

ORIGINAL

IN THE SUPREME COURT OF OHIO

IRVIN W. HUTH
PO Box 17
Bolivar, OH 44612

Case No. 14-1214

and

MICHELA HUTH
PO Box 673
Bolivar, OH 44612

Relators,

v.

NEW PHILADELPHIA MUNICIPAL COURT
166 East High Avenue
New Philadelphia, Ohio 44663

and

THE HON. RICHARD D. REINBOLD
A Visiting Judge of the New Philadelphia
Municipal Court
166 East High Avenue
New Philadelphia, Ohio 44663

Respondents.

FILED
JUL 10 2014
CLERK OF COURT
SUPREME COURT OF OHIO

COMPLAINT FOR WRITS OF PROHIBITION, MANDAMUS,
OTHER WRIT AND ALTERNATIVE WRITS

Michela Huth

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Attorney for Relator William I. Huth, and Pro Se

RECEIVED
JUL 10 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Now comes Irvin W. Huth and Michela Huth, and for their Complaint states:

NEED FOR IMMEDIATE RELIEF

1. This is an original action for a writ of prohibition and mandamus to:
 - (A) Restrain Respondent Court and Judge from exercising jurisdiction over all pending criminal cases based upon alleged criminal offenses which occurred within the Village of Bolivar and which are pending in the New Philadelphia Municipal Court, and are being filed or prosecuted by Steven A. Anderson (Ohio Attorney Registration No. 0066445),
 - (B) Restrain Respondent Court and Judge from exercising jurisdiction over the criminal case of Relator Irvin W. Huth, New Philadelphia Municipal Court Case No. CRB 1400643 A-C and the criminal case of Relator Michela Huth, New Philadelphia Municipal Court Case No. CRB 1400642.
 - (C) Order the Respondents to not accept any further criminal cases filed by Steven A. Anderson, based upon criminal offenses committed within the Village of Bolivar.
 - (D) Order the Respondent New Philadelphia Municipal Court to dismiss any current criminal cases filed by Steven A. Anderson, based upon criminal offenses committed within the Village of Bolivar.
 - (E) Order the Respondent to expunge any past criminal cases filed by Steven A. Anderson, based upon criminal offenses committed within the Village of Bolivar.
 - (F) Order the Respondent to seal all closed criminal cases filed by Steven A. Anderson, based upon criminal offenses committed within the Village of Bolivar.

(G) Order the Respondents to dismiss the criminal cases of Relators: 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

(H) Restrain Relators from continuing to adjudicate the two criminal cases: 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

2. Steven A. Anderson has, and had, no legal authority to hold himself out as a prosecutor, in criminal cases brought in the New Philadelphia Municipal Court, on cases where criminal offenses allegedly occurred within the Village of Bolivar, and in fact, is specifically barred by statute from doings by statute, as to the two main criminal cases listed above
3. Based upon the fact that Steven A. Anderson was never appointed as one of the enumerated officers in R.C. § 1901.34(A), nor ever designated as an assistant prosecutor by anyone properly so designated, Mr. Anderson has been falsely and fraudulently representing that he is the prosecutor of the Village of Bolivar and has been filing and prosecuting cases before the New Philadelphia Municipal Court for alleged criminal offenses occurring with the municipality of the Village of Bolivar.
4. It is not the position of the Relators that the Village of Bolivar cannot prosecute for alleged crimes occurring or which occurred within the Village of Bolivar. It is the position of the Relators that the Village of Bolivar must comply with the law, and appoint a person who can legally operate as prosecutor.
5. Whether it is because it has simply been so obvious for every other municipality that a corporation cannot be a public officer, and thus cannot serve as prosecutor, thus the issue has

never been previously litigated, this case appears to be a case of first impression, and therefore is appropriate before this Court.

JURISDICTION

6. This Court has jurisdiction over original actions in prohibition and mandamus pursuant to the Ohio Constitution, Article IV, Sections 2(B)(1)(d), and the Rules of Practice of the Supreme Court of Ohio, vests this Court with original jurisdiction to grant mandamus, a writ of prohibition, and other writs.
7. Ohio Revised Code § 2503.40 authorized this Court to issue, in addition to the original jurisdiction conferred by Section 2, Article IV of the Ohio Constitution, “writs of supersede as in any case, and other writs not specifically provided for and not prohibited by law, when necessary to enforce the administration of justice.” *Smith v. Granville Twp. Bd. of Trustees*, 77 Ohio St.3d 1215, 691 N.E.2d 253 (1998).

PARTIES

8. Relators, Irvin W. Huth and Michela Huth have been criminally charged and are currently being prosecuted in the New Philadelphia Municipal Court, New Philadelphia, Ohio. On May 29, 2014, Mr. Huth was served with three summonses for alleged violations of Ohio Revised Code Sections 2917.11(A)(1) (disorderly conduct), 2903.22(A) (menacing), and 2917.12(A)(1) (disturbing a lawful meeting). Ms. Huth also was served with a summons for alleged violations of R.C. Section 2917.12(A)(1) (disturbing a lawful meeting). *Exhibits A & B*. The charges against both Relators stem from a Village of Bolivar (Ohio) special meeting where the elected officials voted to supercede the will of the voters November 2013 ballot

initiative, and settle a federal case which effected the siting of a sand and gravel operation within the Village.

9. The Respondents in this action are the New Philadelphia Municipal Court and the Honorable Richard D. Reinbold, a duly appointed visiting judge of the Respondent Court.¹

FACTS

10. Relators, Irvin W. Huth and Michela Huth, are currently being prosecuted in the New Philadelphia Municipal Court, New Philadelphia, Ohio.
11. On May 29, 2014, Mr. Huth was served with three summons for alleged violations of Ohio Revised Code (“R.C.”) Sections 2917.11(A)(1) (disorderly conduct), 2903.22(A) (menacing), and 2917.12(A)(1) (disturbing a lawful meeting).
12. Ms. Huth also was served with a summons for alleged violations of R.C. Section 2917.12(A)(1) (disturbing a lawful meeting).
13. The charges against both Relators stem from a May 19, 2014 Village of Bolivar (Ohio) special meeting where the elected officials voted to supercede the will of the voters November 2013 ballot initiative, and settle a federal case which effected the siting of a sand and gravel operation within the Village.
14. Steven Anderson, until he was disqualified by Relators, Judge Richard D. Reinbold, held himself out to be the prosecutor in the criminal cases against Relators.

¹ The naming of Respondents in this Writ does not, in any form or manner, imply impropriety on the part of Respondents. In fact, a fraud upon the Court was committed, and continues to be perpetrated, which necessitates this Writ. The Respondents are being named purely based upon the technical requirements of a Writ of Prohibition and Mandamus.

15. He has also held himself out to be the prosecutor in criminal cases against other Defendants, for alleged criminal offenses occurring within the Village of Bolivar.
16. Mr. Anderson has filed or prosecuted, and is currently prosecuting, criminal cases for alleged crimes committed within the Village of Bolivar.
17. Mr. Anderson works for Fitzpatrick, Zimmerman & Rose Co.
18. Steven A. Anderson, without authority of law, has illegally, improperly, and fraudulently, designated himself as prosecutor in the criminal cases against Relators, Irvin W. Huth and Michela Huth. *Ex. C. State of Ohio's Brief on Stay of Case and Conflict of Interest Issues.*
19. Steven A. Anderson, without authority of law, has illegally, improperly, and fraudulently, designated himself as prosecutor in other criminal cases based upon alleged criminal offenses occurring within the Village of Bolivar. *Ex D.*
20. Mr. Anderson claims to be the "Prosecutor for the Villages of Bolivar, Midvale and Strasburg." *Ex. D.*

COUNT I

STEVEN A. ANDERSON HAS UNLAWFULLY FILED OR PROSECUTED, IN THE NEW PHILADLEPHIA MUNICIPAL COURT, CRIMINAL CASES BASED UPON CRIMINAL OFFENSES OCCURING WITH THE VILLAGE OF BOLIVAR

21. The verified allegations stated in all preceding paragraphs above are incorporated as if fully rewritten herein.
22. Ohio Revised Code § 1901.34 sets forth certain persons who have the authority to "prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer." *See R.C. § 1901.34(A).*
23. R.C. § 1901.34(A) provides in part:

(A) Except as provided in divisions (B) and (D) of this section, the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer.

24. Steven A. Anderson claims to be, and has been holding himself out as, the prosecutor for the Village of Bolivar. *Exs. C & D.*
25. The Village of Bolivar did not designate Steven A. Anderson as one of the persons statutorily authorized by R.C. § 1901.34(A),² to prosecute, for the Village of Bolivar, alleged criminal offenses which have occurred within the Village of Bolivar. Therefore Mr. Anderson has, and is, acting without prosecutorial authority.
26. Because Steven A. Anderson is not the chief legal officer (nor has he been designated as an assistant prosecutor, by a prosecutor validly holding the position of chief legal officer), he has no statutory authority to “prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer.”
27. Mr. Anderson has not been officially appointed to prosecute criminal cases, but rather just appointed himself a prosecutor.

² R.C. § 1901.34(A) provides in part:

Except as provided in divisions (B) and (D) of this section, the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer.

28. Mr. Anderson is a private attorney who is prosecuting, before the New Philadelphia Municipal Court, cases which the alleged criminal offense occurred within the Village of Bolivar.
29. Nevertheless, in contravention of the law, Steven A. Anderson has prosecuted, is prosecuting, and will prosecute, persons for alleged crimes committed within the Village of Bolivar.
30. Therefore, under the current circumstances, the criminal cases against the Relators,³ and all past, pending, and future criminal cases filed or prosecuted by Steven A. Anderson, against Relators, and other Defendants, who allegedly committed criminal offenses within the Village of Bolivar, are unlawful as a matter of law.

COUNT II
THE VILLAGE OF BOLIVAR HAS NO CHIEF LEGAL OFFICER

31. The verified allegations stated in all preceding paragraphs above are incorporated as if fully rewritten herein.
32. Sometime in 2014, the Village of Bolivar enacted Ordinance #O-88-2014 as an emergency measure. *Ex. E.*
33. This Ordinance is titled “An Ordinance Providing for the Contractual Services of Legal Counsel for the Village of Bolivar and Declaring it as an Emergency.”
34. This Ordinance provides in relevant part:

SECTION 1. That legal counsel shall be provided for this Village and the legal professional corporation of Fitzpatrick, Zimmerman & Rose Co., L.P.A., of New Philadelphia, Ohio, is hereby contracted as such counsel and shall be known as “Legal Counsel

³ 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

of the Village of Bolivar”. Said Legal Counsel is hereby contracted for a term beginning January 1, 2014 and ending December 31, 2014.

SECTION 2. Said Village Legal Counsel shall be the legal advisor for the Village and the officers thereof in their official capacity and as such, attorneys to prosecute and defend all actions by or against the said Village or any department or officer thereof, during the term of its contract; to render legal opinions to the said Council or any department or officer of the Village during the term of its contract upon the request in writing.

35. In sum, this Ordinance designated Fitzpatrick, Zimmerman & Rose Co, L.P.A., as the Legal Counsel for the Village of Bolivar, to represent the Village and render legal opinions for it.
See Ordinance #O-88-2014.
36. This Ordinance did not designate Fitzpatrick, Zimmerman & Rose Co, L.P.A to perform any other duties, than the ones so designated in the Ordinance.
37. Therefore, the Village of Bolivar has no person with statutory authority who “shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer.”
38. Consequently, any person or entity holding themselves out as the chief legal officer, or holding themselves out as the prosecutor, is acting without legal authority, if that person or entity is prosecuting cases for crimes allegedly committed within the Village of Bolivar.
39. Again, R.C. § 1901.34(A) provides in part:

Except as provided in divisions (B) and (D) of this section, the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer.

40. Therefore, under the current circumstances, the criminal cases against the Relators,⁴ and all past, pending, and future criminal cases filed or prosecuted by Steven A. Anderson, against Relators and other Defendants, who allegedly committed criminal offenses within the Village of Bolivar, are unlawful as a matter of law.

COUNT III
A CORPORATION CANNOT BE A CHIEF LEGAL OFFICER

41. The verified allegations stated in all preceding paragraphs above are incorporated as if fully rewritten herein.
42. The Village of Bolivar Ordinance #O-88-2014 designated the law firm, Fitzpatrick, Zimmerman & Rose as Legal Counsel for the Village.
43. Assuming arguendo, that Fitzpatrick, Zimmerman & Rose was intended to be designated, by the Village of Bolivar, to be the chief legal officer for all purposes, notwithstanding the limited responsibilities set forth in Ordinance #O-88-2014, a corporation cannot be a chief legal officer for purposes of R.C. § 1901.34(A).⁵
44. According to an Ohio Attorney General Opinion, a prosecutor hold a position of public office. *Ex. F, Ohio Attorney General Opinion No. 99-027, March 22, 1999, at page 3,*

⁴ 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

⁵ R.C. § 1901.34(A) provides in part:

Except as provided in divisions (B) and (D) of this section, the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer.

available at <http://www.ohioattorneygeneral.gov/Files/Legal/Opinions/1999-Opinions/1999-027> (“A prosecuting attorney * * * holds a public office.”).⁶

45. A corporation cannot be a public official, just as a corporation cannot be a mayor, a police chief, or a city council member.
46. A prosecutor must be a person. *See* R.C. § 102.01(B).⁷
47. Fitzpatrick, Zimmerman & Rose is not a person for the purpose of holding a public office, and therefore cannot hold the public office as the village solicitor, city director of law, or similar chief legal officer.

