



## COUNTY OF ERIE

MICHAEL A. SIRAGUSA  
COUNTY ATTORNEY

MARK C. POLONCARZ  
COUNTY EXECUTIVE

DEPARTMENT OF LAW

MICHELLE M. PARKER  
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH  
SECOND ASSISTANT COUNTY ATTORNEY

June 2, 2016

**VIA HAND DELIVERY**

Hon. John J. Mills, Chairman  
Erie County Legislature  
Old Erie County Hall  
92 Franklin Street, 4<sup>th</sup> Floor  
Buffalo, NY 14202

Re: Erie County Legislator Joseph C. Lorigo  
Outside Counsel Opinions – Incompatibility Issue

Dear Chairman Mills:

I write in response to your letter dated May 23, 2016, wherein you respond to my letter of May 18, 2016 in regard to opinions rendered by outside counsel on the issue of whether Erie County Legislator Joseph C. Lorigo could simultaneously hold the position of Erie County Legislator as well as the position of Town Prosecutor of the Town of West Seneca.

As you know, in January of 2016 my office learned that Erie County Legislator Lorigo was appointed to the position of Town Prosecutor in the Town of West Seneca. After concerns were raised about the compatibility of these positions, we sought, and were provided, legal opinions that the two positions were, in fact, incompatible and that Legislator Lorigo, by accepting the appointment as West Seneca Town Prosecutor, may have vacated his Legislative seat.

To remind you of the delicate nature of this situation, please remember that even the possibility that a Legislator held an incompatible position, even for a short while, could be used against the County and Your Honorable Body in some future litigation. Additionally, the fact that an Erie County lawmaker, without the statutorily required authorization from the Erie County District Attorney, (See Correspondence from Acting District Attorney Flaherty's Office dated January 21, 2016 attached as Exhibit "A") held himself out as a duly authorized prosecutor in West Seneca Town Court and, upon information and belief, actually prosecuted between 100 and 200 members of the public, could also be used against the County or the Legislator himself.

Hon. John J. Mills, Chairman  
June 2, 2016  
Page 2

In your letter dated May 23, 2106, you question, *inter alia*, the actions of this office in obtaining the above noted opinions and request that I answer a series of questions of dubious relevance to the matter at hand.

First, I respectfully disagree with your position that I have "absolute authority" to disclose attorney-client privileged communications due to the fact that outside counsel was retained. Nevertheless, I will endeavor to respond to your questions to the best of my ability and within the requisite ethical parameters I must follow; but I cannot disclose privileged communications.

I am the chief legal counsel to the County of Erie, a New York State municipal corporation with a \$1.7 billion budget. My primary responsibility is to the County as a whole and to assure that actions taken on behalf of the County, whether it be by an individual elected official or by the Legislature, are lawful, appropriate and binding. I take that responsibility seriously and I work tirelessly, despite the limited resources afforded me, to adequately represent and protect the County's interests.

If there are actions taken by any elected official that could possibly jeopardize the decisions made and actions taken by the County's governing body, it is my duty to investigate the same and take any and all necessary action to remedy the situation and/or to determine that said actions are lawful. In this case, the monies spent were well justified to protect the actions of a legislative body that oversees and controls a \$1.7 billion budget.

Faced with this clear and present problem and in order to avoid a conflict of interest, I felt it prudent to employ outside counsel to look into this issue. Accordingly, I engaged the firm of Kavinoky & Cook to do the same. I decided to engage Kavinoky & Cook because the firm is well respected and has provided us with knowledgeable and reliable opinions during my tenure. The fact that the County Executive worked there over eleven (11) years ago, is of little consequence and certainly does not present a conflict of interest. Nor was there a conflict by virtue of the fact that some of the attorneys that work at that firm are donors to the County Executive. Members of many law firms in Buffalo have made donations to this County Executive, as well as prior County Executives whose administrations have also retained their firms for legal work. I have engaged many law firms that do not donate to the County Executive as well. Those considerations are non-factors in such determinations. Additionally, the Kavinoky firm, like many other firms, responded to a Request for Proposals issued by my office in December of 2015, and also like many other firms, were placed on the County's pre-approved outside counsel list. At no point did the County Executive direct me to hire Kavinoky & Cook to look into this matter. In fact, he has never directed me to employ any firm to conduct work on any matter.

Moreover, at no time did I direct Kavinoky & Cook to make a particular finding that the positions were incompatible, nor did I direct them to opine that Legislator Lorigo had vacated his seat on the Legislature as a result of being appointed to the position of Town Prosecutor. I simply posed the question of whether or not there was a legal impediment to Legislator Lorigo holding both positions.

Once the investigation and legal research was finalized by the Kavinoky firm, we were presented with a memorandum opining that the two positions were in fact incompatible, and therefore, Legislator Lorigo could not simultaneously hold both positions. (See Memo from Kavinoky & Cook dated January 20, 2016 attached as Exhibit "B"). Additionally, and most concerning, the memorandum cited cases that held that when there is either a common law or statutory prohibition against the holding of incompatible offices, a person who accepts and qualifies for a second incompatible office is held to vacate, or by implication resign from, the first office upon acceptance of the second office. Because we were faced with the possibility that a sitting Erie County Legislator may have vacated his seat by being appointed to the position of West Seneca Town Prosecutor and having acted as same, I sought a second opinion from the firm of Hodgson Russ, which in effect agreed with the Kavinoky opinion. (See Memo from Hodgson Russ dated January 20, 2016 attached as Exhibit "C").

