December 17, 2009

The Honorable Gary L. Lammers
Putnam County Prosecuting Attorney
336 East Main Street, Suite B
Ottawa, Ohio 45875

SYLLABUS: 2009-053

1. An assistant county prosecuting attorney who does not serve in place of the county prosecuting attorney on the county budget commission may engage in the private practice of law, provided he does not as a private practitioner represent persons in (1) matters that involve any parties represented by the county prosecuting attorney in the county prosecuting attorney's official capacity, (2) criminal proceedings brought by the state or a municipal corporation that has entered into an agreement with the county prosecuting attorney whereby the county prosecuting attorney prosecutes criminal cases for the municipal corporation, or (3) hearings or proceedings concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child or juvenile traffic offender.

2. R.C. 120.39(A) prohibits an assistant county prosecuting attorney who engages in the private practice of law from serving as counsel appointed by a court or co-counsel appointed to assist the state public defender or a county or joint county public defender.

3. Any representation undertaken by an assistant county prosecuting attorney as a private practitioner must not violate any provision in the ethics statutes set forth in R.C. Chapter 102 or R.C. 2921.42-.43 or any rule set out in the Supreme Court Rules for the Government of the Bar of Ohio or the Ohio Rules of Professional Conduct.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

December 17, 2009

OPINION NO. 2009-053

The Honorable Gary L. Lammers
Putnam County Prosecuting Attorney
336 East Main Street, Suite B
Ottawa, Ohio 45875

Dear Prosecutor Lammers:

You have requested an opinion whether an assistant county prosecuting attorney who does not serve in place of the county prosecuting attorney on the county budget commission may engage in the private practice of law.[1] It is significant to point out at the outset that your

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[1] For the purpose of this opinion, the phrase "private practice of law" does not include holding a second public position that involves the practice of law. Examples of such public positions include, but are not limited to, service as an elected or appointed judge, magistrate, administrative hearing officer, township law director, assistant attorney general, city director of law, city prosecutor, city solicitor, village solicitor, assistant city director of law, assistant city prosecutor, assistant city solicitor, or assistant village solicitor. Accordingly, this opinion does not address the propriety of an assistant county prosecuting attorney serving simultaneously in another public position that involves the practice of law.

The phrase "private practice of law," as used in this opinion, does, however, include instances in which an assistant county prosecuting attorney provides legal services to a public entity as a private independent contractor, and not in his capacity as an assistant county prosecuting attorney. In such cases, an assistant county prosecuting attorney is not holding another public office or employment, but rather, is performing legal services for a governmental entity on a contractual basis. *See generally* 1980 Op. Att'y Gen. No. 80-098 (syllabus, paragraph 1) ("[i]n order to determine whether an attorney employed by a township pursuant to R.C. 309.09(A) is an independent contractor or an employee of the township, it is necessary to consider all the circumstances surrounding the arrangement between the township and the attorney").

question poses two separate and distinct issues. First, it must be determined whether an assistant county prosecuting attorney may serve simultaneously in a private attorney position. If such dual service is permissible, it then must be determined whether there is a provision in the ethics statutes or rules governing the professional conduct of attorneys that limits the matters the assistant county prosecuting attorney may undertake as a private attorney.

Compatibility Test

The following five questions are used in determining whether a public officer or employee may serve concurrently in a private position:

1. Is the public position a classified employment within the terms of R.C. 124.57?

2. Does a constitutional provision or statute prohibit a person from serving in both positions at the same time?

3. Does an impermissible conflict of interest exist between the two positions?

4. Are there local charter provisions, resolutions, or ordinances which are controlling?

5. Is there a federal, state, or local departmental regulation applicable?

See 2005 Op. Att'y Gen. No. 2005-023 at 2-227.

The first question asks whether the public position is a classified employment within the terms of R.C. 124.57. The position of assistant county prosecuting attorney is in the unclassified civil service. R.C. 124.11(A)(11). R.C. 124.57's provisions thus do not operate to prevent an assistant county prosecuting attorney from serving as a private attorney.