⁶ The Ohio Supreme Court has thus described the standards for determining whether a position is a public office or employment:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him....

The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

....

... [I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state. (Emphasis added.)

State ex rel. Landis v. Board of Comm'rs, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917); accord *State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950) (citing *State ex rel. Landis v. Board of Comm'rs* with approval).

⁷ (B) "Public official or employee" means any person who is elected or appointed to an office or is an employee of any public agency.

The Village of Bolivar is a public agency. *See* R.C. 102.01(C) (“Public agency” means the general assembly, all courts, any department, division, institution; board, commission, authority, bureau or other instrumentality of the state, a county, city, village, or township, the five state retirement systems, or any other governmental entity.”).

48. A law firm cannot be a public official, and any claimed appointment of the law firm to act as the prosecutor for the Village of Bolivar is analogous to suggesting that a corporation can be the Village Mayor, Council Member, or Chief of Police.
49. Even if, however, a corporation could hold a position of public office, the Village of Bolivar's ordinance, limits the duties of Fitzpatrick, Zimmerman, and Rose to representing the Village of Bolivar, and providing legal opinions. *See Ex. E*, Ordinance #O-88-2014.
50. Therefore, under the current circumstances, the criminal cases against the Relators,⁸ and all past, pending, and future criminal cases filed or prosecuted by Steven A. Anderson, against Relators and other Defendants, who allegedly committed criminal offenses within the Village of Bolivar, are unlawful as a matter of law.

COUNT IV
THE VILLAGE OF BOLIVAR UNLAWFULLY
DELEGATED LEGISLATIVE POWER

51. The verified allegations stated in all preceding paragraphs above are incorporated as if fully rewritten herein.
52. Assuming arguendo, Fitzpatrick, Zimmerman & Rose could be the chief legal officer for purposes of R.C. § 1901.34(A),⁹ despite it being a corporation rather than a person, the

⁸ 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

⁹ R.C. § 1901.34(A) provides in part:

Except as provided in divisions (B) and (D) of this section, the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer.

prosecutorial acts of its employee, Steven A. Anderson constitute an illegal delegation of legislative power.

53. The Village of Bolivar's acquiescence to the designation by Fitzpatrick, Zimmerman & Rose of Steven A. Anderson as prosecutor, constitutes an illegal delegation of legislative authority.
54. The passing of Ordinance #O-88-2014 was a legislative act of the legislative body of the Village of Bolivar. *See Ex. rel. City of Brecksville v. Husted*, 133 Ohio St.3d 301, 304, 2012-Ohio-4530, 978 N.E.2d 157, ¶ 11 ("The test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence.") (internal citation and quotation marks omitted).
55. The Village of Bolivar's Ordinance #O-88-2014 is invalid to the extent it is being interpreted to allow Fitzpatrick, Zimmerman & Rose to choose public officials.
56. The purported delegation by Fitzpatrick, Zimmerman & Rose of Mr. Anderson as the prosecutor is impermissible under the law.¹⁰ *City of Norwood v. Horney*, 161 Ohio App.3d 316, 2005-Ohio-2448, 830 N.E.2d 381, ¶ 52 (1st Dist.), citing *Singer v. Troy* (1990), 67 Ohio App.3d 507, 587 N.E.2d 864 ("Where the final decision to exercise legislative authority rests with the municipality's city council, then there can be no delegation of municipal legislative authority"), reversed on other grounds, *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115; see also *City of Cincinnati v. Cook*, 107 Ohio St. 223, 226, 140 N.E. 655 (1923) (The principle is a plain one that the public powers or trusts devolved by law or charter upon a council or governing body, to be exercised by it when and in such manner as *it*

¹⁰ It should be noted that the only indicia of any such designation are the statements by Mr. Anderson, and that at no time has Fitzpatrick, Zimmerman & Rose ever formally designated him to act or defined in what capacity, and the limits of his discretion.

shall judge best, *cannot be delegated to others.*") (*internal citation and quotation marks omitted*) (*emphasis in Cook*).

57. The Village of Bolivar's Ordinance appointing the law firm of Fitzpatrick, Zimmerman & Rose, is unlawful and invalid to the extent the Village of Bolivar's ordinance permits the law firm to appoint public officers.
58. The Village of Bolivar cannot delegate its obligation to designate a chief legal officer, any more than it can delegate to someone else to choose who will be the police chief of the Village.
59. Therefore, under the current circumstances, the criminal cases against the Relators,¹¹ and all past, pending, and future criminal cases filed or prosecuted by Steven A. Anderson, against Relators and or other Defendants, who allegedly committed criminal offenses within the Village of Bolivar, are unlawful as a matter of law.

COUNT IV
A PROSECUTOR MUST TAKE AN OATH

60. The verified allegations stated in all preceding paragraphs above are incorporated as if fully rewritten herein.
61. R.C. § 705.28 requires officers and employees of municipalities to take an oath:

Every officer of a municipal corporation and every employee holding a position upon an annual salary, before entering upon the duties of his office, shall take and subscribe to an oath or affirmation, which shall be filed and kept in the office of the clerk of the municipal corporation, that he will * * * .

¹¹ 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

62. R.C 3.22 requires “[e]ach person chosen or appointed to an office under the constitution or laws of this state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties.”
63. Fitzpatrick, Zimmerman, & Rose Co, is not a public officer, therefore by operation of law (R.C. § 705.28 and R.C. § R.C. § 3.22) it cannot take the required oath.
64. Moreover, Fitzpatrick, Zimmerman, & Rose Co, is not a person, and non-persons cannot take oaths.
65. Even, assuming arguendo, Fitzpatrick, Zimmerman, & Rose Co, is a public official and a principal of the law firm could take an oath on behalf of the firm, upon information and belief, Fitzpatrick, Zimmerman, & Rose Co never took the required oath.
66. Thus, even if Steven Anderson individually took an Oath, as he is not a principal in the firm, he is not authorized to take the oath on behalf of the firm.
67. And, even if Steven Anderson individually took an Oath, he is not a legal officer for purposes of R.C. § 1901.34(A),¹² and therefore he would not be authorized to take the oath, and that oath would have no validity.
68. Therefore, under the current circumstances, the criminal cases against the Relators,¹³ and all past, pending, and future criminal cases filed or prosecuted by Steven A. Anderson, against

¹² R.C. § 1901.34(A) provides in part:

Except as provided in divisions (B) and (D) of this section, the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer.

¹³ 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

Relators and other Defendants, who allegedly committed criminal offenses within the Village of Bolivar, are unlawful as a matter of law.

COUNT VII
**STEVEN ANDERSON, AS A PRIVATE ATTORNEY,
IS STATUTORILY BARRED FROM PROSECUTING RELATOR'S CRIMINAL CASES**

69. The verified allegations stated in all preceding paragraphs above are incorporated as if fully rewritten herein.

70. For all of the reasons stated above, Steven A. Anderson is not the prosecutor, and therefore acts solely in the capacity as a private attorney.

71. Ohio Revised Code § 2938.13 prohibits the prosecution of criminal cases by a private attorney employed or retained by a complaining witness. *See* R.C. § 2938.13 (“But the magistrate or judge shall not permit prosecution of any criminal case by private attorney employed or retained by a complaining witness.”).

72. R.C. § 2938.13 provides:

In any case prosecuted for violation of a municipal ordinance the village solicitor or city director of law, and for a statute, he or the prosecuting attorney, shall present the case for the municipal corporation and the state respectively, but either may delegate the responsibility to some other attorney in a proper case, or, if the defendant be unrepresented by counsel may with leave of court, withdraw from the case. But the magistrate or judge shall not permit prosecution of any criminal case by private attorney employed or retained by a complaining witness.

*see also Ex. G, Ohio Attorney General Opinion No. 81-094.*¹⁴

73. The Village of Bolivar’s Mayor, Rebecca Hubble is the complaining witness.

¹⁴ Available at <http://www.ohioattorneygeneral.gov/About-AG/Organizational-Structure/Opinions/Opinion-Results.aspx?searchtext=1981-094&searchmode=anyword>

74. Fitzpatrick, Zimmerman & Rose represents Mayor Hubble and the Village of Bolivar, and Steven A. Anderson is an employee of the law firm; thus as Mr. Anderson is a private attorney of the law firm representing the complaining witness, his role as prosecutor in the Relators' criminal case, is unlawful, and specifically barred as a matter of law.

75. Therefore, under the current circumstances, the criminal cases against the Relators,¹⁵ having been filed by Steven A. Anderson, a private attorney representing the complaining witnesses, is unlawful by operation of law.

COUNT VIII

THIS COURT LACKS JURISDICTION TO HEAR CRIMINAL CASES BEING FILED OR PROSECUTED BY STEVEN A. ANDERSON, FOR CRIMES ALLEGEDLY COMMITTED WITHIN THE VILLAGE OF BOLIVAR

76. The verified allegations stated in all preceding paragraphs above are incorporated as if fully rewritten herein.

77. Because the New Philadelphia Municipal Court is hearing pending criminal cases related to alleged criminal offenses occurring within the Village of Bolivar, and which Steven A. Anderson is or was the prosecutor for, the Respondents have no jurisdiction over those cases.

78. Because Steven A. Anderson has not been designated as legal officer, nor designated as an assistant prosecutor by a person properly designated, he has no authority to file and prosecute criminal offense, is making fraudulent filings, and has committed a fraud upon the Respondents, the Relators, and the public.

79. Under the current circumstances, the criminal cases against the Relators,¹⁶ and all other pending criminal cases filed or prosecuted by Steven A. Anderson, for crimes allegedly committed within the Village of Bolivar, are unlawful as a matter of law.

¹⁵ 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

80. Respondents have no jurisdiction to hear criminal cases being filed or prosecuted by Steven A. Anderson, for crimes allegedly committed within the Village of Bolivar.

COUNT IX

THIS COURT LACKED JURISDICTION TO HEAR CRIMINAL CASES FILED OR PROSECUTED BY THE VILLAGE OF BOLIVAR BY STEVEN A. ANDERSON

81. The verified allegations stated in all preceding paragraphs above are incorporated as if fully rewritten herein.
82. Because the New Philadelphia Municipal Court has heard criminal cases related to alleged criminal offenses occurring within the Village of Bolivar, and which Steven A. Anderson was the prosecutor for, the Respondents have no jurisdiction over those cases.
83. Because Steven A. Anderson has not been designated as legal officer, nor designated as an assistant prosecutor by a person properly designated, he had no authority to file and prosecute criminal offense, is making fraudulent filings, and has committed a fraud upon the Respondents and Relators.
84. Under the current circumstances, past criminal cases which were filed or prosecuted by Steven A. Anderson, for crimes allegedly committed within the Village of Bolivar, were unlawful as a matter of law.
85. Thus, based upon the continuing fraud upon the Court, Respondents have no jurisdiction to hear criminal cases which were filed or prosecuted by Steven A. Anderson, for crimes allegedly committed within the Village of Bolivar.

¹⁶ 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

86. For all the reasons state above, Steven Anderson has no authority to hold himself out as the prosecutor, and to act as prosecutor. And his actions in doing so have been, and are, improper, fraudulent, illegal and unethical.

87. Therefore, under the current circumstances, the criminal cases against the Relators,¹⁷ and all past, pending, and future criminal cases filed or prosecuted by Steven A. Anderson, against Relators and other Defendants, who allegedly committed criminal offenses within the Village of Bolivar, are unlawful as a matter of law.

COUNT X
OTHER WRIT

88. The verified allegations stated in all preceding paragraphs above are incorporated as if fully rewritten herein.

89. Relators ask this Court to grant it any other relief, which this Court should find necessary, in order to carry out the administration of justice.

RELATORS HAVE NO ADEQUATE REMEDY AT LAW

90. The verified allegations stated in all preceding paragraphs above are incorporated as if fully rewritten herein.

91. Steven A. Anderson's improperly and fraudulently holding himself out as the prosecutor, notwithstanding the various reasons set forth above, constitutes a continuing fraud upon the court, and therefore is antithetical to the proper administration of justice, and it is improper for the court to be a part of, and willing participant in such a fraud.