You have asked why I sought the second opinion from the law firm of Hodgson Russ, who by the way also employs attorneys who donate to this County Executive, as well as having donated to prior County Executives, both Democratic and Republican. The answer is simple. Quite frankly, I was shocked that the research showed that Legislator Lorigo may have, in fact, vacated his seat on the Legislature by appearing as a Town Prosecutor in West Seneca. First and foremost, I wanted to be sure of the finding(s). I did not seek a second opinion because I felt the Kavinoky opinion was incorrect or biased. I sought the second opinion because I was faced with the unthinkable possibility that a Legislator may have vacated his seat and placed this County in considerable jeopardy. Additionally, I knew that if I presented this finding - a finding which I never expected - to Legislator Lorigo, as well as Your Honorable Body, it would be called into question, labeled as partisan, and would cause an uproar. In hindsight, I was right.

As soon as the opinions were finalized, I notified Legislator Lorigo, provided him with copies of both opinions and arranged to meet with him on January 21, 2016. Prior to receiving those opinions there was no reason to communicate with Legislator Lorigo regarding this issue as I did not know what results the research would adduce.

After meeting with Legislator Lorigo on January 21<sup>st</sup>, I left the meeting with the impression that he would not accept the position of Town Prosecutor and that the matter would be laid to rest. Even so, during the January 21<sup>st</sup> meeting with Legislator Lorigo, I was presented with additional facts that appeared to be potentially problematic even though Legislator Lorigo stated he would not take the Town Prosecutor position. Specifically, I was advised that Legislator Lorigo actually appeared in West Seneca Town Court on January 15, 2016, despite the fact that the District Attorney had not authorized him to do so, (which is required by New York State County Law Section 700.) Accordingly, I asked for additional research to be conducted on the issue of whether or not Legislator Lorigo *de facto* accepted the Town Prosecutor position by appearing in West Seneca Town Court, acting as a prosecutor, prosecuting individuals, and thereby inadvertently vacating his seat on the Legislature. (See Memo from Kavinoky & Cook dated January 22, 2016 attached as Exhibit "D").

It is my duty as County Attorney to take any and all actions necessary to do my best to insure that the actions taken by Your Honorable Body are valid and will pass legal

challenge/scrutiny as well as to do my best to insure that the interests of the County of Erie are protected. I did so by requesting that additional research be conducted.

Yet further expense was incurred because Legislator Lorigo hired the law firm of Phillips Lytle LLP, which provided a legal opinion that contradicted the two opinions we had received. (See Memo of Phillips Lytle dated January 28, 2016 attached as Exhibit "E"). Thus, although Legislator Lorigo represented to me that would not take the Town Prosecutor position, shortly after our meeting, I read in published media reports that he was seeking a second legal opinion which would support him holding both positions. (See News coverage dated January 25, 2016 attached as Exhibit "F").

Upon being supplied with the Phillips Lytle opinion that the positions were compatible, I deemed it appropriate to have that opinion assessed and responded to. Kavinoky & Cook and Hodgson Russ supplied me with responses to the Phillips Lytle memo. (See Memo from Kavinoky & Cook dated February 1, 2016 attached as Exhibit "G" and Memo from Hodgson Russ dated February 2, 2016 attached as Exhibit "H"). As you can see by reviewing the attached, both firms disagreed with the conclusion reached by the Phillips firm that the positions were compatible and raised "questions as to the validity of both legislative actions and criminal proceedings in which Mr. Lorigo participated". See Ex. "E". Based upon this change in circumstance, it was clear that these issues were ongoing and I was put in the position of protecting the County as a whole from the actions of a single Legislator.

As previously stated, I am the chief legal counsel to the County of Erie, a New York state municipal corporation with a \$1.7 billion budget. If there are actions taken by any elected official that could possibly jeopardize the decisions made and actions taken by the county's governing body, it is my duty to investigate same and take any and all necessary action to remedy the situation and/or to determine that said actions are lawful. In this case, the monies spent on remedying the situation were well justified to protect the actions of a legislative body that oversees and controls a \$1.7 billion budget.

You infer that if I had contacted Legislator Lorigo sooner, there would have been no need to spend monies on this issue. I respectfully disagree. By the time I learned of the issue, Legislator Lorigo had already been appointed to the position of West Seneca Town Prosecutor. I did not have the benefit of either the Kavinoky or Hodgson opinions at that time, so there would be no reason to contact him. Once I obtained the Kavinoky and Hodgson opinions setting forth the problems with Legislator Lorigo holding both positions, I contacted him to express my concerns. Costs associated with this matter would have been reduced or eliminated had Legislator Lorigo contacted my office at the outset and sought an opinion on whether or not he could hold both positions. However, he chose not to do so.

Also, contacting either the District Attorney's Office or the Erie County Clerk's Office would not have negated the need to look into this matter. First and foremost, the Kavinoky and Hodgson research was not completed until January 20, 2016. See Ex. "B" & "C". The fact that Legislator Lorigo appeared and acted as a Town Prosecutor on January 15, 2016 without having filed an Oath Card or without being duly appointed by the District Attorney in accordance with

Hon. John J. Mills, Chairman  
June 2, 2016  
Page 5

New York State Law was not determinative. Concern remained that, notwithstanding the absence of the District Attorney's authorization or lack of filing of an Oath Card, by virtue of the actions taken by Legislator Lorigo inasmuch as he acted in the capacity of Town Prosecutor in West Seneca and actually prosecuted a large number of individuals, those actions alone may have amounted to an acceptance of an incompatible position resulting in the vacating of his seat on the Legislature. See Ex. "D". Therefore, I disagree that the need to research these issues would have been alleviated by contacting either the District Attorney or County Clerk earlier.

