

OPINION NO. 95-044**Syllabus:**

An individual licensed as a private investigator pursuant to R.C. Chapter 4749 may serve as a probation officer/bailiff in a county court, provided he does not conduct any investigations for probationers supervised by him as a probation officer/bailiff and is not in violation of any statutory provisions subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08.

To: Robert L. Herron, Columbiana County Prosecuting Attorney, Lisbon, Ohio
By: Betty D. Montgomery, Attorney General, December 20, 1995

You have requested an opinion whether an individual licensed as a private investigator may serve as a probation officer/bailiff in a county court.¹ 1989 Op. Att'y Gen. No. 89-037 at 2-163 and 2-164 set forth the following five questions for determining whether a public and private position may be held simultaneously:

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

¹ A member of your staff has indicated that the individual in question does not hold simultaneously the positions of probation officer and bailiff. Rather, the individual is employed by the county court as a probation officer. As a part of his duties as probation officer, the individual discharges duties that are ordinarily performed by a court bailiff. *See generally* 1962 Op. Att'y Gen. No. 3511, p. 1023 at 1025 (since no provision of law provides for a bailiff in a county court, a county court is not entitled to a bailiff). Accordingly, this opinion does not address the compatibility of the positions of probation officer and bailiff within the same county court. *See generally* 1927 Op. Att'y Gen. No. 689, vol. II, p. 1175 (a person acting under appointment as a court bailiff may be appointed probation officer).

2. Do statutes governing either position limit the outside employment possible?
3. Is there a conflict of interest between the two positions?
4. Are there local charter provisions or ordinances which are controlling?
5. Is there a federal, state, or local departmental regulation applicable?

Local Legislation and Departmental Regulations

Questions four and five concern the applicability of local legislation and state and federal departmental regulations. Whether there is an applicable local departmental regulation, charter provision, or ordinance is a matter of local concern. Op. No. 89-037 at 2-164. It is thus assumed, for purposes of this opinion, that there are no local departmental regulations, charter provisions, or ordinances that prohibit the simultaneous holding of the positions of probation officer/bailiff and private investigator. Research discloses that there are no state or federal departmental regulations that address the simultaneous holding of these two positions.

R.C. 124.57

Question number one asks whether the public position is a classified employment within the terms of R.C. 124.57, which prohibits classified employees and officers in the service of the state, the several counties, cities, and city school districts thereof, and civil service townships from participating in partisan political activity, other than to vote or express their political views. Pursuant to a telephone conversation, a member of your staff has stated that the individual in question is appointed probation officer/bailiff by the county court judge, *see State ex rel. Hillyer v. Tuscarawas County Bd. of Comm'rs*, 70 Ohio St. 3d 94, 637 N.E.2d 311 (1994) (a county court judge may appoint a probation officer), and that the position of probation officer/bailiff is not in the classified service, *see R.C. 124.11(A)(10)* (the unclassified service shall comprise bailiffs of courts of record²). Therefore, the prohibition of R.C. 124.57 does not apply in this instance.

Outside Employment

Question number two asks whether the statutes governing either position limit the outside employment possible. No statute in the Revised Code prohibits the simultaneous holding of the positions of private investigator and probation officer/bailiff in a county court. Accordingly, the second question may be answered in the negative.

Conflict of Interest

Question number three asks whether there is a conflict of interest between the two positions. "A public servant may not simultaneously hold an additional position which would subject him or her to divided loyalties and conflicting duties or to the temptation to act other than in the best interests of the public." Op. No. 89-037 at 2-164. Resolution of this particular

² Pursuant to R.C. 1907.01, "[c]ounty courts are courts of record for all purposes of law."

question requires an examination of the duties of the two positions in order to determine whether an individual's activities or responsibilities as a private investigator would conflict with the performance of his public duties as a probation officer/bailiff for a county court.

The powers and responsibilities of a probation officer include, as a general matter, the supervision of any person who has been placed on probation by the county court, providing information and instruction with respect to the conditions of probation to each person placed on probation, keeping informed concerning the conduct and condition of each person under his supervision, using all suitable methods to aid persons under his supervision and to bring about improvement in their conduct and condition, keeping detailed records regarding persons under his supervision, and performing any duties that the court directs. *See* R.C. 2151.14 (setting forth the duties and powers of a probation officer in the juvenile court); R.C. 2301.30 (setting forth the duties of a county probation department established by a court of common pleas); *see also* R.C. 1901.33(A) (probation officers of a municipal court must perform any duties that are designated by the court); R.C. 2151.13 (a juvenile judge may fix the duties of a probation officer). In addition, this particular probation officer performs the duties of a bailiff that are required by the county court judge. *See* R.C. 1901.32(A)(6) (setting forth the duties of municipal court bailiffs and requiring such bailiffs to "perform any other duties that are requested by rule of court"); R.C. 2151.13 (a juvenile judge may appoint bailiffs and fix their duties); *see also* R.C. 2301.15 (setting forth the duties of criminal bailiffs appointed by the court of common pleas).