¹⁷ 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

92. Steve A. Anderson's unlawful actions has caused, and will continue to cause injury to the Relators and to other criminal defendants who are being filed or prosecuted by Mr. Anderson, for crimes committed within the Village of Bolivar.
93. Steve A. Anderson's unlawful actions have caused injury to other criminal defendants who have been filed or prosecuted by Mr. Anderson, for crimes committed within the Village of Bolivar.
94. This Complaint is supported by an Affidavit of Irvin W. Huth and an Affidavit of Michela Huth.
95. The New Philadelphia Municipal Court is exercising judicial authority by hearing the criminal cases of Relators, which was filed and prosecuted, by Steven A. Anderson, for crimes committed in the Village of Bolivar.
96. The New Philadelphia Municipal Court has exercised judicial authority by hearing criminal cases being filed or prosecuted by Steven A. Anderson, for crimes committed in the Village of Bolivar.
97. This judicial authority is not authorized by law, because that Court has no jurisdiction to hear cases which were filed or prosecuted by Steven A. Anderson, for crimes committed in the Village of Bolivar.
98. Relators and other such similar defendants, have no other adequate remedy in the ordinary course of law if this writ of prohibition and mandamus is denied.

WHEREFORE, Relators, Irvin W. Huth and Michela Huth, respectfully pray for this Court to issue Writ of Prohibition and Mandamus immediately, that the New Philadelphia Municipal Court and Honorable Judge Richard D. Reinbold lack jurisdiction to hear all pending

criminal cases filed or prosecuted by Steven A. Anderson for crimes allegedly committed within the Village of Bolivar. Additionally, Relators requests that this Court to grant their Writ of Prohibition and Mandamus and ask this Court to:

- (A) Restrain Respondent Court and Judge from exercising jurisdiction over all pending criminal cases based upon alleged criminal offenses which occurred within the Village of Bolivar and which are pending in the New Philadelphia Municipal Court, and are being filed or prosecuted by Steven A. Anderson (Ohio Attorney Registration No. 0066445),
- (B) Restrain Respondent Court and Judge from exercising jurisdiction over the criminal case of Relator Irvin W. Huth, New Philadelphia Municipal Court Case No. CRB 1400643 A-C and the criminal case of Relator Michela Huth, New Philadelphia Municipal Court Case No. CRB 1400642.
- (C) Order the Respondents to not accept any further criminal cases filed by Steven A. Anderson, based upon criminal offenses committed within the Village of Bolivar.
- (D) Order the Respondent New Philadelphia Municipal Court to dismiss any current criminal cases filed by Steven A. Anderson, based upon criminal offenses committed within the Village of Bolivar.
- (E) Order the Respondent to expunge any past criminal cases filed by Steven A. Anderson, based upon criminal offenses committed within the Village of Bolivar.
- (F) Order the Respondent to seal all closed criminal cases filed by Steven A. Anderson, based upon criminal offenses committed within the Village of Bolivar.

(G) Order the Respondents to dismiss the criminal cases of Relators: 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

(H) Restrain Relators from continuing to adjudicate the two criminal cases: 1) State v. William Huth, Case No. CRB 1400643 A-C; and 2) State v. Michela Huth, Case No. CRB 1400642.

Relator also prays this Court to issue permanent Writs of Prohibition and Mandamus of the same effect following hearing and argument.

Respectfully submitted,



MICHELA HUTH (Reg. No. 0091353)
PO Box 673
257 Canal Street
Bolivar, OH 44612
Phone: 330-275-9219
Fax: 330-874-4884
Email: michelahuth.esq@gmail.com
Attorney for Relator Bill Huth, and Pro Se.

INSTRUCTIONS TO THE CLERK

Pursuant to the Supreme Court of Ohio, Rules of Practice, R. 12.02, please issue summons and serve this Complaint by Certified Mail, to the Respondents.



MICHELA HUTH (Reg. No. 0091353)
Attorney for Relators

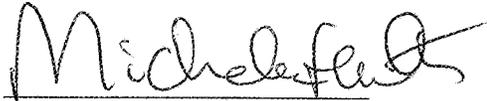
STATE OF OHIO)

)

COUNTY OF TUSCARAWAS)

AFFIDAVIT

Michela Huth, being first duly sworn, says that she is a criminal defendant in Case No. . CRB 1400642, captioned State v. Michela Huth, and that she has read the foregoing Complaint for Writ of Prohibition and Mandamus, that she is acquainted with the facts set forth in the Complaint, and that the facts stated therein are true to the best of her knowledge.



Michela Huth
Relator

Sworn to before me and subscribed in my presence this 14 day of July 2014.



LOIS L. GIRARD
Notary Public, State of Ohio
My Commission Expires June 2, 2015
Recorded in Tuscarawas County

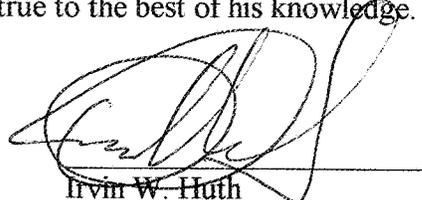


Notary Public

STATE OF OHIO)
)
COUNTY OF TUSCARAWAS)

AFFIDAVIT

Irvin W. Huth, being first duly sworn, says that he is a criminal defendant in Case No. CRB 1400643 A-C, captioned State v. William Huth, and that he has read the foregoing Complaint for Writ of Prohibition and Mandamus, that he is acquainted with the facts set forth in the Complaint, and that the facts stated therein are true to the best of his knowledge.


Irvin W. Huth
Relator

Sworn to before me and subscribed in my presence this 14 day of July 2014.



LOIS L. GIRARD
Notary Public, State of Ohio
My Commission Expires June 2, 2015
Recorded in Tuscarawas County


Notary Public

SUMMONS IN LIEU OF ARREST WITHOUT WARRANT, AND COMPLAINT UPON SUCH SUMMONS

(Rule 4(A)(3))

New Philadelphia Municipal Court
New Philadelphia TUSCARAWAS County, Ohio

THE STATE OF OHIO

Village of Bolivar

William Hutch
name of defendant

1584 ST RT 212 NW
address

Bolivar OHIO 44612

D.O.B. 12/23/1992 SEX M

Soc. Sec. No. 7486

SUMMONS NO.

CASE NO.

DOC. PAGE

Summons in Lieu of Arrest Without Warrant, and Complaint Upon Such Summons (Rule 4(A)(3))

TO DEFENDANT:

SUMMONS

In lieu of immediate arrest upon a misdemeanor you are summoned and ordered to appear at 1 o'clock P.M. on 4th June 2014 day - month - year

New Philadelphia Municipal Court

If you fail to appear at this time and place you may be arrested. This summons served personally on the defendant on 4th June 2014

COMPLAINT

On May 19th 2014 at 117 Almond St Bolivar Village Council Room place

you have been charged with Disturbance of Public Order by outburst of anger & forcible motion of hands 2917.12 (A)(1)

Signature of Issuing/Charging Law Enforcement Officer

Being duly sworn the issuing-charging law enforcement officer states that he has read the above complaint and that it is true.

Officer Mark Myers Issuing/Charging Law Enforcement Officer

Sworn to and subscribed before me by

/Judge/Clerk/Deputy Clerk/

Notary Public

My Commission Expires

County/State of Ohio/

NOTICE TO DEFENDANT: The officer is not required to swear to the complaint upon your copy of the summons and complaint. He swears to the complaint on the copy he files with the court. You may obtain a copy of the sworn complaint before hearing time. You will be given a copy of the sworn complaint before or at the hearing. For information regarding your duty to appear call

fill in telephone number(s)

NOTICE TO DEFENDANT UNDER EIGHTEEN YEARS OF AGE: You must appear before the County Juvenile Court,

at the time and place determined by that Court. The Juvenile Court will notify you when and where to appear. This Summons and Complaint will be filed with the Juvenile Court. The Complaint may be used as a juvenile complaint. You may obtain a copy of the sworn complaint from the Juvenile Court before the Juvenile Court hearing. You will attend the Juvenile Court hearing. Juvenile Court call

DEFEN

EXHIBIT A

SUMMONS IN LIEU OF ARREST WITHOUT WARRANT, AND COMPLAINT UPON SUCH SUMMONS

(Rule 4(A)(3))

New Philadelphia Municipal Court
New Philadelphia Twp. Adams County, Ohio

THE STATE OF OHIO

14998 of Bellevue
William Hutz
name of defendant
1580 ST ST 212 W.W.
address
Bellevue OHIO 44612
D.O.B. 12/24/1942 SEX M
Soc. Sec. No. 74810

SUMMONS NO.
CASE NO.
DOC. PAGE
Summons in Lieu of Arrest Without Warrant, and Complaint Upon Such Summons (Rule 4(A)(3))

TO DEFENDANT:

SUMMONS

In lieu of immediate arrest upon a misdemeanor you are summoned and ordered to appear at 1 o'clock PM. on 5th June 2014 day - month - year

New Philadelphia Municipal Court
If you fail to appear at this time and place you may be arrested.
This summons served personally on the defendant on May 27 2014

COMPLAINT

On May 19th 2014 at 117 Al Canal St Bellevue place
you knowingly made cause for Major Huggins to
describe the offense charged and state the numerical
design of the applicable statute or ordinance
2903.22 (A)

Signature of Issuing-Charging Law Enforcement Officer

Being duly sworn the issuing-charging law enforcement officer states that he has read the above complaint and that it is true.

Signature of Issuing-Charging Law Enforcement Officer

Sworn to and subscribed before me by on

/Judge/Clerk/Deputy Clerk/

or Court

Notary Public

My Commission Expires

County/State of Ohio/

NOTICE TO DEFENDANT: The officer is not required to swear to the complaint upon your copy of the summons and complaint. He swears to the complaint on the copy he files with the court. You may obtain a copy of the sworn complaint before hearing time. You will be given a copy of the sworn complaint before or at the hearing. For information regarding your duty to appear call.

fill in telephone number(s)

NOTICE TO DEFENDANT UNDER EIGHTEEN YEARS OF AGE: You must appear before the County Juvenile Court.

at the time and place determined by that Court. The Juvenile Court will notify you when and where to appear. This Summons and Complaint will be filed with the Juvenile Court. The Complaint may be used as a juvenile complaint. You may obtain a copy of the sworn complaint from the Juvenile Court before the Juvenile Court hearing. You will be notified of the Juvenile Court hearing.

Juvenile Court call

DEFEN

SUMMONS IN LIEU OF ARREST WITHOUT WARRANT, AND COMPLAINT UPON SUCH SUMMONS

(Rule 4(A)(3))

New Philadelphia Municipal Court
NEW Philadelphia TUSCARAWAS County, Ohio
(City) (Name of County)

THE STATE OF OHIO

Village of Bolivar

William North

name of defendant 1520 ST RT 212 NW

address TOLLIVER OHIO 44610

D.O.B. 02/24/1942 SEX M

Soc. Sec. No. 74610

SUMMONS NO.

CASE NO.

DOC. PAGE

Summons in Lieu of Arrest Without Warrant, and Complaint Upon Such Summons (Rule 4(A)(3))

TO DEFENDANT:

SUMMONS

In lieu of immediate arrest upon a misdemeanor you are summoned and ordered to appear at 1 o'clock P.M. on 5th June 2014 day - month - year

If you fail to appear at this time and place you may be arrested.

This summons served personally on the defendant on May 29 2014

COMPLAINT

On May 19th 2014 at 117N Canal St Bolivar Village Council Room place

you where DISORDERLY IN RECKLESS BY THREATING TO describe the offense charged and state the numerical designation of the applicable statute or ordinance harm Mayor North by saying "I will hurt you" 2917.11(A)(1)

Signature of Issuing Charging Law Enforcement Officer

Being duly sworn the issuing charging law enforcement officer states that he has read the above complaint and that it is true.