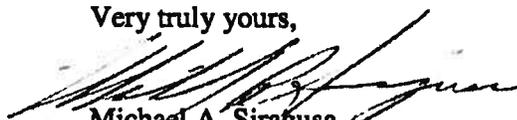
You have also asked whether my office was capable of researching the above discussed issues. My office certainly was and is capable of performing such a task. However, I made the determination to send this matter to outside counsel for the reasons stated above.

Your concern that the County Executive used my office for political gain is misplaced and unfounded. As Erie County Attorney, I had serious concerns about the impact of Legislator Lorigo's actions on Your Honorable Body. I was obligated to take actions to protect that Body to the best of my ability in this very unusual situation that could have undermined the actions of the governing body of a municipal corporation with a \$1.7 billion budget.

I want to reiterate what I stated in my prior letter. There is a series of cases that stand for the proposition that when a public official takes a second incompatible position they forfeit the first. The potential implications of this situation are staggering and could have jeopardized every action the legislature has and/or will take. Every action my office took was an attempt to insulate the County from the adverse consequences of such a situation.

I trust this letter answers your questions and provides you with necessary background information to share with your colleagues. I expect that this issue can now be finally laid to rest.

Very truly yours,



Michael A. Siragusa  
Erie County Attorney

cc: Honorable Members of the Erie County Legislature  
Hon. Mark C. Poloncarz  
Hon. Christopher L. Jacobs  
Hon. Stefan I. Mychajliw  
Acting District Attorney Michael J. Flaherty, Jr.  
Hodgson Russ, LLP  
Kavinoky & Cook, LLP

# **EXHIBIT A**



**OFFICE OF THE ERIE COUNTY DISTRICT ATTORNEY**

**MICHAEL J. FLAHERTY, JR.**  
**ACTING DISTRICT ATTORNEY**  
January 21, 2016

Michael Siragusa  
Erie County Attorney  
95 Franklin Street  
Buffalo, New York 14202

**Re: Designation**

Dear Mr. Siragusa:

I have reviewed our records and at no time has the Erie County District Attorney's Office designated Joseph Lorigo, Esq., as the Town Prosecutor for the Town of West Seneca.

Should you have any questions, please feel free to contact me at 858-2461.

Very truly yours,

**MICHAEL J. FLAHERTY, JR.**  
**ACTING DISTRICT ATTORNEY**

A handwritten signature in cursive script, appearing to read "Amy C. Hughes".

By: **AMY C. HUGHES**  
Chief of Administration

ACH/

# EXHIBIT B



MEMORANDUM

TO: Michael A. Siragusa, County Attorney  
FROM: Jonathan H. Gardner   
Date: January 20, 2016  
RE: Appointment of County Legislator as Town Prosecutor

We have been asked to advise on whether an Erie County Legislator may also serve as the Town Prosecutor for the Town of West Seneca.

Common Law Prohibition on Incompatible Offices

It is well settled under common law that a person may not hold two public offices which are "incompatible." Two positions are incompatible if one is subordinate to the other or there is an inherent inconsistency between the two. See *People ex rel. Ryan v. Green*, 58 NY 295 (Court of Appeals, 1874); Op AG No. 99-35 (informal). An inconsistency in the functions of the two offices exists when there is a built-in right of the holder of one position to interfere with the functioning of the other. Such interference may include situations where one office is subject to review by the other. The harm presented in such situations is that the design that one act as a check on the other is frustrated. Incompatibility has been found where one position involves an element of budgetary control over the other. *Held v. Hall*, 191 Misc. 2d 427 (N.Y. Sup. Ct. 2002); *Dupras v. Clinton*, 213 A.D. 952 (3<sup>rd</sup> Dep't. 1995).

In the situation presented to us, a sitting Erie County Legislator has been appointed as the West Seneca Town Prosecutor by the West Seneca Board. While neither his appointment nor his compensation are directly subject to the County Legislature, his appointment is subject to approval by the Erie County District Attorney.<sup>1</sup> The annual budget for the Erie County District Attorney is a line item budget, subject to approval by the County Legislature. As a result, on an annual basis, the Erie County District Attorney must approve the appointment and re-

<sup>1</sup> Pursuant to County Law §700, in order for a Town Prosecutor's appointment to be effective, the District Attorney, within whose jurisdiction the Town Prosecutor will be acting, must authorize such appointment. This must be done annually.

appointment of the West Seneca Town Prosecutor while the same person the District Attorney is approving must annually vote on the District Attorney's budget.<sup>2</sup> The conflict situation will arise every year and would be in the background of every interaction between the Legislator and the District Attorney.<sup>3</sup>

To put the point more succinctly, by holding the two positions, the Legislator in question is effectively both the District Attorney's supervisor for budget purposes and the District Attorney's agent. The Prosecutor's authorization to act arises by virtue of a delegation of duty by the District Attorney. *People v. Cooper*, 156 Misc. 2d 483 (N.Y. County Ct. 1992). A fundamental duty of a County Legislator is to oversee County government, the allocation and use of County resources (i.e., the County budget) and to act as a supervisor. The District Attorney depends upon the Erie County Legislature for funding and for approval of his budget. Therefore, the District Attorney's office is subordinate to the Legislator's office in the context of the budget, and the Town Prosecutor is subordinate to the District Attorney in his role as Town Prosecutor.