A private investigator is a person licensed pursuant to R.C. Chapter 4749 to engage in the business of private investigation. *See* R.C. 4749.01(A); R.C. 4749.13(A). For purposes of R.C. Chapter 4749, the phrase "business of private investigation" is defined as follows:

'Business of private investigation' means ... conducting, for hire, in person or through a partner or employees, of any investigation relevant to any crime or wrong done or threatened, or to obtain information on the identity, habits, conduct, movements, whereabouts, affiliations, transactions, reputation, credibility, or character of any person, or to locate and recover lost or stolen property, or to determine the cause of or responsibility for any damage to property, or to secure evidence for use in any legislative, administrative, or judicial investigation or proceeding.

R.C. 4749.01(B). *See generally* R.C. 5739.01(EE) (as used in R.C. Chapter 5739 (sales tax), "[p]rivate investigation and security service' means the performance of any activity for which the provider of such service is required to be licensed pursuant to Chapter 4749. of the Revised Code, or would be required to be so licensed in performing such services in this state, and also includes the services of conducting polygraph examinations and of monitoring or overseeing the activities on or in, or the condition of, the consumer's home, business, or other facility by means of electronic or similar monitoring devices").

An individual licensed as a private investigator under R.C. Chapter 4749 thus may conduct investigations that require him to work closely with law enforcement agencies, or involve him in the criminal justice system. A private investigator licensed pursuant to R.C. Chapter 4749 is not, however, a law enforcement officer for any purpose. R.C. 4749.08(A); 1974 Op. Att'y Gen. No. 74-041.

Because both a probation officer/bailiff and a private investigator may need information with respect to a criminal matter, it may occur that if one individual holds both of these positions, public officials involved in criminal prosecutions may work with the individual as a probation officer/bailiff and a private investigator. For example, the individual, as a probation officer/bailiff, may require information from the county sheriff or county prosecuting attorney on the involvement of a probationer in a crime, or the individual, as a private investigator, may require information from the county sheriff or prosecuting attorney concerning a crime. It thus may not be clear to a public official in a given situation whether the individual is acting in his capacity as a probation officer/bailiff for the county court or as a private investigator.

In addition, the probation officer/bailiff may discover evidence that could lead to the revocation of a person's probation.³ A person who may have his probation revoked may hire a private investigator to conduct an investigation to obtain information or evidence having a bearing upon his probation revocation. This situation presents an individual who serves in the dual capacities of probation officer/bailiff and private investigator with an opportunity for self-dealing if the person who is the subject of the probation revocation becomes a client of the individual in his capacity as a private investigator.

Op. No. 89-037, which concerned the compatibility of the positions of coroner's investigator and criminal bondsman, examined the potential for conflict when a public official engages in a private business that results in him being involved in the criminal justice system in his public and private capacity, and when the public official is in a position to uncover evidence that may lead to an accused becoming a customer in his private business. In determining that an individual engaged in private business as a criminal bondsman may simultaneously hold a position as a coroner's investigator, Op. No. 89-037 at 2-166 stated:

From the above review it can be seen that both a coroner's investigator and a criminal bondsman are peripheral actors in the criminal justice system. It is predictable that if one individual holds both jobs, some of the other persons involved in the system will at times deal with that individual in his capacity as investigator and at other times in his capacity as bondsman. *While this may be confusing, it does not establish a conflict of interest in and of itself.* Neither the coroner's investigator nor the coroner have any responsibility or authority regarding the custody of accused persons or the setting of bond, either directly or through interaction with court and law enforcement officials. *See* Op. No. 88-035 at 2-163 ("coroners do not have the authority to determine whether the law has been broken, or to determine that a particular person is guilty of violating the

³ An individual's duties as a private investigator may lead to the discovery of evidence that could result in a person's probation being revoked. As a general matter, a private investigator licensed under R.C. Chapter 4749 may not "[d]ivulge any information acquired from or for a client to persons other than the client or his authorized agent without express authorization to do so or unless required by law." R.C. 4749.13(B)(3); *accord* 3 Ohio Admin. Code 1301:4-5-17. However, a duly licensed private investigator "may divulge to any law enforcement officer or prosecuting attorney, or his representative, any information he may acquire as to any criminal offense." Rule 1301:4-5-17. Accordingly, a private investigator who discovers evidence of criminal activity by a probationer under his supervision as a probation officer may disclose this evidence to any law enforcement officer or prosecuting attorney, or his representative.

