Accordingly, if an individual who serves simultaneously in the positions of assistant county prosecuting attorney and village solicitor does not prepare the county's or village's budget or present it to the county budget commission or replace the county prosecuting attorney on the budget commission, the potential conflicts that result from the competition for tax moneys and advantageous budget decisions do not render these positions incompatible.¹ See 1992 Op. Att'y Gen. No. 92-041 at 2-165.

An additional potential conflict of interest also exists in that an individual who serves simultaneously as an assistant county prosecuting attorney and village solicitor may be subject to divided loyalties if the village and an entity represented by the county prosecuting attorney are opposing parties in the same legal proceeding. See, e.g., R.C. 309.12 (recovery of county funds); R.C. 709.033 (village may appeal the denial of a petition for annexation made by the board of

¹ Because the potential conflicts of interest that result from the competition for tax moneys and advantageous budget decisions do not automatically render the positions of assistant county prosecuting attorney and village solicitor incompatible, 1989 Op. Att'y Gen. No. 89-007 is hereby clarified to the extent that it concluded that the mere potential for such conflicts rendered the positions incompatible. The opinion, however, remains valid insofar as it concluded that, if an individual who serves simultaneously in the positions of assistant county prosecuting attorney and village solicitor is required to prepare the county's or village's budget or present it to the county budget commission or replace the county prosecuting attorney on the budget commission, the potential conflicts that result from the competition for tax moneys and advantageous budget decisions render the positions incompatible.

county commissioners). In such a situation, the individual could be placed in the untenable position of having to provide legal representation to different parties in the same case.

It seems, however, unlikely that there will be many occasions in which the village and an entity represented by the county prosecuting attorney will be opposing parties in the same legal proceeding. Moreover, it is only speculative whether the individual, as an assistant county prosecuting attorney, would be assigned by the county prosecuting attorney to represent the governmental entity in a matter involving the village or that the employment contract between the village and village solicitor would require the solicitor to represent the village in all matters. The village may at any time employ another attorney to represent the village's interests in a particular case. See *Rose v. Village of Wellsville*. Finally, the individual has an ethical duty to withdraw from any matter in which he might not be able to act in the best interest of his employer.² See Code of Professional Responsibility DR 5-101(A)(1) ("[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests"). Accordingly, if an individual who holds the positions of assistant county prosecuting attorney and village solicitor does not represent the village in legal proceedings against an entity represented by the county prosecuting attorney or represent an entity on behalf of the county prosecuting attorney in legal proceedings against the village, the individual is not subject to an impermissible conflict of interest.

In light of the foregoing, it is my opinion and you are advised that an individual appointed as an assistant county prosecuting attorney may also serve within the same county as a village solicitor, provided that the individual is not delegated, as an assistant county prosecuting attorney, responsibility for prosecuting actions under R.C. Chapter 2733, R.C. 733.73, or R.C. 309.12, preparing the county budget or presenting it to the county budget commission, or replacing the county prosecuting attorney on the county budget commission. In addition, the individual may not represent the village in legal proceedings against an entity represented by the county

² It is beyond the scope of this opinion to interpret the ethical provisions of R.C. Chapter 102 or the rules and canons governing the professional responsibilities of an assistant county prosecuting attorney or village solicitor. Pursuant to R.C. 102.08(A), the Ohio Ethics Commission is authorized to render advisory opinions interpreting R.C. Chapter 102. In similar fashion, the Board of Commissioners on Grievances and Discipline of the Supreme Court is authorized to issue advisory opinion letters concerning the application of the Supreme Court Rules for the Government of the Bar of Ohio and the Code of Professional Responsibility. Ohio Gov. Bar R. V § 2(C); accord R.C. 102.08(A). Because "[t]he Attorney General will abstain from rendering an opinion where another governmental entity has been granted the authority to render advisory opinions concerning the relevant subject matter," 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three), it is appropriate that we refrain from advising you concerning the professional responsibilities of an assistant county prosecuting attorney and village solicitor under the Supreme Court Rules for the Government of the Bar of Ohio and the Code of Professional Responsibility. It is, therefore, recommended that you request the Board of Commissioners on Grievances and Discipline of the Supreme Court for advice concerning the application of the Supreme Court Rules for the Government of the Bar of Ohio and the Code of Professional Responsibility to the situation described in your letter.

prosecuting attorney or represent an entity on behalf of the county prosecuting attorney in legal proceedings against the village. (1989 Op. Att'y Gen. No. 89-007, clarified.)