Public officials should obviate the possibility of any conflict of interest to preserve the integrity of the legislative body and public confidence in its operations. *Held* citing *Town of Ramapo v. Walton*, 90 Misc. 2d 914 (NY Sup Ct. 1977), *Dupras*; see also *Dykeman v. Symonds*, 54 A.D.2d 159 (N.Y. App. Div. 4th Dep't 1976) ("It is the possibility of wrongdoing and the principle involved which bars her from holding these incompatible offices"); NY Att'y Gen. Op. No. 98-44 (informal) ("Even the appearance of impropriety should be avoided in order to maintain public confidence in government"). This issue is amplified by the County Legislator's appearances before, and County assistance to, the Town of West Seneca, the municipality that he serves as Town Prosecutor. For example, he is sometimes requested by the West Seneca Town Board, or its members, to pursue issues on behalf of the Town in his capacity as Legislator.<sup>4</sup> His

---

<sup>2</sup> The problem is perhaps amplified by the fact that the Legislator in question is also the Majority Leader of the Legislator.

<sup>3</sup> We note that the Legislator in question also was appointed to the position of Americans with Disabilities Officer and Harassment Compliance Officer by the West Seneca Town Board. We have not been asked to review the computability of this appointment. However, it is a paid position and as a result the Legislator in question actually holds three public offices related to West Seneca, taking into account that his legislative district includes West Seneca.

<sup>4</sup> A review of meeting minutes of the West Seneca Town Board (available at <http://westseneca.net>) demonstrates Mr. Lorigo's involvement with the Board:

- Upon being questioned regarding the details surrounding the selection of a new member of the Town Zoning Board, Councilman Hanley responded there were "many meetings held and he had met with Mr. Lorigo and Councilman Hart to discuss different options for the Organization Meeting." (Minutes #2014-01, January 13, 2014, p.9.). If Mr. Lorigo's duties as Town Prosecutor include assisting the Town Attorney in Zoning Board matters, this would also evidence the conflict between an attorney holding the two offices. See Ethic Committee Opinion N.Y. State 326 (1974).

dependence on the Town for a portion of his personal income (as Prosecutor) creates a conflict (or at a minimum the appearance of a conflict) with the independent discharge of his duties as County Legislator.

In *Dupras*, the Court held that a county legislator could not simultaneously hold the position of senior clerk in the County Board of Elections because, in her legislative capacity, the individual would be in a position to vote upon the budget and personnel of the County Board of Elections, resulting in an intersection of duties that would require the subordination of the interests of one municipality to the other. Similarly, there is a potentially incompatible intersection of duties between the office of County Legislator and Town Prosecutor. Not only does the Erie County Budget fund the District Attorney, it also funds the Erie County Sheriff's Department, which has jurisdiction in the Town, and may have Sheriff Deputies appearing in West Seneca Court to assist the Town Prosecutor in trying cases.

In some instances, conflicts between two positions can be avoided by recusal from votes that may involve acting upon matters related to the second position. The problem with this argument, as applied to the matter at hand, is that budgetary process is broad and involves interrelated matters. It is by its nature a process of allocating resources such that all aspects of the budget and, by extension, the needs of County agencies, are balanced against each other. Courts have found that avoidance of the conflict in the context of approving budgets would require recusal from the entire budgetary process. *Dupras*.<sup>3</sup> As a result, the holder of two offices may be abdicating his duties as a legislator if he cannot vote on budget issues.

- 
- Amy Carpenter questioned if anything will be done with Seneca Street between Union Road and Ridge Road. Supervisor Meegan responded this is a county project and suggested calling Legislator Joseph Lorigo. (Minutes #2015-23, November 23, 2015, p.8)
  - "Supervisor Meegan responded that sidewalk installation or replacement is included in the town's road reconstruction projects. Indian Church Road is a county road so any requests for crosswalks should be referred to County Legislator Joseph Lorigo." (Minutes #2013-09, April 15, 2013, p.9)

<sup>3</sup> In *Dupras*, the respondent was appointed to the Clinton County Legislature to fill the unexpired term of her husband. At the time she was also a senior clerk in the Clinton County Board of Elections. An action was brought to compel the respondent to resign from one of the offices. The Supreme Court granted the petition and the respondent appealed. The Appellate Court affirmed the decision of the Supreme Court. In its decision, the Court discussed the respondent's proposal to ameliorate the conflict by recusing herself from any votes on the Board of Elections' budget. The Court responded by saying that "in consideration of the needs of the other County agencies and departments and the resources of the County, Perry [the respondent] would have to recuse herself from the entire budgetary process to remove any suggestion of conflict of interest or appearance of impropriety. This would be unacceptable since it would deprive Perry's [the respondent's] constituents of a voice in a significant aspect of the Legislature's responsibilities.

Thus, the rule that has evolved in New York is that where there is either a common law or statutory prohibition against the holding of incompatible offices, a person who accepts and qualifies for a second incompatible office is held to vacate, or by implication resign from, the first office upon acceptance of the second office. No judicial proceedings are necessary, and a successor may at once be elected or appointed. An individual may accept a second office by entering upon the performance of the duties of that office, or by an official act such as taking the oath of office, thereby vacating his original office.<sup>6</sup> *Held* at 445; *see also Ryan v. Green, supra*, at 304; *Smith v. Dillon*, 267 A.D. 39 (N.Y. App. Div. 1943); *Knauf v. County Legislature of County of Monroe*, 27 A.D.2d 440 (N.Y. App. Div. 4th Dep't 1967) (holding that an incumbent town supervisor who was elected to the county legislature vacated the office of Town Supervisor at the organizational meeting of the County); *Spencer v. Cristo*, 27 Misc. 3d 334 (N.Y. Sup. Ct. 2010).