law"). *See also State v. Cousin*, 5 Ohio App. 3d 32, 449 N.E.2d 32 (Seneca County 1982); 1969 Op. Att'y Gen. No. 69-036. *Compare* 1968 Op. Att'y Gen. No. 68-112 (individual's duty as a deputy sheriff to fix bail by objective standards conflicts with his pecuniary interest as a bondsman in maximizing the amount). The coroner's investigator may uncover evidence which leads to the subsequent arrest and charging of an individual. Such evidence may also affect the amount of bail which is required. In most instances, the accused will then become a potential customer of the bondsman. *To the extent that this can be viewed as an opportunity for self-dealing, the potential for conflict is cured in your case by the bondsman's voluntary abstention from providing bonds to persons accused in criminal matters where the coroner's office has been involved.* (Emphasis added.)

Op. No. 89-037 thus determined that there is no conflict of interest when a public official engages in a private business that involves him in the criminal justice system in his public and private capacity, and that a public official who is in a position to uncover evidence that may lead to an accused becoming a customer in his private business may cure the potential conflict of interest by abstaining from conduct in his public position that exposes him to an opportunity for self-dealing. *See generally* 1994 Op. Att'y Gen. No. 94-079 (syllabus, paragraph two) ("[a] member of a board of county commissioners who is privately retained to serve as defense counsel in a criminal case is not subject to a conflict of interest").

In light of Op. No. 89-037, it appears that the confusion that may arise when an individual who serves simultaneously as a probation officer/bailiff and a private investigator seeks information about a crime does not establish a conflict of interest in and of itself. In addition, a probation officer/bailiff who serves as a private investigator is not subject to an impermissible conflict of interest provided he abstains, as a private investigator, from conducting investigations to obtain information or evidence having a bearing upon the probation revocation of persons whose probation he supervises as a probation officer.

A probation officer/bailiff licensed as a private investigator may also be subject to the temptation to act in a manner that is inconsistent with the public's best interest. *See generally* Op. No. 89-037 at 2-164 ("[a] public servant may not simultaneously hold an additional position which would subject him or her to divided loyalties and conflicting duties or to the temptation to act other than in the best interests of the public"); 1973 Op. Att'y Gen. No. 73-043 at 2-167 and 2-168 ("[a] public officer must be beyond temptation and he should not be in a position to profit from his public office. His position is one of a fiduciary nature to the community which requires that all his public decisions be completely objective"). If the individual as a private investigator is conducting an investigation for a probationer, who is under his supervision as a probation officer/bailiff, on a matter that is not related to the probationer's probation, the individual as a probation officer/bailiff may not take appropriate action if he learns of a probation violation by the probationer. For instance, the individual as a probation officer/bailiff may not initiate proceedings to revoke the probation of the probationer for fear that the probationer will be unable to pay for the investigation if his probation is revoked. A potential conflict of interest thus exists because the individual as a probation officer/bailiff will be exposed to influences that may prevent him from making completely objective, disinterested decisions. *See generally* 1980 Op. Att'y Gen. No. 80-035 at 2-149 (a conflict of interest occurs when a person's "responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective").

Prior opinions of the Attorney General have determined that the mere possibility that a person is subject to a conflict does not prohibit the simultaneous holding of two positions. *See, e.g.*, 1994 Op. Att'y Gen. No. 94-080 at 2-400; 1979 Op. Att'y Gen. No. 79-111 at 2-372. Rather, a conflict is to be considered on its particular facts, and "[w]here possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated." Op. No. 79-111 at 2-372. Factors used in determining whether a conflict is remote and speculative include, *inter alia*, the degree of remoteness of a potential conflict and the ability or inability of an individual to remove himself from the conflict. *Id.* at 2-372.

With respect to your specific inquiry, it is only speculative whether the individual will have to conduct an investigation for a probationer, who is under his supervision as a probation officer/bailiff, on a matter that is not related to the probationer's probation. I believe it most unlikely that a probationer will hire his probation officer as a private investigator to perform an investigation on his behalf. Moreover, the individual in question may refuse to conduct investigations for probationers who are under his supervision as a probation officer/bailiff. Accordingly, insofar as the potential for conflict is unlikely and seemingly avoidable, it appears that the conflict is remote and speculative, and that such conflict does not prevent an individual licensed as a private investigator from serving as a probation officer/bailiff in a county court.

