

June 18, 2019

The Honorable Charles E. Coulson
Lake County Prosecuting Attorney
105 Main Street
P.O. Box 490
Painesville, Ohio 44077

SYLLABUS:

2019-021

1. The areas of potential conflicts of interests between the position of an assistant prosecuting attorney and the positions of a magistrate or a temporary acting judge of a municipal court within the same county are so numerous, direct, and diverse as to render it impractical to fashion a comprehensive arrangement of limitations upon the duties and responsibilities of such positions so as to avoid significant danger of conflicts of interests. As such, the position of an assistant prosecuting attorney is incompatible with the position of a magistrate or a temporary assigned judge serving in a municipal court within the same county.
2. The areas of potential conflicts of interests between the position of a special assistant prosecuting attorney appointed by a judge of a common pleas court pursuant to R.C. 2941.63 and the positions of a magistrate or a temporary acting judge of a municipal court within the same county are so numerous, direct, and diverse as to render it impractical to fashion a comprehensive arrangement of limitations upon the duties and responsibilities of the positions so as to avoid significant danger of conflicts of interests. As such, the position of a special assistant prosecuting attorney appointed by a judge of the common pleas court pursuant to R.C. 2941.63 is incompatible with the position of a magistrate or a temporary assigned judge serving in a municipal court within the same county.



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OPINION NO. 2019-021

The Honorable Charles E. Coulson
Lake County Prosecuting Attorney
105 Main Street
P.O. Box 490
Painesville, Ohio 44077

Dear Prosecuting Attorney Coulson:

By your letter of May 1, 2019, you solicit our formal opinion as to certain matters incident to your service as the Prosecuting Attorney of Lake County. Specifically you seek a determination as to the compatibility of the following positions:

1. A part-time assistant prosecuting attorney of a county prosecutor's office who is also either a part-time magistrate or acting judge of a municipal court within the same county; and
2. A special prosecutor appointed by the court of common pleas to prosecute criminal or delinquent offenders and who is also either a part-time magistrate or acting judge of a municipal court within the same county.

You indicate that “[t]here may be an opportunity for a part-time assistant prosecuting attorney or special prosecutor, who both handle limited criminal and delinquent matters, to serve a municipal court in Lake County as either a part-time magistrate or acting judge.”

You make reference in your letter to 1992 Op. Att’y Gen. No. 92-041, which indicates that:

An individual employed as an assistant county prosecuting attorney may also serve within the same county as a mayor’s court magistrate in the mayor’s court of a village, provided that the individual (1) as mayor’s court magistrate does not preside over hearings involving actions prosecuted or defended by the county prosecuting attorney who employs him as an assistant prosecuting attorney, and (2) is not delegated, as an assistant county prosecuting attorney, responsibility for the prosecution of actions under R.C. Chapter 2733, R.C.

733.73, or R.C. 117.27-.29, the handling of appeals from the mayor's court to the county court or municipal court, the preparation or presentation of the county budget to the county budget commission, or the replacing of the county prosecuting attorney on the county budget commission.

1992 Op. Att'y Gen. No. 92-041, at 2-158 (syllabus). You write that "[d]ue to the differences between a mayor's court and municipal court" you are "seeking an opinion that is specific to the situations outlined herein." We note as well that 1990 Op. Att'y Gen. No. 90-005, indicates that "[a]n individual employed as an assistant prosecuting attorney may also serve as a part-time domestic relations referee in an adjoining county without having a conflict of interest, provided that the individual does not preside over hearings involving actions prosecuted or defended by the county prosecuting attorney who employs him as an assistant county prosecuting attorney." 1990 Op. Att'y Gen. No. 90-005 (syllabus).

Set forth in 1979 Op. Att'y Gen. No. 79-111 are the seven questions related to the determination of whether two public positions are compatible. They are:

1. Is either of the positions a classified employment [position] within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment [that is] 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 that is applicable?

1979 Op. Att'y Gen. No. 79-111, at 2-367 to 2-368; *see also* 1992 Op. Att'y Gen. No. 92-041, at 2-160. Before two public positions may be determined to be compatible, all seven questions must be answered in a manner which supports their compatibility.

Initially, we note that the sixth and seventh questions involve matters of local legislation and departmental regulations. We are aware of no applicable state or Federal departmental regulations which bear on the issues which you raise. It seems unlikely, and, for the purposes of this opinion, we assume that no such regulations exist, and that there are no local departmental

regulations, charter provisions, or ordinances that prohibit or impose limitations upon the concurrent holding of positions in the manner which you describe.