Signature of Issuing Charging Law Enforcement Officer

Sworn to and subscribed before me by

/Judge/Clerk/Deputy Clerk/

or

Notary Public

My Commission Expires

NOTICE TO DEFENDANT: The officer is not required to swear to the complaint upon your copy of the summons and complaint. He swears to the complaint on the copy he files with the court. You may obtain a copy of the sworn complaint before hearing time. You will be given a copy of the sworn complaint before or at the hearing. For information regarding your duty to appear call

fill in telephone number(s)

NOTICE TO DEFENDANT UNDER EIGHTEEN YEARS OF AGE: You must appear before the County Juvenile Court

at the time and place determined by that Court. The Juvenile Court will notify you when and where to appear. This Summons and Complaint will be filed with the Juvenile Court. The Complaint may be used as a juvenile complaint. You may obtain a copy of the sworn complaint from the Juvenile Court before the Juvenile Court hearing. You will be given a copy of the sworn complaint before the Juvenile Court hearing. For

Juvenile Court call

DEFENDANT

SUMMONS IN LIEU OF ARREST WITHOUT WARRANT, AND COMPLAINT UPON SUCH SUMMONS

(Rule 4(A)(3))

New Philadelphia Municipal Court
New Philadelphia Tuscawas County, Ohio

THE STATE OF OHIO

Village of Bolivar v.
Michelle J. North
name of defendant
220 SR 312 NW
address
Bolivar Ohio 44612
D.O.B. 7-24-1968 SEX F
Soc. Sec. No. 06 90

SUMMONS NO.
CASE NO.
DOC. PAGE
Summons In Lieu of Arrest Without Warrant, and Complaint Upon Such Summons (Rule 4(A)(3))

TO DEFENDANT:
In lieu of immediate arrest upon a misdemeanor you are summoned and ordered to appear at 1 o'clock P.M. on 5th June 2014 day - month - year

If you fail to appear at this time and place you may be arrested.
This summons served personally on the defendant on 5th June 2014

COMPLAINT

On May 19th 2014 at 117 Al Canal St Bolivar place

you knowingly EXCEEDED/EXCEEDED a limit hereby describe the offense charged and state the numerical designation of the applicable statute or ordinance
2917.12 (A)(1)

Signature Of Issuing-Charging Law Enforcement Officer

Being duly sworn the issuing-charging law enforcement officer states that he has read the above complaint and that it is true.

Officer Mark Reynolds Issuing-Charging Law Enforcement Officer

Sworn to and subscribed before me by on

/Judge/Clerk/Deputy Clerk/ Court

or

Notary Public My Commission Expires

NOTICE TO DEFENDANT: The officer is not required to swear to the complaint upon your copy of the summons and complaint. He swears to the complaint on the copy he files with the court. You may obtain a copy of the sworn complaint before hearing time. You will be given a copy of the sworn complaint before or at the hearing. For information regarding your duty to appear call

fill in telephone number(s)
NOTICE TO DEFENDANT UNDER EIGHTEEN YEARS OF AGE: You must appear before the County Juvenile Court,

at the time and place determined by that Court. The Juvenile Court will advise you when and where to appear. The Juvenile Court. The Complaint will be filed with the Juvenile Court. You will be given a copy of the sworn complaint before or at the hearing. For information regarding your duty to appear call the Juvenile Court call

EXHIBIT B

DEFENDANT

IN THE NEW PHILADELPHIA MUNICIPAL COURT
NEW PHILADELPHIA, OHIO

STATE OF OHIO,

Plaintiff,

v.

IRVIN W. HUTH

Defendant.

* CASE NO. CRB 1400643 A-C

* JUDGE VONALLMAN

* STATE OF OHIO'S BRIEF
* ON STAY OF CASE AND CONFLICT OF
* INTEREST ISSUES

*

Now comes the State of Ohio, by and through counsel, and hereby respectfully requests that this Honorable Court deny the Defendant's motion to stay the trial and disqualify Atty. Anderson as Prosecutor for the State of Ohio in this case.

For cause, the State states that the Defendant's requests are not supported by the law and have not merit. Defendant's motion came before this Court for a hearing on June 9, 2014. The Court requested a briefing on the various issues at play. This brief sets forth in more detail the State's position.

Stay of the Criminal Proceedings

First, it is clear that the Defendant has no basis for requesting a stay of the criminal proceedings due to a pending civil proceeding against the Village of Bolivar and its officials, including Atty. Anderson. Ohio law is clear that where there is a pending criminal action in state court, and the defendant files a civil lawsuit in federal court related to the same matter, it is the civil case which is stayed until the criminal case concludes, not the other way around. See the case of *Younger v. Harris*, 401 U.S. 379 (1971), where the court held that "a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either

EXHIBIT C

injunction or declaration in an existing state criminal prosecution. Such circumstances exist only when there is a threat of irreparable injury "both great and immediate." The *Younger* court also stated that such extraordinary circumstances might be shown "if the state criminal statute in question were patently and flagrantly unconstitutional on its face" or "or if there has been bad faith and harassment-official lawlessness-in a statute's enforcement". *Id.* This is referred to in other cases on the issue as the Abstention Doctrine. See also *Jenkins v. Moyer*, 2008 WL 2944606 (attached). In *Moyer*, the defendant was charged criminally in state court and filed a civil rights case in federal court while the criminal case was pending against, among other defendants, the prosecutor. The court applied the Abstention Doctrine, stating that under *Younger*, the federal court must abstain where "[1] state proceedings are pending; [2] the state proceedings involve an important state interest; and [3] the state proceeding will afford the plaintiff an adequate opportunity to raise his constitutional claims." *Id.* The *Moyer* court noted that all three elements were present in that case, and further noted that "state criminal prosecutions have traditionally been considered an arena in which federal courts decline to interfere." *Id.* Finally, the court held that, absent evidence to the contrary, "the federal court must presume that the state courts are able to protect the interests of a federal plaintiff." *Id.* However, it is important for our purposes here to note that the remedy under this Doctrine is the staying of the *civil* case, and to allow the criminal case to proceed. Whether the civil case is stayed or not pursuant to this doctrine is for the federal court to discuss, and not the decision of this Court. There is no case law or statute which would provide for the staying of the criminal case due to a pending civil matter, and this Court should deny the Defendant's motion to stay this case.

Disqualification of Prosecutor Anderson

Secondly, the Defendant's motion also requests that Atty. Anderson be disqualified due to being named as a defendant in the Defendant's civil lawsuit. Again, the Defendant provides no basis for this assertion, and none is found in either case law or statute. The case law which does exist on this issue does not support disqualification of Atty. Anderson. See the case of *City of Brecksville v. Alsenas*, 2000 WL 1754002 (attached). Here the defendant was criminally charged by a prosecutor in state court, and the defendant sought to disqualify the prosecutor because he had sued the prosecutor for violating his civil rights in another matter. The court held the defendant's assertion that the prosecutor should be presumed biased due to the case brought against him in civil court was unfounded, and that "a mere allegation of a prosecutor's personal bias, without more, does not warrant disqualification of that prosecutor." *Id.* See also the case of *State v. White*, 2004-Ohio-5200, which provides that "the mere appearance of impropriety is insufficient to warrant the disqualification of an entire prosecutor's office." *White* also provides additional guidance on the disqualification of entire office. It states:

A decree disqualifying a prosecutor's office should only be issued by a court when actual prejudice is demonstrated. In making the determination, relevant factors may include: 1) the type of relationship the disqualified prosecutor previously had with a defendant, 2) the screening mechanism, if any, employed by the office, 3) the size of the prosecutor's office, and 4) the involvement the disqualified prosecutor had in the case. Prejudice will not be presumed by an appellate court where none is demonstrated.

In this case, the Defendant has failed to provide any proof of actual impropriety or a type of relationship with the Defendant which would provide a conflict of interest. There is no case

law which suggests that a prosecutor should be automatically disqualified simply because the defendant files a lawsuit against them. If that were the case, defendants would be able to avoid “tough” prosecutors simply by filing a civil lawsuit against them. It also must be noted that prosecutors have absolute immunity against civil suits in the performance of their duties, and as such, Atty. Anderson will be dismissed from the Defendant’s lawsuit shortly. *See Imbler v. Pachtman*, 424 U.S. 409, 427–28, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

Thirdly, although not included in the Defendant’s motion, Atty. Huth raised the issue at the June 9, 2014 hearing that this is the third prosecution of opponents to the sand and gravel mining operation in Bolivar by Atty. Anderson. The State assumes that two of the cases Atty. Huth is referring to are the case at hand and the case against Atty. Huth in Case Number CRB 1400642, which arise out of both Defendant’s and Atty. Huth’s disruptive conduct at the same meeting. Both were charged with offenses based on the Prosecutor’s evaluation of their independent conduct, which can be seen in the different nature of their charges. The only other case the State can think of which might apply here is the case of State of Ohio v. Robert Austin, Case Number CRB 1301636 A-C. The State understands that Mr. Austin is an opponent of the sand and gravel mining. That case dealt with Mr. Austin’s commission of domestic violence against his wife, in which he broke her wrist. It was completely unrelated to Mr. Austin’s political views. It cannot be said to show some kind of bias against sand and gravel opponents.

Attorney Daisher as Potential Witness

Finally, this Court raised the question at the June 9, 2014 hearing of whether Prosecutor Anderson had a conflict of interest due to being a part of the same law firm as Attorney Jillian A. Daisher, who is the Village Solicitor for Bolivar and witnessed the events in this case. The Court was concerned that Atty. Daisher might be called as a witness, and wondered whether that

would disqualify Atty. Anderson. The parties were asked to brief this issue for the Court even though it was not raised by the Defendant in his motion.

“It is well-established that disqualification constitutes a ‘drastic measure which courts should hesitate to impose except when absolutely necessary [.]’ in large part because it deprives a client of the counsel of his choosing. *Kala v. Aluminum Smelting & Refining Co.* (1998), 81 Ohio St.3d 1, 6, 688 N.E.2d 258; see, also, *Quigley* at ¶ 6. The trial court should disqualify counsel ‘if, and only if, the [c]ourt is satisfied that real harm is likely to result from failing to [disqualify].’ *Barberton Rescue Mission v. Hawthorn*, 9th Dist. No. 21220, 2003-Ohio-1135, at ¶ 5.” See *Puritas Metal Prods., Inc. v. Cole*, 2008-Ohio-4653.

Under the Ohio Rule of Professional Conduct 3.7, an attorney is not permitted to appear as an advocate in the same proceeding where he is appearing as a witness. See also *King v. Patterson*, 2013-Ohio-4665 (5th Dist.), applying these Rules. The court noted that “under Prof.Cond.R. 3.7, a lawyer may be disqualified from representing his or her client only when it is likely the lawyer will be a “necessary” witness. A necessary witness under Prof.Cond.R. 3.7 is one whose testimony must be admissible and unobtainable through other trial witnesses.” The court also noted that “testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony and availability of other evidence. * * * A party's mere declaration of an intention to call opposing counsel as a witness is an insufficient basis for disqualification even if that counsel could give relevant testimony.”

In this case, Atty. Daisher is not a necessary witness. The incident occurred at a public meeting of the Bolivar Village Council. The meetings are recorded on video by the Village, and a tape exists of the incident in question. Furthermore, the room was full of witnesses to the

Defendant's actions, several of which made police reports about the incident, and others who can easily be identified and subpoenaed to testify. With so many alternatives available, it would be impossible for the Defendant to meet the burden in requiring Atty. Daisher to be disqualified as a necessary witness. If Atty. Daisher is not disqualified under these rules, then Atty. Anderson should not be either.

In addition, Rule of Professional Conduct 3.7 provides direct guidance on the issue of whether the fact that another attorney at a firm is a witness disqualifies other attorneys at the firm from representation. Rule 3.7(b) states:

A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's *firm* is likely to be called as a witness unless precluded from doing so by Rule 1.7 or 1.9.

Comment 5 to this Rule states:

Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, division (b) permits the lawyer to do so except in situations involving a conflict of interest.

Further guidance is provided by looking at Rule 1.7 and 1.9. It is clear that those Rules do not apply to the instant case. Rule 1.7 deals with representations which might be adverse to current clients and Rule 1.9 deals with representations which might be adverse to former clients. It is not alleged by either party that Atty. Anderson, Atty. Daisher, or Fitzpatrick, Zimmerman & Rose are currently representing or have ever represented Defendant Huth in any capacity. While the aforementioned parties all currently represent the Village of Bolivar, Atty. Daisher's testimony would not violate Rule 1.7, as her recollection would be favorable to the State. It is

clear that Attorney Huth's assertion during the June 9, 2014 hearing that Atty. Daisher could be an exculpatory witness is false. On the videotape of the incident, Atty. Daisher can be heard as the first party to react to Defendant Huth's threat, and she is also the first party to call it a threat. This was acknowledged by Atty. Huth at the June 9, 2014 hearing. It is unclear how Atty. Daisher could testify in the Defendant's favor that the Defendant did not make a threat when she is heard on tape calling him out for making a threat. Because Atty. Daisher's testimony would not violate Rule 1.7 or Rule 1.9, there is no prohibition against Atty. Anderson continuing to prosecute this case, and he should not be disqualified.

WHEREFORE, the State of Ohio requests the motion filed by the Defendant to stay the case and disqualify Prosecutor Steven A. Anderson be denied.



Steven A. Anderson (#0066445)

Attorney for Plaintiff

**FITZPATRICK, ZIMMERMAN &
ROSE CO., L.P.A.**

P.O. Box 1014

New Philadelphia, OH 44663

Telephone: 330-364-1614

Facsimile: 330-343-3077

Email: sanderson@fzrlaw.com

PROOF OF SERVICE

A copy of this Notice was served by regular mail upon Attorney Michela Huth, attorney for Defendant, at P.O. Box 673, Bolivar, OH 44612 this 18th day of June, 2012.