The second question asks whether a constitutional provision or statute prohibits a person from serving in both positions at the same time. No constitutional provision or statute prohibits an assistant county prosecuting attorney from engaging in the private practice of law. *Cf.* R.C. 4705.01 (except as provided in R.C. 4705.09 or in rules adopted by the Ohio Supreme Court, "admission to the bar shall entitle the person to practice before any court or administrative tribunal without further qualification or license").

R.C. 120.39(A) does, however, impose the following restriction on an assistant county prosecuting attorney who engages in the private practice of law:

> Except as provided in division (B) of this section,[2] *counsel appointed by the court, co-counsel appointed to assist the state public defender or a county or joint county public defender*, and any public defender, county public defender, or joint county defender, or member of their offices, *shall not be a partner or employee of any prosecuting attorney*, city director of law, village solicitor, or similar chief legal officer. (Emphasis and footnote added.)

R.C. 120.39(A) thus prohibits an assistant county prosecuting attorney who engages in the private practice of law from serving as counsel appointed by a court or co-counsel appointed to assist the state public defender or a county or joint county public defender. *See* 1989 Op. Att'y Gen. No. 89-099 at 2-483 n.3; *see also Cain v. Calhoun*, 61 Ohio App. 2d 240, 401 N.E.2d 947 (Gallia County 1979); 1978 Op. Att'y Gen. No. 78-026; 1977 Op. Att'y Gen. No. 77-060. Accordingly, while no constitutional provision or statute prohibits a person from serving in both positions at the same time, R.C. 120.39(A) prohibits an assistant county prosecuting attorney who engages in the private practice of law from serving as counsel appointed by a court or co-counsel appointed to assist the state public defender or a county or joint county public defender.

The third question asks whether an impermissible conflict of interest exists between the two positions. Whether an impermissible conflict of interest exists between a public and private position requires an examination of how the duties and interests involved in each position interrelate. Because public officials owe an undivided loyalty to the public, such officials may not hold a private position that would create divided loyalties, conflicting duties, or the temptation to act other than in the public interest. 2005 Op. Att'y Gen. No. 2005-023 at 2-231.

With respect to your specific inquiry, an assistant county prosecuting attorney who engages in the private practice of law is clearly subject to divided loyalties when, as a private practitioner, he participates in matters that align him against the county prosecuting attorney. Such divided loyalties occur when the assistant in his private practice represents a person in a matter involving the county, a township, or other governmental entity that is represented by the county prosecuting attorney acting in an official capacity.[3] *See* 1994 Op. Att'y Gen. No. 94-035 at 2-179; 1923 Op. Att'y Gen. No. 584, p. 466; 1916 Op. Att'y Gen. No. 2115, vol. II, p. 1919; *see also* 1997 Op. Att'y Gen. No. 97-034 at 2-199 and 2-200. They also arise when the assistant, as a private practitioner, represents a person in a criminal proceeding brought by the state or a

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[2] R.C. 120.39(B) excepts a "partner or employee of a village solicitor or of a law firm, legal professional association, or legal clinic with which the village solicitor is affiliated" from R.C. 120.39(A)'s prohibitions. R.C. 120.39(B) does not, however, apply to the position of assistant county prosecuting attorney.

[3] A county prosecuting attorney serves as the legal adviser to the county and statutory townships, *see* R.C. 309.09, and commences various civil actions on behalf of other governmental entities, *see, e.g.*, R.C. 309.12; R.C. 309.14; R.C. 309.17; R.C. 1747.11; R.C. 4123.92.

municipal corporation that has entered into an agreement with the county prosecuting attorney whereby the county prosecuting attorney prosecutes criminal cases for the municipal corporation.[4] *See* 1971 Op. Att'y Gen. No. 71-050; 1967 Op. Att'y Gen. No. 67-112; 1966 Op. Att'y Gen. No. 66-159. *See generally* Board of Commissioners on Grievances & Discipline Op. No. 88-008 (June 17, 1988) (syllabus) ("[a] part time prosecutor, whose duty it is to represent the State of Ohio in criminal cases, may not represent criminal defendants against the State of Ohio in his or her private practice"). And, finally, such divided loyalties occur when the assistant in his private capacity represents a person in a hearing or proceeding concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child or juvenile traffic offender.[5] *See* 1971 Op. Att'y Gen. No. 71-050; 1967 Op. Att'y Gen. No. 67-112; 1966 Op. Att'y Gen. No. 66-159.