The first question asks if either of the two public positions to be held is in the classified civil service under R.C. 124.57. An assistant county prosecuting attorney holds a position in the unclassified civil service under R.C. 124.11(A)(11), and the position of court magistrate is in the unclassified civil service as provided in R.C. 124.11(A)(10).

The second question asks if there are statutory prohibitions against concurrently holding the two offices. There are several statutes which limit a county prosecuting attorney and his or her assistants from holding dual offices. *E.g.*, R.C. 3.11; R.C. 309.02; R.C. 3313.13; *see also* 1983 Op. Att’y Gen. No. 83-030, at 2-113. We find no statutory enactments, however, which specifically prohibit an assistant county prosecuting attorney or a special assistant county prosecuting attorney from serving concurrently as a magistrate or as an appointed substitute judge of a municipal court.¹

The third question asks if one of the positions at issue is subordinate or answers to the other. Both a municipal court magistrate and a substitute municipal court judge are appointed by the judge of the court, while an assistant prosecuting attorney is appointed by the prosecuting attorney of the county. The magistrate and the substitute judge, therefore, answer to the judge of the court, and the assistant prosecuting attorney answers to the county prosecuting attorney. As such, neither position is subordinate to the other. Further, the position of an appointed special prosecutor under R.C. 2941.63 either functions under the direction of the prosecuting attorney, or, in certain matters involving the recusal of the prosecutor’s office, acts independently. In either case, we perceive no issue as to subordination.

Question four asks if it is physically possible for one individual to discharge the duties of both positions. This question raises a factual inquiry to be answered by local officials who are in a position to more precisely determine the demands of each position. 1979 Op. Att’y Gen. No.

¹ Article IV of the Ohio Constitution provides that “[j]udges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States.” Ohio Const. art. IV, § 6(B) (emphasis added). This prohibition applies to all judges. 1973 Op. Att’y Gen. No. 73-081 (syllabus). In 1973 Op. Att’y Gen. No. 73-082, then Attorney General William J. Brown opined that “the office of assistant county prosecuting attorney must be considered a public office, because the assistant is authorized to stand in place of the prosecuting attorney” and, on that basis, concluded that a part-time assistant county prosecuting attorney may not serve as a part-time municipal court judge. 1973 Op. Att’y Gen. No. 73-082, at 2-311 to 3-312 (citing 1971 Op. Att’y Gen. No. 71-037; 1973 Op. Att’y Gen. No. 73-081). This determination is questioned by 1999 Op. Att’y Gen. No. 99-027, at 2-174. In view of our conclusions set forth herein it is unnecessary for us to reconcile these two opinions, and we do not do so now.

79-111, at 2-373. A finding of compatibility, however, must be supported by the conclusion that it is physically possible for one individual to discharge the duties of both positions at issue simultaneously.

The final question asks if there are any conflicts of interest between the two positions. A person may not hold two public positions if he or she would be subject to divided loyalties and conflicting duties, or be exposed to the temptation of acting other than in the best interest of one or the other of the offices of his or her service. 1985 Op. Att’y Gen. No. 85-042, at 2-150.²

Pursuant to R.C. 309.06, a county prosecuting attorney may appoint “any assistants . . . who are necessary for the proper performance of the duties of his office and fix their compensation.” A properly qualified and appointed assistant county prosecuting attorney may perform most of the functions of his or her appointing prosecutor. *See* R.C. 3.06; R.C. 309.06; *see also* 1992 Op. Att’y Gen. No. 92-041, at 2-159; 1971 Op. Att’y Gen. No. 71-050, at 2-172. Because an assistant county prosecuting attorney may discharge most of the duties of the county’s prosecuting attorney, an assistant prosecuting attorney’s holding of any position or discharging of any duty which the prosecuting attorney may hold or discharge may give rise to potential conflicts of interest. 1992 Op. Att’y Gen. No. 92-041, at 2-159; 1990 Op. Att’y Gen. No. 90-005, at 2-15; 1986 Op. Att’y Gen. No. 86-035, at 2-178.