ATTORNEY STEVEN A. ANDERSON
ATTORNEY FOR PLAINTIFF



FITZPATRICK ZIMMERMAN & ROSE CO. ATTORNEYS

140 Fair Avenue NW * New Philadelphia, Ohio 44663 * 330.364.1614
116 Cleveland Ave. NW * Canton, Ohio 44702 * 330.437.0026
202 W. Main Street * Sugar Creek, Ohio 44881 * 330.852.8855

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STEVEN A. ANDERSON

Injuries, Accidents, Wrongful Death, Litigation, Business Law, Banking, Collections/Foreclosures

e-mail: sanderson@fzrlaw.com

Steven focuses his practice on creditor's rights litigation, general litigation, personal injury, contract law, real estate law, municipal law, liquor law, and criminal law. Steve joined the firm in 1996. Steve's experience includes litigating disputes over the interpretation and enforcement of contracts, general business litigation, and collection of debts for clients. Steve serves as Prosecutor for the Villages of Bolivar, Midvale and Strasburg.

Steve, a native of New Philadelphia, Ohio, received his undergraduate degree, with honors, from Ohio State University in 1992. While at Ohio State University, Steve was selected and studied law at Oxford University in England. Steve earned his Juris Doctorate *magnum cum laude*, from Capital University in 1996. While in law school Steve was class president, recipient of the Noah J. Kern academic scholarship, received the American Juris Prudence award in Constitutional Law, the C.A.L.L. award in Criminal Procedure, was a member of Law Review, the Order of the Curia, and served as an intern for Justice Andrew Douglas with the Ohio Supreme Court.

Steve, his wife, Toni, and their children, Sydney and Riley reside in New Philadelphia.

Education

- J.D., Capital Law School, 1996
- B.A. with Honors, History and Political Science, The Ohio State University

Legal Affiliations

- Tuscarawas County Bar Association, past treasurer and secretary
- Ohio State Bar Association

Community Involvement

- Sacred Heart Church, New Philadelphia, member
- Sacred Heart Church Finance Board, member
- Tuscarawas Central Catholic, girls softball coach
- Tuscarawas Central Catholic, volunteers as a mock trial coach
- TCCES Advisory Board, president
- Tuscarawas County Big Brothers/Big Sisters, board of directors
- New Philadelphia Kiwanis, member
- Kent State University, Tuscarawas Campus, Real Estate Professor
- Punt, Throw and Kick Competitions, chairperson and coordinator
- High School Mock Trial Competition, chairperson and coordinator

Business Law
Collections/Foreclosures
Criminal Law
Elder Law/Medicaid
Family Law/Divorce/Dissolution

General Litigation
Government Entity Counsel
Injuries, Accidents, Wrongful Death
Municipal/Water & Sewer District
Oil, Gas, Coal Leases/Law

Probate/Adoption
Real Estate Disputes
Real Estate Transactions
Trusts/Wills

FITZPATRICK ZIMMERMAN & ROSE CO. ATTORNEYS

140 Fair Avenue NW * New Philadelphia, Ohio 44663 * 330.364.1614
116 Cleveland Ave. NW * Canton, Ohio 44702 * 330.437.0026
202 W. Main Street * Sugar Creek, Ohio 44881 * 330.852.8855

EXHIBIT D

ORDINANCE # O-88-2014

AN ORDINANCE PROVIDING FOR THE CONTRACTUAL SERVICES OF LEGAL COUNSEL FOR THE VILLAGE OF BOLIVAR AND DECLARING IT AS AN EMERGENCY

NOW, THEREFORE, BE IT ORDAINED by the Council of the Village of Bolivar Ohio as follows:

SECTION 1. That legal counsel shall be provided for this Village and the legal professional corporation of Fitzpatrick, Zimmerman & Rose Co., L.P.A., of New Philadelphia, Ohio, is hereby contracted as such counsel and shall be known as "Legal Counsel of the Village of Bolivar". Said Legal Counsel is hereby contracted for a term beginning January 1, 2014 and ending December 31, 2014.

SECTION 2. Said Village Legal Counsel shall be the legal advisor for the Village and the officers thereof in their official capacity and as such, attorneys to prosecute and defend all actions by or against the said Village or any department or officer thereof, during the term of its contract; to render legal opinions to the said Council or any department or officer of the Village during the term of its contract upon the request in writing.

SECTION 3. Said Legal Counsel shall be compensated at the rate of \$60.00 per hour for all work and services performed on behalf of said Village. Said Legal Counsel shall have, Jillian A. Daisher, or another licensed attorney, attend council meetings of the Village as it shall be requested to do so and shall prepare legislation therefore; said fee shall be payable at the end of each month when the services were rendered and statements submitted therefore to the said Village Clerk. The said Legal Counsel may in its judgment select another employee of it to attend the council meetings of the Village or to perform work for the Village.

SECTION 4. All prior ordinances inconsistent herewith are hereby repealed.

SECTION 5. This ordinance is hereby declared to be an emergency measure necessary to the health, safety and welfare of the citizens of the Village of Bolivar, Ohio, for the reason that legal counsel must be retained by the said Village, and therefore this ordinance shall take effect and be in force immediately upon its passage and approval.

SECTION 6. This ordinance shall take effect retroactively to January 1, 2014 through December 31, 2014.

PASSED: this ____ day of _____, 2014

Rebecca S. Hubble, Mayor

ATTEST:

Maria A. App, Clerk-Treasurer

EXHIBIT E

March 22, 1999

OPINION NO. 99-027

The Honorable Robert A. Fry
Hancock County Prosecuting Attorney
222 Broadway, Room 104
Findlay, Ohio 45840

Dear Prosecutor Fry:

You have requested an opinion whether the positions of assistant prosecuting attorney and member of the legislative authority of a statutory city are compatible. You have indicated that the assistant prosecuting attorney in question is employed on a part-time basis, and does not serve as your chief deputy or first assistant.

The standard test for determining whether two public positions are compatible is set forth in 1979 Op. Att'y Gen. No. 79-111. The seven questions of the test are 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.

EXHIBIT F

Questions six and seven concern the applicability of charter provisions, ordinances, and federal, state, and local departmental regulations. We have found no applicable state or federal regulations. Because the city in question has not adopted a charter, there is no applicable charter provision. Additionally, whether there is an applicable ordinance or local departmental regulation is a matter for local officials to determine. We will assume, for purposes of this opinion, that there is no departmental regulation or ordinance of either the city or the county that prohibits a person from serving simultaneously as an assistant prosecuting attorney and as a member of a city legislative authority.

Question number one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits, *inter alia*, a classified officer or employee of a city or county from participating in partisan political activity other than to vote as he pleases or express freely his political opinions. R.C. 124.11(A)(11) provides that assistant prosecuting attorneys are in the unclassified civil service. Because members of the legislative authority of a city are elected, R.C. 731.01, they are also in the unclassified civil service. R.C. 124.11(A)(1). The prohibition of R.C. 124.57 thus does not prohibit a person from serving simultaneously as an assistant prosecuting attorney and as a member of the legislative authority of a city.

Question number two asks whether the empowering statutes of either position limit outside employment. Except for R.C. 120.39, no other statute limits the outside employment of assistant prosecuting attorneys. R.C. 120.39 prohibits an assistant prosecuting attorney from serving as court appointed counsel or co-counsel appointed to assist the state public defender, or a county or joint county public defender. This statute also prohibits an assistant prosecuting attorney from holding the position of public defender, county public defender, joint county defender, member of the state public defender commission, member of a county or joint county public defender commission, or member of the office of a public defender, county public defender, or joint county defender. R.C. 120.39 thus does not prevent an assistant prosecuting attorney from serving as a member of the legislative authority of a city.

Pursuant to R.C. 731.02, each member of the legislative authority of a city "shall not hold any other public office, except that of notary public or member of the state militia." We must first determine, therefore, whether the position of assistant prosecuting attorney is a public office for purposes of R.C. 731.02.

The Ohio Supreme Court has thus described the standards for determining whether a position is a public office or employment:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him...
The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such

duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

....
... [I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state. (Emphasis added.)

State ex rel. Landis v. Board of Comm'rs, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917); accord *State ex rel. Milburn v. Pethel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950) (citing *State ex rel. Landis v. Board of Comm'rs* with approval).

In accordance with these criteria, a public position is a public office, rather than a public employment, if the position is conferred by law with duties that require the exercise of continuing, independent, political, or governmental functions, which constitute a portion of the sovereignty of the state. As stated in the second syllabus paragraph of *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898):

To constitute a public office ... it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else.

Accord *State ex rel. Landis v. Board of Comm'rs*; *State ex rel. Scarl v. Small*, 103 Ohio App. 214, 145 N.E.2d 200 (Portage County 1956); 1963 Op. Att'y Gen. No. 3548, p. 58, at 61; see also 1970 Op. Att'y Gen. No. 70-035 (a deputy sheriff is not a public office).

Applying the traditional criteria used to determine whether a position is a public office, it is clear that a prosecuting attorney, but not his assistants, holds a public office. A prosecuting attorney is elected to that position and serves a fixed term. R.C. 309.01. A prosecuting attorney must give a bond and take an oath of office before entering upon the discharge of his duties. R.C. 309.03; see also R.C. 3.22; R.C. 3.23; R.C. 309.02. The duties and powers of the prosecuting attorney are prescribed by statute and constitute a portion of the sovereignty of the state. See, e.g., R.C. 309.08 (the prosecuting attorney shall prosecute criminal cases and all complaints, suits, and controversies in which the state is a party, and, in the case of conviction, he shall cause execution to be issued for the fine and costs, or costs only, as the case may be, and urge the collection of any moneys due the state or county); R.C. 309.09 (the prosecuting attorney shall be the legal adviser to all county and township officers, boards, and commissions); see also Code of Professional Responsibility EC 7-13 ("[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. The special duty exists because ... the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers"). In discharging his duties, the

prosecuting attorney acts autonomously and independently and is not subject to the direct control and supervision of any other office or entity of government. Therefore, it follows that the position of prosecuting attorney is a public office. *See generally State ex rel. Pogue*, 91 Ohio St. 1, 12, 109 N.E. 477, 480 (1914) (indicating that the prosecuting attorney is a county officer).

In contrast, assistant prosecuting attorneys are neither required nor authorized by law to exercise such independent public duties. Assistant prosecuting attorneys are appointed by, and serve at the pleasure of, the prosecuting attorney. R.C. 309.06(A); *Rose v. Village of Wellsville*, 63 Ohio Misc. 2d 9, 18, 613 N.E.2d 262, 267 (C.P. Columbiana County 1993); *see also* 1991 Op. Att’y Gen. No. 91-011 at 2-58 (persons appointed to positions “in the unclassified service hold their positions at the pleasure of their appointing authority, and are subject to dismissal from their positions without cause”). The duties and responsibilities of assistant prosecuting attorneys are not conferred by statute. Rather, pursuant to R.C. 309.06(A), a prosecuting attorney, in order to properly discharge the functions of his office, delegates responsibilities and duties to his assistants. Assistant prosecuting attorneys thus perform their assigned duties and responsibilities at the direction of the prosecuting attorney. *See State ex rel. Thomas v. Henderson*, 123 Ohio St. 474, 478, 175 N.E. 865, 866 (1931); 1970 Op. Att’y Gen. No. 70-022 at 2-39; 1963 Op. Att’y Gen. No. 25, p. 113, at 114-15; *cf. Thomas v. Board of Comm’rs of Hamilton County*, 88 Ohio St. 489, 493, 104 N.E. 536, 537 (1913) (“[t]he very purpose of having assistants to the [city] solicitor, or any other public officer, is to secure the participation by them in the performance of the duties of the office”). *See generally State ex rel. Myers v. Blake*, 121 Ohio St. 511, 516-17, 169 N.E. 599, 601 (1929) (“[t]he subordinate of one in an official position is necessarily an assistant, looking toward the accomplishment of the common objective”). Accordingly, in the exercise of their duties, assistant prosecuting attorneys do not act independently; assistants merely aid the prosecuting attorney in discharging his statutory responsibilities and functions by performing such duties and functions as may be assigned by the prosecuting attorney.

An assistant prosecuting attorney is subject to the direction and control of the prosecuting attorney, and thus does not exercise independent public duties that constitute a portion of the sovereignty of the state. As explained previously, it is the prosecuting attorney who is invested by law with such duties. The responsibility for exercising a portion of the sovereignty of the state, therefore, rests with the prosecuting attorney, not his assistants.