Thus, in each of the foregoing situations, an assistant county prosecuting attorney who engages in the private practice of law is subject to a conflict of interest because of the duty of loyalty he owes to the county prosecuting attorney and the public.

Although conflicts of interest may exist when an assistant county prosecuting attorney serves simultaneously in another position, Attorney General opinions have determined that the existence of such conflicts does not bar the assistant from holding the other position when the assistant is able to avoid the conflicts. *See, e.g.*, 2001 Op. Att'y Gen. No. 2001-040; 2001 Op. Att'y Gen. No. 2001-027; 1999 Op. Att'y Gen. No. 99-027. In addition, 1994 Op. Att'y Gen. No. 94-035 at 2-179 stated that, when it is possible for a county prosecuting attorney to avoid conflicts of interest by limiting the type of legal services provided as a private practitioner, the county prosecuting attorney may engage in the private practice of law.[6] Therefore, insofar as it is possible for an assistant county prosecuting attorney to avoid conflicts of interest by limiting the type of legal services he provides as a private attorney, an assistant county prosecuting attorney may engage in the private practice of law, provided he does not as a private practitioner represent persons in (1) matters that involve any parties represented by the county prosecuting

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[4] R.C. 309.08 requires a county prosecuting attorney to "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party." *See* R.C. 1901.34; R.C. 2938.13; R.C. 2945.67. A county prosecuting attorney may also enter into an agreement with a municipal corporation whereby the county prosecuting attorney prosecutes criminal cases for the municipal corporation. R.C. 1901.34(D).

[5] A county prosecuting attorney has a duty to assist a juvenile court "in presenting the evidence at any hearing or proceeding concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child or juvenile traffic offender." R.C. 2151.40; *see* R.C. 2152.13; R.C. 2152.14; R.C. 2945.67.

[6] R.C. 325.11(B) provides that, "[a] prosecuting attorney shall not engage in the private practice of law unless before taking office the prosecuting attorney notifies the board of county commissioners of the intention to engage in the private practice of law."

attorney in the county prosecuting attorney's official capacity, (2) criminal proceedings brought by the state or a municipal corporation that has entered into an agreement with the county prosecuting attorney whereby the county prosecuting attorney prosecutes criminal cases for the municipal corporation, or (3) hearings or proceedings concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child or juvenile traffic offender.[7]

The fourth and fifth questions ask about the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local departmental regulations. No federal or state regulation prohibits a person from serving simultaneously as an assistant county prosecuting attorney and a private attorney. Whether an applicable county charter provision, resolution, ordinance, or departmental regulation bars a person from holding these two positions at the same time is a factual question that must be answered by the county prosecuting attorney.[8] Therefore, absent a county charter provision, resolution, ordinance, or departmental regulation prohibiting an assistant county prosecuting attorney from serving in a private attorney position, an assistant county prosecuting attorney who does not serve in place of the county prosecuting attorney on the county budget commission may engage in the private practice of law, provided he does not as a private practitioner represent persons in (1) matters that involve any parties represented by the county prosecuting attorney in the county prosecuting attorney's official capacity, (2) criminal proceedings brought by the state or a municipal corporation that has entered into an agreement with the county prosecuting attorney whereby the county prosecuting attorney prosecutes criminal cases for the municipal corporation, or (3) hearings or proceedings concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child or juvenile traffic offender.[9]

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[7] R.C. 325.11(B) authorizes a county prosecuting attorney to engage in the private practice of law while in office. *See* note 6, *supra;* 1994 Op. Att'y Gen. No. 94-035 at 2-178. Like an assistant county prosecuting attorney, a county prosecuting attorney owes an undivided loyalty to the public, and, as such, he must avoid conflicts of interest by limiting the type of legal services he provides as a private practitioner. 1994 Op. Att'y Gen. No. 94-035 at 2-179. Accordingly, the limitations imposed upon an assistant county prosecuting attorney who engages in the private practice of law also apply to a county prosecuting attorney who engages in the private practice of law.

[8] A county prosecuting attorney, as an appointing authority, *see* R.C. 309.06, may enact rules or regulations governing the private practice of law by his assistants.