R.C. 309.08(A) sets out the general duties of a county prosecuting attorney. This section authorizes a county prosecuting attorney to “inquire into the commission of crimes within the county.” R.C. 309.08(A). With certain enumerated exceptions, it charges the holder of that office to “prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party,” and such “other suits, matters, and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, or court of appeals.” *Id.* In addition, a number of statutory provisions impose upon county prosecuting attorneys responsibility to pursue a variety of other legal actions including those incident to the activities of an organized crime task force, R.C. 177.03; in protection of public funds, R.C. 309.12; arising from injury to timber, R.C. 309.14; reclaiming the property of certain deceased individuals, R.C. 309.17; claims against public officials for breach of bond, R.C. 321.42; enforcement of laws incident to agriculture, R.C. 901.25; compelling compliance with terms of a charitable trust, R.C. 1719.05; forfeiture actions against unauthorized real estate trusts, R.C. 1747.11; certain quo

² The Board of Professional Conduct of the Supreme Court is authorized to issue advisory opinions concerning the application of the Ohio Rules of Professional conduct. “Because the Ohio 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” we will refrain from advising you on the professional responsibilities of an attorney serving as an assistant county prosecuting attorney, a special assistant county prosecuting attorney, a municipal court magistrate, and an appointed substitute municipal court judge. 1997 Op. Att’y Gen. No. 97-034, at 2-200 n.2.

warranto proceedings, R.C. 2733.04; and enforcement and recoveries under workers' compensation laws, R.C. 4123.92. The county prosecuting attorney is also entrusted with the responsibility of defending, on behalf of a township which has adopted a resolution regarding the operation of an adult entertainment establishment under R.C. 503.52, any challenge to the validity of that resolution or any action seeking to enjoin the enforcement of the resolution; and to represent the township in any action seeking abatement of a nuisance under the provisions of the township's resolution. R.C. 309.09(B)(2).

A county prosecuting attorney serves as the "legal adviser of the board of county commissioners, board of elections, all other county officers and boards, and all tax-supported libraries," and is obligated, upon request, to provide such entities with "written opinions or instructions . . . in matters connected with their official duties" and to "prosecute and defend all suits and actions that any such officer, board, or tax-supported public library directs or to which it is a party." R.C. 309.09(A). The prosecuting attorney also serves as the "legal adviser for all township officers, boards, or commissions," with the exception of those townships which have adopted "limited home rule government" under Chapter 504 of the Revised Code which have "not entered into a contract to have the prosecuting attorney serve as the township law director," R.C. 309.09(B)(1), and as legal adviser of a lake facilities authority. R.C. 309.09(L). A county prosecuting attorney, with the approval of the board of county commissioners, may also serve as legal counsel for a park district, R.C. 309.09(D); a joint fire district created under R.C. 505.371, R.C. 309.09(E); a joint ambulance district created under R.C. 505.71, R.C. 309.09(F); a joint emergency medical services district formed under R.C. 307.052, R.C. 309.09(G); a fire and ambulance district created under R.C. 505.375, R.C. 309.09(H); a regional airport authority created under R.C. Chapter 308 or a port authority created under R.C. Chapter 4582, R.C. 309.09(I); and a regional planning commission formed under R.C. 713.21, R.C. 309.09(J).³

As set forth in R.C. 5705.27, the county prosecuting attorney also is a member of the county budget commission. The budget commission is imbued with considerable authority in examining the annual tax budgets submitted by every subdivision within the county and in ascertaining the total amount of revenue proposed to be raised in the county for the purposes of each of its subdivisions and other taxing units. R.C. 5705.27; R.C. 5705.31.

³ R.C. Chapter 504 provides for the adoption by a township, in certain circumstances, of Limited Home Rule status. R.C. 504.15(A) provides that the board of trustees of a Limited Home Rule township "shall appoint a full-time or part-time township law director" who is to serve as legal counsel for the township. R.C. 504.15(B), however, authorizes the board of trustees of a Limited Home Rule Township, with the consent of the board of county commissioners, to enter into a contract with the county prosecuting attorney pursuant to which the prosecuting attorney serves as the township law director. Discussion here in reference to potential conflicts involving the representation of a township is limited to townships which have not adopted Limited home Rule status, and is inapplicable as well to such townships which have not entered into a contract with the county prosecuting attorney for the service of said officer as the township law director.