This is the case even though an assistant prosecuting attorney is required to exercise his professional judgment when discharging his duties. The exercise of professional judgment on the part of an assistant prosecuting attorney does not arise by virtue of his appointment to that position. Rather, the exercise of discretion by an assistant prosecuting attorney in the discharge of his duties and responsibilities in a particular legal matter is the result of the assistant’s being licensed to practice law in Ohio. *See generally* R.C. 4705.01 (before a person may be permitted to practice as an attorney and counselor at law he must be admitted to the bar by order of the Ohio Supreme Court); Ohio Gov. Bar R. I (setting forth provisions concerning the admission to the practice of law). Also, since an assistant prosecuting attorney performs his duties and

responsibilities on behalf of the prosecuting attorney, see R.C. 309.06; *State ex rel. Thomas v. Henderson*, 123 Ohio St. at 478, 175 N.E. at 866; 1970 Op. Att'y Gen. No. 70-022 at 2-39; 1963 Op. Att'y Gen. No. 25, p. 113, at 114-15, an assistant's professional judgment is subject to review by the prosecuting attorney. See generally 1991 Op. Att'y Gen. No. 91-011 at 2-58 (an unclassified employee serves at the pleasure of his appointing authority). The exercise of professional judgment by an assistant prosecuting attorney thus does not make that position a public office. See generally *State ex rel. Attorney General v. Jennings*, 57 Ohio St. at 428, 49 N.E. at 406 (“[s]kill and experience do not constitute a public office; they are simply requirements of suitability for the place; and are no more attributes of a public office than of a private employment”).

Because an assistant prosecuting attorney does not exercise independent public duties that constitute a portion of the sovereignty of the state, the position of assistant prosecuting attorney is not a public office for purposes of R.C. 731.02. See generally *Rose v. Village of Wellsville*, 63 Ohio Misc. 2d at 18, 613 N.E.2d at 267-68 (an assistant county prosecuting attorney is a public employee). But see generally 1973 Op. Att'y Gen. No. 73-082 at 2-311 (for purposes of Ohio Const. art. IV, § 6(B), which prohibits a judge from holding another office of profit or trust, “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”).¹ Accordingly, the language of R.C. 731.02 does not prohibit a member of the legislative authority of a city from serving as an assistant prosecuting attorney.

Although no statute prohibits a person from serving simultaneously in the positions of member of the legislative authority of a city and assistant prosecuting attorney, prior opinions of the Attorneys General have stated that, “because an assistant prosecutor is empowered to act for, and in the place of a prosecutor in most matters, the assistant is subject to the same limitations as the prosecutor, and may not hold any office which a prosecutor may not hold.” 1983 Op. Att'y Gen. No. 83-030 at 2-112; accord 1992 Op. Att'y Gen. No. 92-041 at 2-159; 1988 Op. Att'y Gen. No. 88-049 at 2-223; 1971 Op. Att'y Gen. No. 71-050 at 2-172. Because the position of prosecuting attorney is a public office, R.C. 731.02 prevents a person from serving concurrently as a member of a city's legislative authority and as a prosecuting attorney. It would, thus, ordinarily follow that R.C. 731.02 similarly prevents a person from serving concurrently as an assistant prosecuting attorney and as a member of the legislative authority of a city. We have not reached that conclusion in this instance, however. Let us explain our reasons for this determination.

¹ In this opinion we have concluded that the position of assistant prosecuting attorney is not a public office, thus calling into question 1973 Op. Att'y Gen. No. 73-082's assertion that the position of assistant prosecuting attorney is a public office for purposes of Ohio Const. art. IV, § 6(B).

Examination of the opinions that have addressed this issue discloses that a single proposition appears to serve as the basis for extending a restriction such as that found in R.C. 731.02 to a prosecuting attorney's assistants. That proposition is that an assistant prosecuting attorney is authorized to act for and in place of the prosecuting attorney in most matters. 1988 Op. Att'y Gen. No. 88-049 at 2-223; 1983 Op. Att'y Gen. No. 83-030 at 2-112; *see also* R.C. 309.06. Thus, 1971 Op. Att'y Gen. No. 71-050 at 2-172 states that "it has long been the accepted opinion in this state that an assistant is, for all practical purposes, the alter ego of the prosecuting attorney and is authorized to act in his place in almost all matters." *Accord* 1970 Op. Att'y Gen. No. 70-053 at 2-85. For this reason, the prior opinions conclude that an assistant prosecuting attorney is not permitted to hold any position that the prosecuting attorney may not hold. *See, e.g.*, 1983 Op. Att'y Gen. No. 83-030 at 2-112 ("because an assistant prosecutor is empowered to act for, and in the place of a prosecutor in most matters, the assistant is subject to the same limitations as the prosecutor, and may not hold any office which a prosecutor may not hold").

Having examined the law in this area, however, we find ourselves in disagreement with that proposition. While an assistant prosecuting attorney may be empowered to act for and in the place of the prosecuting attorney, an assistant generally does not assume the role of prosecuting attorney or acting prosecuting attorney. *See generally* R.C. 305.02 (a vacancy in the office of the prosecuting attorney is filled by election or appointment by the board of county commissioners or the central committee of a political party, and prior to the filling of such a vacancy, a board of county commissioners may appoint an acting prosecuting attorney). Instead, the role of an assistant prosecuting attorney is limited to aiding or assisting the prosecuting attorney in the performance of his numerous statutory responsibilities. *See State ex rel. Thomas v. Henderson*, 123 Ohio St. at 478, 175 N.E. at 866; 1970 Op. Att'y Gen. No. 70-022 at 2-39; 1963 Op. Att'y Gen. No. 25, p. 113, at 114-15. Assistants enable the prosecuting attorney to perform effectively the duties of his office. *See generally* 1945 Op. Att'y Gen. No. 184, p. 163, at 164 ("[i]t is obvious that in a county where a number of assistants are required, a great many of the duties devolving upon the prosecuting attorney under the law must be performed by his assistants"). Without assistants, a prosecuting attorney would be unable to completely and appropriately perform the duties of his office.

An assistant prosecuting attorney thus performs his duties on behalf of the prosecuting attorney. This means that an assistant prosecuting attorney does not act for or stand in the place of the prosecuting attorney in a particular matter unless so authorized and directed by the prosecuting attorney. An assistant prosecuting attorney is not, by virtue of his appointment to that position, conferred all of the powers, duties, and responsibilities of the prosecuting attorney. Nor is he empowered to act for or in the place of the prosecuting attorney in all matters. Rather, an assistant prosecuting attorney may perform only those duties or functions that the prosecuting attorney assigns to him. *See* R.C. 309.06; *State ex rel. Thomas v. Henderson*, 123 Ohio St. at 478, 175 N.E. at 866; 1970 Op. Att'y Gen. No. 70-022 at 2-39; 1963 Op. Att'y Gen. No. 25, p. 113, at 114-15. Thus, it is only with regard to those duties assigned to him by the prosecuting attorney that an assistant prosecuting attorney acts for or in the place of the prosecuting attorney.

Our review of the case law of Ohio and other jurisdictions also discloses no authority for the more general proposition that statutory restrictions upon the outside employment of a public officer are applicable to his assistants.² The general principles of law that govern the conduct of assistants of public officers other than prosecuting attorneys thus do not compel the conclusion that an assistant of a public officer is not permitted to hold a position that his appointing officer is statutorily prohibited from holding. Accordingly, there is no antecedent or contemporary legal support for concluding that an assistant prosecuting attorney may not hold a position that the prosecuting attorney may not hold.

Finally, to conclude that the dual officeholding prohibition in R.C. 731.02 is applicable to an assistant prosecuting attorney would improperly expand that statutory prohibition. Pursuant to R.C. 731.02, a member of the legislative authority of a city may not hold another public office. Because the position of prosecuting attorney is a public office, a member of the legislative authority of a city may not hold the position of prosecuting attorney. However, the position of assistant prosecuting attorney, as explained above, is not a public office. Thus, the plain language of R.C. 731.02 does not prohibit a member of the legislative authority of a city from serving as an assistant prosecuting attorney. Interpreting R.C. 731.02 as prohibiting a member of the legislative authority of a city from serving as an assistant prosecuting attorney leads to a conclusion that the General Assembly did not apparently intend. If the General Assembly had intended to prohibit a member of the legislative authority of a city from serving as an assistant prosecuting attorney, it could easily have stated such intention, having explicitly imposed such a dual officeholding prohibition in other instances. *Compare* R.C. 120.39 (neither a prosecuting attorney nor an assistant prosecuting attorney may serve as court appointed counsel or co-counsel appointed to assist the state public defender or a county or joint county public defender, or hold the position of public defender, county public defender, joint county defender, member of the state public defender commission, member of a county or joint county public defender commission, or member of the office of a public defender, county public defender, or joint county defender) *with* R.C. 3.11 (a prosecuting attorney may not hold the office of county sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, or probate judge) *and* R.C. 309.02 (“[n]o prosecuting attorney shall be a

² Without considering the issue whether a statutory restriction upon a public officer’s dual officeholding or outside employment applies to the officer’s assistants, at least one opinion has advised that an assistant of a public officer may hold a position that the public officer is otherwise barred from holding. *See* 1993 Op. Att’y Gen. No. 93-016 (the positions of member of the legislative authority of a city and administrative assistant to the county engineer are compatible). *See generally* 1979 Op. Att’y Gen. No. 79-111 (the positions of member of a municipal council and special deputy sheriff are compatible); 1970 Op. Att’y Gen. No. 70-035 (the positions of member of a village council and special deputy sheriff are compatible).

member of the general assembly of this state or mayor of a municipal corporation"). See generally *Carter v. Youngstown*, 146 Ohio St. 203, 65 N.E.2d 63 (1946) (the polestar of statutory interpretation is effecting the intentions of the General Assembly).

Based on the foregoing reasons, it is our opinion that the fact that an assistant prosecuting attorney may be authorized to act for and in the place of the prosecuting attorney is insufficient in and of itself to find that an assistant prosecuting attorney may not hold a position that the prosecuting attorney may not hold.³ Accordingly, while R.C. 731.02 prohibits a member of the legislative authority of a city from serving concurrently as a prosecuting attorney, that statute does not prohibit that member from serving as an assistant prosecuting attorney. Question two of the compatibility analysis, therefore, may be answered in the negative.

³ The following opinions have found the position of assistant prosecuting attorney incompatible with another position because the prosecuting attorney was statutorily barred from holding the other position: (1) 1983 Op. Att'y Gen. No. 83-030 (assistant prosecuting attorney and member of a county board of mental retardation and developmental disabilities are incompatible, R.C. 5126.03(A)(1), now R.C. 5126.021(A)(1)); (2) 1970 Op. Att'y Gen. No. 70-053 (assistant prosecuting attorney and mayor of a municipal corporation are incompatible, R.C. 309.02); (3) 1970 Op. Att'y Gen. No. 70-022 (assistant prosecuting attorney and mayor of a municipal corporation are incompatible, R.C. 309.02); (4) 1969 Op. Att'y Gen. No. 69-133 (assistant prosecuting attorney and member of a board of education are incompatible, R.C. 3313.13); and (5) 1846-1906 Official Opinions of the Ohio Attorney General, vol. 4, p. 746 (assistant prosecuting attorney and member of the General Assembly are incompatible, R.S. 1268, now R.C. 309.02).

These opinions do not, as a general matter, consider whether the positions in question might be incompatible on other grounds. For instance, the position of assistant prosecuting attorney may be incompatible with another position because the assistant may be subject to an impermissible conflict of interest or because the assistant prosecutor position is subordinate to, or may act as a check upon, the other position. See generally 1983 Op. Att'y Gen. No. 83-030 at 2-113 ("[e]ven if an assistant prosecutor were not considered to be within the scope of R.C. 5126.03(A)(1), [now R.C. 5126.021(A)(1),] I find the positions of assistant prosecutor and member of a county board of mental retardation and developmental disabilities to be incompatible under a common law analysis"). This means that the conclusions reached in the foregoing opinions with respect to incompatibility may be warranted, but for reasons different than those enumerated in the opinions. Accordingly, since we have not here reexamined the compatibility of the positions considered in these opinions, we merely question their conclusions and do not summarily overrule them.

Question number three asks whether one position is subordinate to, or in any way a check upon, the other. A member of the legislative authority of a city, as an elected officer of the city, R.C. 731.01, serves and is responsible to the citizens of the city. An assistant prosecuting attorney is appointed by and serves at the pleasure of the prosecuting attorney. R.C. 309.06; *see* R.C. 124.11(A)(11). The positions of member of the legislative authority of a city and assistant prosecuting attorney operate independently of each other, and neither assigns duties or responsibilities to or supervises the other. Thus, neither position is subordinate to, or acts as a check upon, the other.

Question number four asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best answered by the interested local officials who may more precisely determine the time demands imposed upon each position. *See* 1997 Op. Att'y Gen. No. 97-045 at 2-282; 1994 Op. Att'y Gen. No. 94-022 at 2-98. It would appear, however, that one person can competently discharge the duties of assistant prosecuting attorney and member of the legislative authority of a city if there is no direct conflict in the working hours of each position.