[9] A county prosecuting attorney has the authority to determine the work schedule of his assistants. *State ex rel. Waite v. Berry,* Case No. CA-1638, 1983 Ohio App. LEXIS 13328, at *7 (Clark County Mar. 24, 1983), *aff'd,* 11 Ohio St. 3d 53, 463 N.E.2d 386 (1984). During the hours an assistant county prosecuting attorney is scheduled to work for the county prosecuting attorney, the assistant may not engage in the private practice of law. *See id.* at *8 (an assistant county prosecuting attorney may undertake "private and not inconsistent or incompatible duties

Ethics Statutes and Rules Governing the Professional Conduct of Attorneys

While it is permissible for an assistant county prosecuting attorney to engage in the private practice of law, any representation undertaken by the assistant as a private practitioner must not violate any provision in the ethics statutes, R.C. Chapter 102; R.C. 2921.42-.43, or rule set out in the Supreme Court Rules for the Government of the Bar of Ohio or the Ohio Rules of Professional Conduct.[10] The authority to issue advisory opinions concerning the interpretation and application of the ethics statutes and the rules governing the professional conduct of attorneys is conferred upon the Ohio Ethics Commission and the Board of Commissioners on Grievances and Discipline of the Supreme Court, respectively. R.C. 102.08; Ohio Gov. Bar R. V, § 2(C).

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during [the] time [he has] not been assigned to public duties"). An assistant county prosecuting attorney therefore must take approved vacation, personal, or compensatory leave or leave without pay for any time he engages in the private practice of law during the hours he is scheduled to provide legal services as an assistant county prosecuting attorney.

[10] By way of example, we note that Ohio Prof. Cond. R. 1.11(d) imposes the following professional standard upon an assistant county prosecuting attorney who engages in the private practice of law:

> Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee shall comply with both of the following:
>
> (1) Rules 1.7 and 1.9;
>
> (2) shall not do either of the following:
>
> (i) participate in a matter in which the lawyer participated personally and *substantially* while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing;
>
> (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and *substantially*, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

See generally Ohio Prof. Cond. R. 1.11(e) (as used in Ohio Prof. Cond. R. 1.11, the term "matter" includes "both of the following: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; (2) any other matter covered by the conflict of interest rules of the appropriate government agency").

In light of the foregoing authority conferred upon the Ohio Ethics Commission and the Board of Commissioners on Grievances and Discipline of the Supreme Court, opinions of the Attorneys General have refrained from interpreting and applying the provisions of the ethics statutes and the rules set forth in the Supreme Court Rules for the Government of the Bar of Ohio and the Ohio Rules of Professional Conduct. *See, e.g.,* 2005 Op. Att'y Gen. No. 2005-023 at 2-233 through 2-235; 1994 Op. Att'y Gen. No. 94-035 at 2-180. If you have further questions about any of those issues, we recommend that you request additional guidance from the Ohio Ethics Commission and the Board of Commissioners on Grievances and Discipline of the Supreme Court regarding the application of the ethics statutes and rules governing the conduct of attorneys to your particular situation.

Conclusions

In sum, it is my opinion, and you are hereby advised as follows:

1. An assistant county prosecuting attorney who does not serve in place of the county prosecuting attorney on the county budget commission may engage in the private practice of law, provided he does not as a private practitioner represent persons in (1) matters that involve any parties represented by the county prosecuting attorney in the county prosecuting attorney's official capacity, (2) criminal proceedings brought by the state or a municipal corporation that has entered into an agreement with the county prosecuting attorney whereby the county prosecuting attorney prosecutes criminal cases for the municipal corporation, or (3) hearings or proceedings concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child or juvenile traffic offender.

2. R.C. 120.39(A) prohibits an assistant county prosecuting attorney who engages in the private practice of law from serving as counsel appointed by a court or co-counsel appointed to assist the state public defender or a county or joint county public defender.

3. Any representation undertaken by an assistant county prosecuting attorney as a private practitioner must not violate any provision in the ethics statutes set forth in R.C. Chapter 102 or R.C. 2921.42-.43 or any rule set out in the Supreme Court Rules for the Government of the Bar of Ohio or the Ohio Rules of Professional Conduct.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General