Ohio municipal courts are established under R.C. 1901.01. It is our understanding that municipal courts have been created and are existent within Lake County in the Cities of Mentor, Painesville, and Willoughby. R.C. 1901.01(A). Each of the three courts has territorial jurisdiction within its municipal corporation of designation, and additional territorial jurisdiction within other designated areas. R.C. 1901.02(B).⁴

With certain exceptions, municipal courts enjoy considerable subject matter jurisdiction in civil matters subject to a monetary limitation of \$15,000. R.C. 1901.17; R.C. 1901.18. In addition, municipal courts specifically are granted jurisdiction over violations of township resolutions adopted pursuant to R.C. 503.52 or 503.53 incident to the operation of adult oriented businesses. R.C. 1901.182. Further, a municipal court is granted jurisdiction “to hear misdemeanor cases committed within its territory and has jurisdiction over the violation of any ordinance of any municipal corporation within its territory.” R.C. 1901.20(A). As to felony matters committed within its territory, a municipal court may “conduct preliminary hearings and other necessary hearings prior to the indictment of the defendant or prior to the court’s finding that there is probable and reasonable cause to hold or recognize the defendant to appear before a court of common pleas and may discharge, recognize, or commit the defendant.” R.C. 1901.20(B).

Rule 53 of the Ohio Rules of Civil Procedure empowers any court of record to appoint one or more magistrates. These officers are charged to assist the court, and are authorized to determine any motion in a civil matter, Civ. R. 53(C)(1)(a); to conduct the trial in any civil case which will not be tried to a jury, Civ. R. 53(C)(1)(b); upon the written unanimous consent of the parties, to preside over a civil jury trial, Civ. R. 53(C)(1)(c); to conduct proceedings incident to temporary protection orders, Civ. R. 53(C)(1)(d); and to exercise any other authority vested in magistrates by statute and consistent with the rule, Civ. R. 53(C)(1)(e). A municipal court also may appoint magistrates to conduct proceedings in its small claims division. R.C. 1925.01(B).

Under Rule 19 of the Ohio Rules of Criminal Procedure “[a] court other than a mayor’s court may appoint one or more magistrates” to assist the court in criminal matters. Crim. R. 19(A), (C)(1). Municipal court criminal magistrates may conduct initial appearances and preliminary hearings, Crim. R. 19(C)(1)(a); preside over arraignments, Crim. R. 19(C)(1)(b); accept pleas of not guilty in felony and misdemeanor cases, Crim. R. 19(C)(1)(c)(i); accept pleas in misdemeanor cases of guilty and no contest, and determine guilt or innocence, receive statements of explanation and in mitigation of sentence, and recommend penalty, Crim. R. 19(C)(1)(c)(ii); conduct pre-trial conferences, Crim. R. 19(C)(1)(d); conduct bail proceedings,

⁴ The jurisdictional areas of each of the three municipal courts are: (1) Mentor municipal court: the municipal corporation of Mentor-on-the-Lake; (2) Painesville municipal court: Painesville, Perry, Leroy, Concord, and Madison Townships; and (3) Willoughby municipal court: the municipal corporations of Eastlake, Wickliffe, Willowick, Willoughby Hills, Kirtland, Kirtland Hills, Waite Hill, Timberlake, and Lakeline, and Kirtland Township. R.C. 1901.02(B).

Crim. R. 19(C)(1)(e); hear and decide pretrial or post-judgment motions in misdemeanor cases in which imprisonment is not a possible penalty, Crim. R. 19(C)(1)(f)(i), and, with the unanimous consent of the parties, in misdemeanor cases in which imprisonment is a possible penalty, Crim. R. 19(C)(1)(f)(ii); conduct proceedings upon the application for a temporary protection order, Crim. R. 19(C)(1)(g); conduct non-jury misdemeanor trials, but, if the matter involves a penalty of possible imprisonment, only with the unanimous consent of the parties, Crim. R. 19(C)(1)(h).

As you note in your letter, pursuant to R.C. 1901.121, a judge of a one-judge municipal court may appoint a substitute judge to preside over the court during the judge's temporary absence for a reason other than his or her incapacity or unavailability due to disqualification, suspension, or recusal. You advise us that there are three municipal courts in Lake County sitting in Painesville, Mentor, and Willoughby, and that each of these courts is a single-judge court.

As has been indicated above in some length, the office of a county prosecuting attorney represents multiple public entities all of which may become involved in civil matters which come before a local municipal court. Further, the county prosecuting attorney handles felony criminal matters which may be lodged initially in a local municipal court and there traverse procedures or which may have direct implications on the operations of the county prosecuting attorney's office. In addition, under R.C. 5705.27 a county prosecuting attorney is statutorily designated as a member of the county budget commission. The determinations of the budget commission may have a significant fiscal impact on municipalities within the county, and, indirectly, upon the interests of their municipal courts.