In *Held*, the respondent was the Police Chief of the Town/Village of Harrison. While serving as Police Chief, he was elected to the Westchester County Board representing the district in which the Town/Village of Harrison was located. The Court held that that the two positions were incompatible. While the petitioners sought an order directing the respondent to resign from one of the offices, the Court held that no court intervention was necessary. On the day that the respondent executed and filed his oath of office as a member of the County Board, he was deemed to have resigned his position as Police Chief. The Court stated that "the law governing the consequence of incompatible office holding has been established in New York since at least 1874 when our state's highest court declared that when incompatibility exists, 'one office is *ipso facto* vacated by accepting another (*People ex rel. Ryan, supra*, 58 NY at 304)', [as] further explained almost 60 years ago in *Matter of Smith v Dillon* (267 App Div 39, 43) . . ."

While it is well settled law in New York that when two offices are incompatible and held by the same person, the "...acceptance of the second is in law an implied resignation of the first" *Dykeman v. Symonds*, 54 A.D. 2<sup>nd</sup> 159, 161 (4th Department 1976), we note that in several cases in which there is both (i) an issue of common law incompatibility and (ii) a statutory conflict of interest or prohibition against dual office holding, the Courts have allowed the public official to choose to resign one position as the resolution of the conflict. *See Dykeman id.* In the matter at hand, however, we have not found a statutory conflict of interest or prohibition and therefore the cases that allow a choice to be made, rather than an automatic vacating of the first position, are distinguishable.

---

<sup>6</sup> There may be a question as to whether the legislator has accepted the second position as Town Prosecutor. As of the date of this Memorandum, we are informed that he has appeared in Court as Town Prosecutor, which would strongly indicate acceptance. However, we do not know the status of the District Attorney's confirmation which also may bear on the issue of acceptance.

### Statutory Considerations

While the common law result, as articulated by the cases we reviewed, plainly appears to support the conclusion that the two offices are incompatible, we did not find a statutory prohibition that was on point.

Erie County Legislators are prohibited from holding multiple elected positions at the same time. County Law §411; Erie County Charter § 202.1. The County Legislator position is an elected office, while the Town Prosecutor is appointed by the Town Board. While neither the Erie County Code of Ethics nor the West Seneca Code of Ethics has an outright prohibition on one person simultaneously holding multiple public offices, §13-3(C)(1) of the West Seneca Code bars Town officials, officers and employees from "becoming interested directly or indirectly in any manner whatsoever in any business or professional dealings with the Town." An Erie County Legislator, who votes on allocations of County funds and resources to the Town and its agencies, would likely be deemed to have an interest in dealings with the Town. Also, under §13-(J), West Seneca's officials, officers and employees generally owe a duty to avoid conflicts.

### Ethical Obligations of Attorneys

The New York Rules of Professional Conduct, formerly known as the Disciplinary Rules ("DR"), sets forth the minimum ethical standards of conduct for attorneys in New York. While not binding on Courts, the Professional Ethics Committee of the New York State Bar Association (referred to herein as the "Ethics Committee") has opined on several questions involving the outside law practice of an elected member of a local legislative body. Several of these opinions focus on the issue of the budgetary duties of the local legislative body and the relationship of such budgetary duties to the circumstances of such outside employment. These opinions rely heavily on ("DR") DR 8-101(A), Canon 9 and Ethical Consideration 8-8 (EC 8-8) of the American Bar Association Model Code of Professional Conduct. Specifically, DR 8-101(A) states that "A lawyer who holds public office shall not use his public position to influence, or attempt to influence a tribunal to act in favor of himself or of a client." The latter specifically provides that "A lawyer who is a public officer, whether full time or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." [*Emphasis added*]. Furthermore, Canon 9 requires the lawyer to promote public confidence where explicit ethical guidance does not exist and to avoid not only professional impropriety but also the appearance of impropriety.

The power of the lawyer who has, as an elected official, budgetary power over another person with whom he has a professional relationship can present a prohibited conflict of interest. For example, it is improper for a county legislator to be the opponent of a prosecutor if district attorneys and assistant district attorneys' salaries are in "line item" budgets subject to the approval by the County Legislature. N.Y. State 424 (1975). Though the Ethics Committee believed it was highly unlikely that the County Legislator would gain any advantage through his

position, the public's suspicion of possible misuse was sufficiently great to justify the Legislator's disqualification in situations where the Legislature controls individual prosecutorial salaries. See, N.Y. State 292 (1973). The appearance of a conflict is the cornerstone for the conclusion prohibiting an attorney from holding both positions, and is similar to the obligation of a public officer to avoid even the appearance of impropriety. See also, N.Y. State 209 (1971) ("where a legislator is retained to act as an attorney for a client dependent to any substantial extent upon the legislature of which the legislator is a member, an impression of impropriety is inevitably created in the eyes of the public which should be avoided).

### Conclusion

We conclude that the offices of Town Prosecutor and County Legislator are incompatible under New York common law and may not be held by one person simultaneously. We further conclude that an attorney holding both positions creates an impermissible conflict of interest (or appearance thereof) under the New York Rules of Professional Conduct. As a result of the incompatibility of the two offices under common law, we conclude that the legislator has vacated his position as County Legislator by operation of law by accepting the appointment as Town Prosecutor and that his seat in the Erie County Legislature is now vacant.