The final question asks whether a person may confront a conflict of interest as a result of holding two different positions. A person may not hold two or more public positions simultaneously 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. As stated in our recent opinions, "resolution of the compatibility issue of conflict of interest in the case of an assistant county 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."⁴ 1997 Op. Att'y

⁴ Several opinions have determined that when incompatibility is based on a conflict of interest, the facts may create an exception to the general rule that an assistant prosecuting attorney may not hold any position that the prosecuting attorney may not hold. 1997 Op. Att'y Gen. No. 97-044; 1997 Op. Att'y Gen. No. 97-034; 1992 Op. Att'y Gen. No. 92-041; *see also* *Rose v. Village of Wellsville*, 63 Ohio Misc. 2d 9, 613 N.E.2d 262 (C.P. Columbiana County 1993). In this regard, 1992 Op. Att'y Gen. No. 92-041 at 2-164 states:

[A]n 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....

Gen. No. 97-044 at 2-273 and 2-274; *accord* 1997 Op. Att'y Gen. No. 97-034 at 2-198. Such an examination enables us to determine whether an assistant prosecuting attorney who serves as a member of the legislative authority of a city will confront a conflict of interest when exercising the powers, duties, and responsibilities in each position that is sufficient to prevent him from holding both of these positions simultaneously.

Assistant prosecuting attorneys aid the prosecuting attorney in discharging the duties of his office. *See State ex rel. Thomas v. Henderson*, 123 Ohio St. at 478, 175 N.E. at 866; 1970 Op. Att'y Gen. No. 70-022 at 2-39; 1963 Op. Att'y Gen. No. 25, p. 113, at 114-15. Accordingly, assistant prosecuting attorneys perform those duties assigned to them by the prosecuting attorney. *See generally* 1945 Op. Att'y Gen. No. 184, p. 163 (syllabus) (“[a]n assistant appointed by the prosecuting attorney may, whenever authorized or directed by him, act for and in the place of such prosecuting attorney in all civil and procedural matters”).

The general powers and duties of the prosecuting attorney are set forth in R.C. Chapter 309. R.C. 309.08 requires the prosecuting attorney to prosecute criminal cases and all complaints, suits, and controversies in which the state is a party, and, in the case of conviction, he is required to cause execution to be issued for the fine and costs, or costs only, as the case may be, and urge the collection of any moneys due the state or county. R.C. 309.09 requires the prosecuting attorney to serve as the legal adviser to all county and township officers, boards, and commissions. A prosecuting attorney is also required to prosecute actions to restrain the misapplication of county funds or public moneys in the hands of the county treasurer, R.C. 309.12, prosecute persons who in any way unlawfully cut down or injure timber growing on land belonging to the state or any school district, R.C. 309.14, and bring actions to recover property of a decedent held by another person, R.C. 309.17. In addition to the powers and duties set forth in R.C. Chapter 309, a prosecuting attorney is authorized to commence an action upon the bond of the county auditor or county treasurer in the event such bond is breached, R.C. 321.42, bring an action in court to enforce the administration of a charitable trust, R.C. 1719.05, bring a forfeiture action against a real estate investment trust that transacts real estate business in the state without authority, R.C. 1747.11(A), commence an action in quo warranto, R.C. 2733.04; R.C. 2733.05, institute and prosecute all necessary actions pertaining to the workers' compensation law, R.C. 4123.92, and sit on the county budget commission, R.C. 5705.27.

The legislative authority of a city exercises the legislative power of the city. R.C. 731.01; R.C. 731.05; *see also* R.C. 731.17 (granting the legislative authority of a city the authority to pass ordinances and resolutions). In order to govern the city, the legislative authority of a city has the power to subdivide the city into wards, R.C. 731.06, determine the number of officers, clerks, and employees in each city department, R.C. 731.08, adopt standard ordinances and codes, R.C. 731.231, manage and control the finances and property of the city, R.C. 731.47, and adopt an annual tax budget, R.C. 5705.28. Additionally, the legislative authority of a city is invested with a variety of specific powers to provide for the public safety of its citizens. *See, e.g.*, R.C. 9.60 (acquisition of fire protection); R.C. 737.021 (establishment of a division of traffic engineering and safety); R.C. 737.04 (acquisition of police protection); R.C.

737.051 (establishment of an auxiliary police unit within the police department); R.C. 737.21 (establishment of a fire department and regulations to guard against the occurrence of fires and protect the property and lives against damage and accidents resulting from fires); R.C. 737.28 (regulation of houses and business structures); R.C. 737.37 (regulation of public buildings).

Let us now consider whether a person who holds the positions of member of the legislative authority of a statutory city and assistant prosecuting attorney is subject to a conflict of interest. An examination of the statutory powers, duties, and responsibilities inherent in each of these positions discloses that a person who serves simultaneously in these two positions may be confronted with several conflicts of interest.

As an assistant prosecuting attorney, the person may be required to bring a civil or criminal action against himself as a member of the legislative authority of a city. Pursuant to R.C. Chapter 2733, a prosecuting attorney is permitted, R.C. 2733.05, or, in certain circumstances, required, R.C. 2733.04, to bring an action in quo warranto against "a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military," or "a public officer, civil or military, who does or suffers an act which, by law, works a forfeiture of his office." R.C. 2733.01. In addition, R.C. 733.73 requires a prosecuting attorney to prosecute a city officer for misfeasance or malfeasance in office, when the city has no law director. See generally R.C. 733.72 (setting forth the charges that may be brought against a municipal officer). Thus, since the position of member of the legislative authority of a city is a public office, *State ex rel. v. Kearns*, 47 Ohio St. 566, 568, 25 N.E. 1027, 1028 (1890); *State ex rel. v. O'Brien*, 47 Ohio St. 464, 25 N.E. 121 (1890), an assistant prosecuting attorney who is required to bring quo warranto actions under R.C. 2733.04 or R.C. 2733.05 or misconduct in office prosecutions under R.C. 733.73 may have to bring such an action or prosecution against himself as a member of the legislative authority of a city.

Moreover, as an assistant prosecuting attorney, the person may have to institute and conduct a civil action against himself as a member of the legislative authority of a city to recover misused or misappropriated public moneys or property. R.C. 117.28 provides as follows:

Where an audit report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving the certified copy of the report pursuant to [R.C. 117.27]⁵ may, within one hundred twenty days after receiving

⁵ Pursuant to R.C. 117.27, an audit report is filed "with the officer required by state law, municipal or county charter, or municipal ordinance to act as legal counsel to the officers of the public office."

the report, institute civil action in the proper court in the name of the public office to which the public money is due or the public property belongs for the recovery of the money or property and prosecute the action to final determination. (Footnote added.)

If no officer is required to act as legal counsel for the audited public office, a copy of the audit report is "filed with the prosecuting attorney of the county within which the fiscal office of the public office is located." R.C. 117.27. A prosecuting attorney thus could be responsible for bringing prosecutions under R.C. 117.28 to recover misused or misappropriated city moneys or property. Also, if the audit report sets forth any malfeasance or gross neglect of duty on the part of a city official for which a criminal penalty is provided, the prosecuting attorney must institute criminal proceedings against the city official. R.C. 117.29. Accordingly, an assistant prosecuting attorney who is responsible for bringing prosecutions under R.C. 117.28 to recover misused or misappropriated city moneys or property or criminal prosecutions against city officials pursuant to R.C. 117.29 may have to initiate and conduct such a prosecution against himself as a member of the legislative authority of a city.

An assistant prosecuting attorney that is required to conduct a legal proceeding pursuant to R.C. 117.27-.29, R.C. 733.73, R.C. 2733.04, or R.C. 2733.05 against himself as a member of the legislative authority of a city is subject to a potential conflict of interest. In such a situation, the assistant prosecuting attorney is exposed to the temptation of acting other than in the best interest of the public.

The fact that an assistant prosecuting attorney who serves in another public position is subject to a potential conflict of interest, however, does not per se require a determination that the assistant may not serve in the other position. *Rose v. Village of Wellsville*; 1997 Op. Att'y Gen. No. 97-044; 1997 Op. Att'y Gen. No. 97-034; 1992 Op. Att'y Gen. No. 92-041. Rather, if an examination of the particular duties and responsibilities assigned to an assistant prosecuting attorney reveals that the potential conflict of interest is remote and speculative, common law incompatibility or conflict of interest rules are not violated. *Rose v. Village of Wellsville*; 1997 Op. Att'y Gen. No. 97-044; 1997 Op. Att'y Gen. No. 97-034; 1992 Op. Att'y Gen. No. 92-041; see 1979 Op. Att'y Gen. No. 79-111 (syllabus, paragraph three).

With respect to your specific inquiry, it is only speculative whether the person, as an assistant prosecuting attorney, will be required to conduct a legal proceeding pursuant to R.C. 117.27-.29, R.C. 733.73, R.C. 2733.04, or R.C. 2733.05 against himself as a member of the legislative authority of a city. Moreover, a member of your staff has informed us that the person in his capacity as an assistant prosecuting attorney is not required to review or prosecute such proceedings against city officers, and that the delegation of such authority to the assistant is not contemplated at this time. The potential conflict of interest thus is remote. Therefore, since the conflict of interest is remote and speculative, the conflict does not prevent an assistant prosecuting attorney from serving as a member of the legislative authority of a city, provided he is not required to prosecute an action under R.C. 117.27-.29, R.C. 733.73, R.C. 2733.04, or R.C.

2733.05 against himself as a member of the legislative authority. *See* 1997 Op. Att'y Gen. No. 97-044; 1997 Op. Att'y Gen. No. 97-034; 1992 Op. Att'y Gen. No. 92-041.

An additional conflict of interest also exists in that a person who serves simultaneously as an assistant prosecuting attorney and member of the legislative authority of a city may be subject to undue influence if the city and an entity represented by him as an assistant prosecuting attorney enter into a contract, *see, e.g.*, R.C. 9.60(C) (a county may contract with a city to obtain fire protection); R.C. 505.43 (in order to obtain police protection, a township may enter into a contract with a city); R.C. 1901.34(D) (a prosecuting attorney may enter into an agreement with a city whereby the prosecuting attorney prosecutes all criminal cases brought before the municipal court), or are opposing parties in the same legal proceeding, *see, e.g.*, R.C. 309.12 (recovery of county moneys); R.C. 709.033 (city may appeal the denial of a petition for annexation made by the board of county commissioners). In such a situation, a person's responsibilities as a member of the legislative authority may influence the performance of his duties as an assistant prosecuting attorney, thereby subjecting him to influences that may prevent his legal advice as an assistant from being completely objective and disinterested. *See* 1980 Op. Att'y Gen. No. 80-035 at 2-149.

An examination of the foregoing conflict of interest indicates that the conflict is remote and speculative. It seems unlikely that there will be many occasions in which the city and an entity represented by the assistant prosecuting attorney will enter into a contract or be opposing parties in the same legal proceeding. It is also speculative whether the person, as an assistant prosecuting attorney, will be required to advise or represent the entity in a matter or legal proceeding involving the city. Information provided to us in this instance indicates that the person will not be assigned any matters or legal proceedings involving the city. Finally, if it becomes necessary in a matter or legal proceeding, it would not be difficult for the person, as an assistant prosecuting attorney, to remove himself from participation in the matter or proceeding. As an assistant prosecuting attorney, the person has an ethical duty to withdraw from any matter or proceeding in which he might not be able to act in the best interest of his employer or client.⁶

⁶ The authority to render interpretations of the ethical provisions of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43 and the rules and canons set forth in the Supreme Court Rules for the Government of the Bar of Ohio and the Code of Professional Responsibility is vested in the Ohio Ethics Commission, R.C. 102.08(A), and the Board of Commissioners on Grievances and Discipline of the Supreme Court, Ohio Gov. Bar R. V § 2(C); *see also* R.C. 102.08(A), respectively. Because the authority to render such interpretations is vested in the Ohio Ethics Commission and the Board of Commissioners on Grievances and Discipline of the Supreme Court, we believe that it is proper to refrain from interpreting such ethical provisions, canons, and rules by way of a formal opinion. *See* 1997 Op. Att'y Gen. No. 97-034 at 2-200 n.2. *See generally* 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three) (“[t]he Attorney General will abstain from rendering an opinion where another governmental entity has been granted the

See Code of Professional Responsibility DR 5-101(A)(1) (“[e]xcept with the consent of the 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”); 1997 Op. Att’y Gen. No. 97-026 at 2-155 (a public official has a duty to abstain from participating in any matter that would impair his objectivity). Accordingly, if the person, as an assistant prosecuting attorney, does not represent an entity on behalf of the prosecuting attorney in matters or legal proceedings involving the city he serves as a member of the legislative authority, the person is not subject to an impermissible conflict of interest.