When incompatibility is found on the basis of a conflict of interest applicable to a county prosecuting attorney, however, the factual circumstances may create an exception to the general rule that an assistant prosecuting attorney may not hold any position that the county prosecuting attorney may not hold. 1986 Op. Att'y Gen. No. 86-035, at 2-184 n.2; 1916 Op. Att'y Gen. No. 2115, vol. II, p. 1919. The potential conflicts may be remote in nature, and their existence may be obviated by limitations imposed upon the duties of one or the other, or both of the two positions. 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 ... conflicts with any of the duties and responsibilities he undertakes" in the other position, may hold both positions even though the county prosecuting attorney may not. 1986 Op. Att'y Gen. No. 86-035, at 2-184 n.2; *see also* 1988 Op. Att'y Gen. No. 88-086 (syllabus, paragraph 3). In the alternative, duties and responsibilities of the position of magistrate or that of substitute judge may be constrained so as to address potential conflicts of interest.

Unlike situations involving conflicts of interest incident to an assistant prosecuting attorney and a mayor's court magistrate (1992 Op. Att'y Gen. No. 92-041), or a magistrate in a domestic relations court in another county (1990 Op. Att'y Gen. No. 90-005), opinions which we do not here question, the areas of potential conflicts of interests between the positions which you describe are numerous, direct, and diverse. As such, it is our opinion that it is impractical to

fashion a comprehensive arrangement of limitations upon the duties and responsibilities of the positions so as to avoid the significant danger of conflicts of interests. On that basis, we conclude and you are advised that the positions of assistant prosecuting attorney and magistrate or appointed, temporary judge of a municipal court within the same county are incompatible.

Our opinion, as set forth above, has focused on an individual occupying a position as an assistant county prosecuting attorney as well as a magistrate or appointed temporary judge of a municipal court. You ask as well, however, about any potential incompatibility between the position of a special prosecutor appointed by the common pleas court to prosecute criminal or delinquent offenders in that tribunal and either of the judicial positions to which you make reference. You are not specific as to the authority pursuant to which the appointment of this "special prosecutor" is effected. It is our assumption, however, that the appointments are made under R.C. 2941.63, which affords a court of common pleas discretion to appoint an attorney to assist the prosecuting attorney in the trial of a case pending in such court whenever the court is of the opinion that the public interest requires it. It is our understanding that such appointments may be made to provide a county prosecuting attorney with assistance in the trial of an action in which he or she is participating directly. Our experience indicates, however, that special prosecutors, on occasion, are appointed at the behest of a prosecuting attorney in matters in which the circumstances render it appropriate for the prosecutor's office to be recused from the proceedings. It is our assumption that all such appointments are made on an occasional and periodic basis, and that each is applicable to an individual action. On the basis of these assumptions, we perceive no divergence in our opinion as to these positions from our analysis as set forth above.

Conclusions

On the basis of the foregoing, it is our opinion, and you are hereby advised as follows:

1. The areas of potential conflicts of interests between the position of an assistant prosecuting attorney and the positions of a magistrate or a temporary acting judge of a municipal court within the same county are so numerous, direct, and diverse as to render it impractical to fashion a comprehensive arrangement of limitations upon the duties and responsibilities of such positions so as to avoid significant danger of conflicts of interests. As such, the position of an assistant prosecuting attorney is incompatible with the position of a magistrate or a temporary assigned judge serving in a municipal court within the same county.
2. The areas of potential conflicts of interests between the position of a special assistant prosecuting attorney appointed by a judge of a common pleas court pursuant to R.C. 2941.63 and the positions of a magistrate or a temporary acting judge of a municipal court within the same county are so numerous, direct, and diverse as to render it impractical to fashion a comprehensive arrangement of limitations upon the duties and

responsibilities of the positions so as to avoid significant danger of conflicts of interests. As such, the position of a special assistant prosecuting attorney appointed by a judge of the common pleas court pursuant to R.C. 2941.63 is incompatible with the position of a magistrate or a temporary assigned judge serving in a municipal court within the same county.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive, flowing style with a large initial "D" and a long, sweeping tail.

DAVE YOST
Ohio Attorney General