It also may happen that the individual's duties as a probation officer/bailiff may involve contact with a probationer for whom he previously conducted an investigation as a private investigator. In such a situation, the individual's previous interaction with the probationer may impair his ability to discharge objectively his supervision of the probationer. *See, e.g.*, Op. No. 89-037 at 2-166 (a coroner's investigator's prior contact with an individual for whom he has posted bail in some earlier unrelated matter may impair his ability to perform an objective investigation).

Op. No. 89-037 at 2-166 examined the issue whether the prior contact of a coroner's investigator with an individual for whom he has posted bail in some earlier unrelated matter impairs his ability to perform an objective investigation, and stated:

[C]ontacts which impair objectivity could arise from any outside activity of the investigator. An effort to avoid even the potential for conflict would disqualify anyone from holding the position. I do not find that contacts made in the criminal bonding business pose any inherent or predictable threat to the objectivity of a coroner's investigator. The potential for conflict is remote and speculative and can be dealt with by the coroner and the investigator on a case by case basis should the need arise, since it is the coroner, not the investigator, who gives directions and is responsible for decisions regarding an investigation under R.C. 313.15.

Accordingly, Op. No. 89-037 determined that, insofar as the contacts made in the criminal bonding business do not pose any inherent or predictable threat to the objectivity of a coroner's investigator, any potential conflicts that may arise from such contacts may be resolved on a case by case basis.

In regard to the situation you have posed, it appears that the fact that a probation officer/bailiff licensed as a private investigator may have previously conducted an investigation for a probationer does not pose an immediate threat to his objectivity as a probation

officer/bailiff. Moreover, while there exists the possibility for abuse, in the absence of evidence to the contrary, it is assumed that the probation officer/bailiff will act in good faith and in accordance with the law. See Op. No. 94-079 at 2-395; 1985 Op. Att'y Gen. No. 85-099 at 2-420 and 2-421; see also *State ex rel. Corrigan v. Hensel*, 2 Ohio St. 2d 96, 206 N.E.2d 563 (1965) (syllabus) ("[a] person, whose private vocation is that of owner and manager of a teachers' placement agency, duly elected to office as a member of a local board of education and who continues in said private occupation after his election, will not be ousted from said elective office by quo warranto, on the ground that by reason of his private occupation he *might possibly or could* secure personal monetary benefits by using his public office in a wrongful manner, it being established by the evidence that said person had not committed, nor was he about to commit, any act or acts in violation of law or violative of his oath of office"). Accordingly, the possibility that a probation officer/bailiff may have to supervise the probation of a probationer for whom he previously conducted an investigation as a private investigator does not prohibit the individual from holding simultaneously the positions of probation officer/bailiff and private investigator.

In addition to the foregoing, the individual in question is required to perform the duties of a bailiff that are required by the county court judge. According to a member of your staff, the county court judge requires the probation officer/bailiff to attend upon the county court during its sessions. During the time the court is in session, the probation officer/bailiff performs duties that are ordinarily performed by a court bailiff. For example, the court may direct the probation officer/bailiff to administer oaths to witnesses and jurors, and to conduct prisoners to and from the jail of the county.

None of the ministerial duties performed by the individual as a bailiff, however, are inconsistent with the activities of a licensed private investigator. Therefore, an individual who simultaneously holds the positions of private investigator and probation officer/bailiff in a county court is not subject to any impermissible conflicts of interest.

Ethical Considerations

This opinion does not consider any questions regarding the application of the statutes governing the ethical conduct of public employees set forth in R.C. Chapter 102 and R.C. 2921.42-.43. These statutes, in general, prohibit public officials from using confidential information acquired in the course of official duties, R.C. 102.03(B), from using one's public position for personal gain, R.C. 102.03(C), from using their public positions to secure anything of value that manifests a substantial and improper influence upon them, R.C. 102.03(D), (E), and from having unlawful interests in public contracts, R.C. 2921.42. Because the General Assembly has conferred authority upon the Ohio Ethics Commission to interpret these statutes by way of written opinions, see R.C. 102.08(A), it is appropriate that the Attorney General decline the issuance of an opinion on matters governed by those statutes. See, e.g., Op. No. 89-037 at 2-167; 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). Thus, you may wish to request additional guidance from the Ohio Ethics Commission regarding the application of the ethics statutes to the situation you have described.

Conclusion

Based on the foregoing, it is my opinion and you are hereby advised that an individual licensed as a private investigator pursuant to R.C. Chapter 4749 may serve as a probation officer/bailiff in a county court, provided he does not conduct any investigations for probationers

supervised by him as a probation officer/bailiff and is not in violation of any statutory provisions subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08.