10003/32403/491640.1

# **EXHIBIT C**

MEMORANDUM FROM



Daniel A. Spitzer, Esq.  
Direct Dial: 716-848-1420  
Email: [Dspitzer@hodgsonruss.com](mailto:Dspitzer@hodgsonruss.com)

---

**To:** Michael Siragusa, County Attorney  
**Date:** January 20, 2016  
**Subject:** Compatibility of Elected County Legislator and Appointed Town Prosecutor Positions

We have been asked whether the elected position of Erie County Legislator is compatible with the appointed position of Town Prosecutor of the Town West Seneca. We have also been asked what, if any, are the consequences if the positions are determined to be incompatible.

**Background**

Our opinion is based on the following information:

On November 10, 2015, elections were held for each seat in the Erie County Legislature, including District 10, which includes the Town of West Seneca.<sup>1</sup> The member representing District 10 was re-elected and, along with other members of the Legislature was sworn in on January 7, 2016. By law, the term begins January 1<sup>st</sup>.

The Town of West Seneca held its annual reorganization meeting on January 4, 2016. The Erie County Legislator for District 10 was appointed one of two Town Prosecutors,

---

<sup>1</sup> Legislative District No. 10 Map, Erie County Board of Elections, at [http://www2.erie.gov/lorigo/sites/www2.erie.gov/lorigo/files/uploads/pdfs/LD\\_10.pdf](http://www2.erie.gov/lorigo/sites/www2.erie.gov/lorigo/files/uploads/pdfs/LD_10.pdf)

effective January 1, 2016.<sup>2</sup> At the same meeting, the Legislator was appointed the Americans with Disabilities Officer and Harassment Compliance Officer. The Town positions are all paid positions.<sup>3</sup>

New York State Law does not create a position of Town Prosecutor, but does allow Town Boards to either create the position of Town Attorney, or hire attorneys to handle the legal duties of the Town. Town Law § 20(2)(a). While Town Attorneys are appointed for a specific term, governed by Town Law § 24, other attorneys, including in this case the Town Prosecutor, serve at the pleasure of the Board.

Town Prosecutors must be authorized by the District Attorney as well as the Town Board to prosecute crimes. Under County Law § 700(1), the District Attorney is charged with conducting "all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected or appointed." Before a Town-retained prosecutor (whether a Town Attorney or attorney retained by the Town) may appear before a court and conduct a prosecution, he or she must be authorized to do so by that County's District Attorney. *People v. Van Sickle*, 13 N.Y.2d 61, 62-63 (1963) ("the District Attorney, as the elected representative of the people and charged with this responsibility, must carry the responsibility

---

<sup>2</sup> Minutes of Town of West Seneca Town Board, January 4, 2016, at [http://www.westseneca.net/sites/default/files/tbmrorg01\\_04\\_201607264520160107152617.pdf](http://www.westseneca.net/sites/default/files/tbmrorg01_04_201607264520160107152617.pdf). We offer no opinion on the legality of a retroactive appointment, which would have the effect of compensating an employee for work not performed. New York law generally limits retroactive appointments to employees governed by the Civil Service Law who are improperly denied promotions. We also do not know when (or if) the District Attorney approved the Legislator as a prosecutor. Therefore, to the extent said approval came after January 1, 2016, we offer no opinion whether the Prosecutor could be compensated for days when he was not legally qualified to act as a prosecutor.

<sup>3</sup> *Id.* As the duties of these positions are unknown, we have not evaluated whether they constitute incompatible offices with that of county legislator.

and must set up a system whereby he knows of all the criminal prosecutions in his county and either appears therein in person or by assistant or consents to appearance on his behalf by other public officers or private attorneys”).

Therefore, a Town Prosecutor who is not the Town Attorney (and thus does not have a specific term of office) serves at the pleasure of both the Town Board and the District Attorney.<sup>4</sup>

#### **Incompatibility of Public Positions**

“Public Policy demands that an officeholder discharge his or her duties with undivided loyalty. The doctrine of incompatibility is intended to assure performance of that quality.” 3 McQuillin MUNICIPAL CORPORATIONS, § 12.112, at 500-1 (3d ed. rev.). The general rule in New York is that a public officer cannot hold two incompatible offices at the same time. *See Smith v. Dillon*, 267 A.D.2d 39, 43 (3d Dep’t 1943).

There is no general prohibition on holding two public offices, as long as the offices (and their respective duties and powers) are independent of each other. The seminal case for determining incompatibility of offices is *People ex rel. Ryan v. Green*, 58 N.Y. 295, 304-5 (1874):

---

<sup>4</sup> This was demonstrated when the Erie County District Attorney revoked the Town of Cheektowaga Town Prosecutor’s authority to serve as a public prosecutor. “Appointed by the Town Board in 2007, [the Town Prosecutor] said she no longer can perform her job without the designation from the District Attorney’s Office.” Janice L. Habuda, *District Attorney Revokes Cheektowaga Prosecutor’s Authority Over Letter to the Editor*, BUFFALO NEWS, April 29, 2014, at <http://www.buffalonews.com/city-region/cheektowaga/district-attorney-revokes-cheektowaga-prosecutors-authority-over-letter-to-the-editor-20140429>.

Incompatibility between two offices, is an inconsistency in the functions of the two; as judge and clerk of the same court -- officer who presents his personal account subject to audit, and officer whose duty it is to audit it. \* \* \* Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. \* \* \* *The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.* (emphasis added).