A final conflict of interest may exist because of the competition for inside millage generated by the unvoted property tax. Pursuant to R.C. 5705.28-32, the legislative authority of a city and the board of county commissioners, as taxing authorities, *see* R.C. 5705.01(C), must prepare, adopt, and submit an annual tax budget to the county budget commission. The county budget commission is statutorily required to revise and adjust the estimate of balances and receipts from all sources for each fund within each subdivision’s tax budget. R.C. 5705.32; *see* R.C. 5705.31. After revising and adjusting the estimates, the county budget commission then adjusts the levies of the county, cities, and other taxing units within the limits of the law. R.C. 5705.31.

Because the determinations of the county budget commission directly affect the amount of inside millage the county, cities, and other taxing units receive, these entities are permitted to directly address the county budget commission. R.C. 5705.32(E)(2) provides that, “[b]efore the final determination of the amount to be allotted to each subdivision from any source, the commission shall permit representatives of each subdivision ... to appear before it to explain its financial needs.”

Pursuant to R.C. 5705.27, the prosecuting attorney is a member of the county budget commission. As explained previously, the county budget commission has a duty to determine a city’s portion of the inside millage generated by the unvoted property tax. R.C. 5705.31. Because an assistant prosecuting attorney may be required to serve on behalf of the prosecuting attorney as a member of the county budget commission,⁷ an assistant could be placed in a position of passing upon the budgetary needs of the city he serves as a member of its legislative authority. *See* 1984 Op. Att’y Gen. No. 84-087 at 2-301.

authority to render advisory opinions concerning the relevant subject matter”). It is, therefore, recommended that you contact these entities for advice concerning the ethical and professional responsibilities of an assistant prosecuting attorney in the situation you have described.

⁷ 1943 Op. Att’y Gen. No. 6186, p. 363 determined that an assistant prosecuting attorney may sit in place of the prosecuting attorney on the county budget commission.

In addition, a person who serves as an assistant prosecuting attorney and member of the legislative authority of a city may be required to prepare both the county's and city's tax budget and explain them to the county budget commission. As a member of the legislative authority of a city, he is required to prepare and adopt a tax budget for the city and may be asked to explain the budget to the county budget commission. R.C. 5705.28. Similarly, as an assistant prosecuting attorney, he may be required to prepare the county's tax budget and explain it to the county budget commission. *See* 1992 Op. Att'y Gen. No. 92-041 at 2-165. If the same person prepares both the county's and city's tax budgets and explains them to the county budget commission, a conflict of interest is present because he must advocate a position on behalf of one to the potential detriment of the other. *See* 1993 Op. Att'y Gen. No. 93-048 at 2-236. An argument that the county or city is entitled to a certain level of funds means a reduced level of funds are available for the other's use. Accordingly, the competition for advantageous budget decisions could subject a person who holds the positions of assistant prosecuting attorney and member of the legislative authority of a city to influences that may prevent him from making completely objective decisions. *See* 1996 Op. Att'y Gen. No. 96-008 at 2-33; 1993 Op. Att'y Gen. No. 93-048 at 2-236.

However, for the following reasons, the potential for conflicts of interest involving budgetary matters is remote and speculative. You have stated that the person's duties, as an assistant prosecuting attorney, do not include the preparation of the county's tax budget or the explanation of it to the county budget commission, nor will he substitute for the prosecuting attorney on the county budget commission. Also, the delegation of such duties is not contemplated at this time. Thus, as an assistant prosecuting attorney, this person is not subject to conflicts of interest involving budgetary matters.

Because this person, as an assistant prosecuting attorney, is not responsible for preparing the county's tax budget or explaining it to the county budget commission, he will not, as a member of the city's legislative authority, be subject to influences that may prevent him from making completely objective decisions when preparing the city's tax budget or explaining it to the commission. As an assistant prosecuting attorney, he will not be responsible for obtaining tax moneys from the county budget commission. The positions of assistant prosecuting attorney and member of the legislative authority are not in competition for the same moneys; thus, any conflicts of interest involving budgetary matters are remote and speculative.

In addition, the fact that a member of the legislative authority holds an office or employment with a political subdivision that adopts a tax budget and explains it to the county budget commission is, in and of itself, an insufficient reason to find that the member is subject to an impermissible conflict of interest. If such reason were sufficient, a member of a political subdivision that adopts a tax budget and presents it to the county budget commission would not be permitted to hold any office or employment with a political subdivision that also adopts a tax budget and presents it to the commission. Moreover, even though the person, as a member of the city's legislative authority, is required to prepare the city's tax budget, and may be required to

explain it to the county budget commission, it is unlikely that he would use less than his best judgment in preparing the budget or explaining it to the commission. *See generally State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph ten) (“[i]n the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully”). This is especially true in light of the fact that while the county and city each submit a tentative tax budget, it is the county budget commission that actually allocates tax moneys to the county and city after adjusting the rates of taxation, fixing the amount of taxes to be levied, and adjusting the estimates of balances and receipts from available sources. *See R.C. 5705.31-.32*. Therefore, since the potential for a conflict of interest involving budgetary matters is remote and speculative, the possibility that such a conflict may occur does not prevent an assistant prosecuting attorney from serving as a member of the legislative authority of a city, provided that as an assistant prosecuting attorney he is not responsible for preparing the county’s tax budget or presenting it to the county budget commission or substituting for the prosecuting attorney on the county budget commission.

Based on the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously as an assistant prosecuting attorney and member of the legislative authority of a statutory city, provided that as an assistant prosecuting attorney he does not prepare the county budget or present it to the county budget commission, substitute for the prosecuting attorney on the county budget commission, or prosecute an action under R.C. 117.27-.29, R.C. 733.73, R.C. 2733.04, or R.C. 2733.05 against himself as a member of the legislative authority. In addition, as an assistant prosecuting attorney he may not advise or represent an entity on behalf of the prosecuting attorney in a matter or legal proceeding involving the city he serves as a member of its legislative authority. (1983 Op. Att’y Gen. No. 83-030; 1970 Op. Att’y Gen. No. 70-053; 1970 Op. Att’y Gen. No. 70-022; 1969 Op. Att’y Gen. No. 69-133; 1846-1906 Official Opinions of the Ohio Attorney General, vol. 4, p. 746, questioned.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General

March 22, 1999

The Honorable Robert A. Fry
Hancock County Prosecuting Attorney
222 Broadway, Room 104
Findlay, Ohio 45840

SYLLABUS:

99-027

A person may serve simultaneously as an assistant prosecuting attorney and member of the legislative authority of a statutory city, provided that as an assistant prosecuting attorney he does not prepare the county budget or present it to the county budget commission, substitute for the prosecuting attorney on the county budget commission, or prosecute an action under R.C. 117.27-.29, R.C. 733.73, R.C. 2733.04, or R.C. 2733.05 against himself as a member of the legislative authority. In addition, as an assistant prosecuting attorney he may not advise or represent an entity on behalf of the prosecuting attorney in a matter or legal proceeding involving the city he serves as a member of its legislative authority. (1983 Op. Att'y Gen. No. 83-030; 1970 Op. Att'y Gen. No. 70-053; 1970 Op. Att'y Gen. No. 70-022; 1969 Op. Att'y Gen. No. 69-133; 1846-1906 Official Opinions of the Ohio Attorney General, vol. 4, p. 746, questioned.)

OPINION NO. 81-094

Syllabus:

Both a county prosecutor and a city law director are, pursuant to R.C. 2938.13, under an obligation to either present the case for the state in a criminal prosecution in county court involving the violation of a state statute or ensure that the prosecutorial responsibility is otherwise carried out.

To: Stephen M. Stern, Jefferson County Pros. Atty., Steubenville, Ohio
By: William J. Brown, Attorney General, December 21, 1981

I have before me your request for my opinion in response to the following question:

When the police of [a city] file criminal charges in a county court based upon events that transpire within the city limits and involve city inhabitants, does the county prosecutor or the [city law director] owe the obligation to prosecute in the county court?

It is my understanding, based on information contained in your letter, that the charges to which you refer are those brought for violations of state statutes rather than for violations of municipal ordinances.

County courts are created pursuant to R.C. Chapter 1907 and possess the jurisdiction with regard to misdemeanor and felony cases which was previously vested in mayors.¹ R.C. 1907.03L. A county court falls within the broad category of judicial bodies known as magistrate courts. R.C. 2938.01 ("The definition of 'magistrate' set forth in section 2931.01 of the Revised Code. . . applies to Chapter 2938. of the Revised Code"); R.C. 2931.01(A) (" 'Magistrate' includes county court judges. . .").

Prior to the enactment of R.C. 2938.13, a county prosecutor had no duty to prosecute cases in magistrate courts. See *Gilliam v. State of Ohio*, 7 Ohio N.P. (n.s.) 482 (1908); *Railroad Co. v. Lee*, 37 Ohio St. 479 (1882). Such a duty, however, is now imposed by R.C. 2938.13, which reads as follows:

In any case prosecuted for violation of a municipal ordinance the village solicitor or city director of law, and for a statute, he or the prosecuting attorney, shall present the case for the municipal corporation and the state respectively, but either may delegate the responsibility to some other attorney in a proper case, or, if the defendant be unrepresented by counsel may with leave of court, withdraw from the case. But the magistrate or judge shall not permit prosecution of any criminal case by private attorney employed or retained by a complaining witness. (Emphasis added.)

R.C. 2938.13 thus states specifically that the city law director or the county prosecutor shall present the case for the state in those cases before a county court or other magistrate court involving the violation of a state statute. 1961 Op. Atty Gen. No. 2279, p. 304 ("Thus, under Section 2938.13, Revised Code, the municipal corporation solicitor and the county prosecutor are given the duty to prosecute

¹"Mayors retain jurisdiction in all criminal causes involving violation of ordinances of their respective municipal corporations and in all criminal causes involving moving traffic violations occurring on state highways located within their respective municipal corporations, to be exercised concurrently with the county court." R.C. 1907.03L.

violations of said Section 3721.99"); 1960 Op. Atty Gen. No. 1548, p. 495 (city law director or county prosecutor may prosecute case in county court). The use of the word "shall" imposes a mandatory duty on the part of the city law director and county prosecutor to carry out the prosecutorial function, unless, of course, the delegation permitted by R.C. 2938.13 has been accomplished. See generally Malloy v. City of Westlake, 52 Ohio St. 2d 103, 106, 370 N.E.2d 457, 459 (1977) ("By employing the verb 'shall'. . .the General Assembly manifested a clear intent that the statute's provisions. . .are mandatory.").

R.C. 2938.13 does not specify the manner in which the city director of law and the county prosecutor are to decide which of them will proceed with a particular prosecution, and I have been unable to locate any other statutory or case law which would require that the decision as to who carries out the prosecution be made in accordance with a specified method. It follows, therefore, that the county prosecutor and the city law director are free to arrive at their own system for determining who will perform this prosecutorial duty. Jewett v. Valley Ry. Co., 34 Ohio St. 601, 608 (1878) ("Where authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner"); State ex rel. Attorney General v. Morris, 63 Ohio St. 496, 512, 59 N.E. 226, 230 (1900) ("And if it should be found that certain things are authorized to be done. . .and no statute can be found prescribing the exact mode of performing that duty or thing, the presumption would be that the general assembly intended that it might be performed in a reasonable manner, not in conflict with any law of the state"). I note, however, that R.C. 2938.13 does require that one or the other of those officeholders present the state's case, unless proper delegation is accomplished, and that "[a] public officer is bound to perform the duties of his office faithfully, to use reasonable skill and diligence, and to act primarily for the benefit of the public." State ex rel. Smith v. Johnson, 12 Ohio App. 2d 87, 91, 231 N.E.2d 81, 84 (1967). Thus, while the county prosecutor and the city law director may devise their own method for designating the manner in which the duty shall be performed, each is under an obligation to ensure that the prosecutorial function is carried out.

Therefore, it is my opinion, and you are advised, that both a county prosecutor and a city law director are, pursuant to R.C. 2938.13, under an obligation to either present the case for the state in a criminal prosecution in county court involving the violation of a state statute or ensure that the prosecutorial responsibility is otherwise carried out.

OPINION NO. 81-095

Syllabus:

A board of county commissioners may issue bonds under the authority provided in Ohio Const. art. VIII, §13 and R.C. Chapter 165 for the purpose of acquiring, constructing, enlarging, improving or equipping a nursing home.

To: Gregory W. Happ, Medina County Pros. Atty., Medina, Ohio
By: William J. Brown, Attorney General, December 21, 1981

I have before me your request for my opinion as to whether a board of county commissioners may issue bonds for a nursing home under the authority provided in Ohio Const. art. VIII, §13 and R.C. Chapter 165.

I shall assume for the purposes of this opinion that you intend the term "nursing home" to be given its common meaning. The common meaning of the term "nursing home" is a facility used for the care of persons who by reason of illness or physical or mental impairment require skilled nursing care and related medical