In evaluating the potential for incompatibility, "the common law rules regarding dual office-holding apply equally to an office, which generally involves the exercise of sovereign authority and discretion, and a position of employment." 2003 N.Y. Op. (Inf.) Att'y Gen. 3 (internal citations omitted), citing, *Matter of Dupras, v. County of Clinton*, 213 A.D.2d 952, 953 (3d Dep't 1995). *Dupras* also noted that the relationship need not be direct supervision. Thus, where in one position the person has control over the budget of the other position, incompatibility exists, and, since the budget is so important to the job of an elected official, incompatibility in the budgetary setting cannot be cured by recusal from voting.

One final general point. In evaluating the incompatibility of offices the focus is on the positions, their duties and how to interact, not on the individual who holds those positions. *Dykeman v. Symonds*, 54 A.D.2d 159, 163 (4th Dep't 1976) ("The fact that respondent Symonds may indeed be able to resist temptation to act in a manner incompatible with the best interests of the county and that she may actually refrain from her duty of participating in the fixation of the salary of Motor Vehicle Supervisor is not enough to permit her to hold both positions. It is the possibility of wrongdoing and the principle involved which bars her from holding these

incompatible offices."'). Nothing in this narrative should be read as implying any inappropriate action on the part of the person holding the two positions in question.

**The Compatibility of the Positions of Appointed Town Prosecutor and Elected County Legislator**

The fundamental principle of compatibility of office that derives from *Ryan* and its progeny is that one person cannot serve as both supervisor and subordinate. Because of the role of the County Legislature in 1) establishing the budget of the District Attorney, 2) establishing shared services contracts with the Town, and 3) determining the allocation of County resources to various locations throughout the County through the budget and capital project processes, we believe the positions of elected County Legislator and appointed Town Prosecutor are incompatible.

First, we note there is no statutory proscription on holding both positions. While limits exist on elected County officials from holding other elected positions, County Law § 411, no statute, state or local, precludes the holding of a second, appointive office by an Erie County Legislator. However, the strings of the fiscal purse which are in the power of the County Legislature create relationships with the Town Board and District Attorney, both of whom hold the Legislator's Town employment in their sole discretion, that render the two offices incompatible.

Adoption of the County Budget, including the District Attorney's budget, is part of the Legislature's power. County Law § 360. The Legislator at issue here is also both the majority Leader and Chair of the Finance & Management Commitment, giving him significant power over the budget of the County official – the District Attorney – at whose pleasure he holds

his prosecutor job. This is precisely the conflict *Dupras* addressed, and prohibited. Nor is conflict over the budget mere speculation. In recent memory, the Erie County District Attorney sued the County Legislature over cuts to his budget. A repeat of such action would place the District Attorney in direct litigation with his own agent before the courts, which is more than just an appearance of impropriety, but a scenario in which the public could never be certain that their interest was the sole consideration of the Legislator.

Similar entanglements occur with the Town Board, which has equal veto power over his Prosecutor position. The Legislature approves all shared services contracts with the Town and decides which capital projects throughout the County will receive County support. For example, there are snow plowing contracts between the County and its towns that have been the subject of significant discord over the past few years.<sup>3</sup> The amount of the payment by the County to the Towns under the snow plow contracts has a direct impact on a town's need to raise funds through its Highway Fund budget. Thus, the Legislator is voting on contracts with a significant financial impact to his employer; in such instances (and those less direct) insurmountable appearances of impropriety exist. See e.g., *Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. of Tuxedo*, 69 A.D.2d 320 (2d Dep't 1979)(in the zoning context, a top executive in an advertising agency handling the account of a corporate client who was the corporate applicant before the board had an apparent conflict of interest which required his disqualification in order to avoid the appearance of impropriety and assure the public that a member of the zoning board be, so far as practicable, open minded, objective, impartial and free

---

<sup>3</sup> See e.g., Harold McNeil, Buffalo News, Boston cancels snowplowing contract with Erie County, , Nov. 6, 2014, at <http://www.buffalonews.com/city-region/southern-erie-county/boston-cancels-snowplowing-contract-with-erie-county-20141106>.

of entangling influences or the taint thereof). The Legislator's actions on such contacts could directly reduce the tax levy that his employer needs to raise, thus creating an incompatibility among the offices.

Additionally, the Legislator votes on where County resources will be spent on capital projects. Such allocations of resources for the benefit of the West Seneca community serve not only his constituents, but his employer the Town Board, thus raising the unfortunate and unavoidable specter that the Legislator's personal stake in his employment holds at least partial sway over his actions as Legislator.

We are aware that the Attorney General found no incompatibility between the office of County Attorney and Village Attorney. 1980 N.Y. Op. (Inf.) Att'y Gen. 114. But that opinion includes no evidence that the Village Attorney was also acting as prosecutor or otherwise owed any aspect of his employment qualifications to the District Attorney. We also note the opinion did not consider any Village-County agreements. Here, the Legislator owes his continued employment to two public entities with which he is fiscally entwined, rendering his Town and County positions incompatible.

#### **Consequences of Holding Two Incompatible Positions**

The common law rule is that where a public officer accepts and qualifies for a second incompatible office, the officer vacates or implicitly resigns from the first office. 3 McQuillin MUNICIPAL CORPORATIONS, § 12.112, at 500 (3d ed. rev.). New York courts generally follow this rule, as do Attorney General opinions, *Dykeman v. Symonds*, 54 A.D.2d 159, 163-164 (4th Dep't 1976) ("The rule has thus evolved, 'that when two public offices or trusts are

incompatible with each other, the [holder of] one is not disqualified to be appointed or elected to the other, **but his acceptance of the second is in law an implied resignation of the first.**"

(internal citations omitted, emphasis added)); *Held v. Hall*, 191 Misc. 2d 426 (Sup. Ct. Westchester Cty. 2002) ("[T]he officeholder vacates, or by implication, resigns, from his first position when he 'accepts and qualifies for [the] second and incompatible office.' An individual may accept a second office by entering upon the performance of the duties of that office, or 'by less than an official act, such as taking the oath of office.'" (internal citations omitted)) 1979 N.Y. Op. (Inf.) Att'y Gen. 263.

In *Held*, for example, a police chief was elected to the county legislature in a district in which his employer was located. The police chief executed and filed his oath of office as a member of the legislature and began fulfilling his county duties. In response, petitioners commenced a declaratory judgment action (converted to an Article 78 proceeding) seeking a declaration that the police chief may not serve as a county legislator, arguing that the office of county legislator was incompatible with the position of police chief. The court found that because the county had budgetary control over the local police department's programs, the police chief was subordinate to the county legislator's position. The court went on to hold that the remedy for "incompatible office holding has been established in New York since at least 1874, when our state's highest court declared that when incompatibility exists, 'one office is *ipso facto* vacated by accepting another.'" *Held*, 191 Misc. 2d at 444 (quoting *People ex rel. Ryan v. Green*, 58 N.Y. 295, 304 (1874)). The court found that since the respondent assumed his duties as a county legislator, he resigned as police chief by implication and was therefore eligible to continue to serve as county legislator. The court refused to grant relief "beyond adjudications

related to the vacatur of respondent's office of Police Chief and his eligibility to serve as a county legislator." *Id.* at 446.

Further, in *Smith*, the Third Department even suggests that this well-settled rule operates so automatically, that "no judicial proceedings are necessary" to resolve the incompatibility. *Smith*, 267 A.D.2d at 43. Since the officer vacates the first office upon taking the second, incompatible office, "[t]he successor may at once be elected or appointed." *Id.* However, it appears as though these matters are frequently litigated and that judicial proceedings are in fact necessary, as the cases above demonstrate. Even in *Held*, the court granted a judgment declaring that the first office was vacated upon assuming the second. The case law demonstrates that appointments to incompatible offices are frequently challenged via Article 78 proceedings and proceed to final judgment. This is in fact necessary to force a resignation or to resolve uncertainty around an alleged vacated office. In addition, a judicial declaration is often necessary to determine whether an office is indeed incompatible, as these matters are frequently contested.

While the Third Department suggested no judicial proceedings are necessary, it later reversed itself by failing to apply New York's well-settled rule in *Dupras v. County of Clinton*, 213 A.D.3d 952 (3d Dep't 1995). There, a petitioner commenced an Article 78 proceeding seeking a judgment against a member of the county legislature who was also employed as a senior clerk with the county board of elections. After noting that the offices were incompatible, the lower court granted the petition and directed the respondent to "resign from one of [the] two public positions." *Id.* The Third Department affirmed and did not apply the rule that the official vacates the first office automatically upon assuming the second.

Thus, while there is substantial authority for the proposition that a vacancy occurs automatically upon taking a second, incompatible office, at least one appellate court has sanctioned the fashioning of an alternate remedy, allowing the public official to choose between two incompatible offices. *See Dupras*, 213 A.D.3d at 953.

**Which Position Is Deemed To Have Been Entered First**

As noted above, the appointment of the Prosecutor and the term of the Legislator both commenced January 1<sup>st</sup>. It may not be clear therefore which position commenced first. An Attorney General opinion states that a vacancy in the prohibited town position of a newly elected county legislator occurs when the county legislator "files the oath of office required by the New York Constitution Article XIII § 3, Public Officers Law § 10, County Law § 402 and Town Law § 25." 1979 N.Y. Op. (Inf.) Att'y Gen. 263. We are informed that the Prosecutor appeared in Court January 15, 2016, but we have no evidence of that date as the commencement of prosecutorial responsibilities. We noted that the County Legislators were sworn in January 7<sup>th</sup>, and the minutes reflect the Legislator's active participation in that meeting. But we do not know if that is the date his oath of office was filed. Accordingly, we are unable to unequivocally determine which position was assumed first. If there is not a clear indication of which position was occupied first, nor a clear indication of when a public official first took official actions, courts may be less likely to find implicit resignation, and may direct the official to choose between the offices. *See Held*, 191 Misc. 2d at 444 ("Here, although an appropriate remedy would have been an order directing respondent, within 15 days, to choose which of the two offices he intends to retain, in fact, no further court intervention is necessary. Rather, by his own actions, respondent has provided the relief sought by petitioners.").

This raises the question of what occurs next. If the Legislator declines to follow the conclusion of this memo and the Kavinoky Cook memo, or attempts to serve in an office he has previously vacated, we believe that litigation would be required to resolve the matter. Withdrawal of support for Town Prosecutor employment by either the Town Board or the District Attorney would only resolve the matter prospectively, it would not cure the incompatibility that occurred, and would be meaningless, if, as most cases have held, the vacancy of the first position was automatic upon assuming the second.

**Conclusion**

The positions of appointed Town of West Seneca Town Prosecutor and elected Erie County Legislator are incompatible, and therefore, may not be held by one person at the same time.

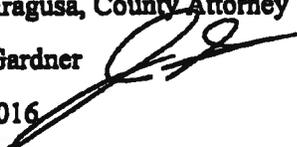
# EXHIBIT D



**kavinoky cook**  
LLP

SHAPED BY HISTORY. DRIVEN BY CHANGE.

MEMORANDUM

TO: Michael A. Siragusa, County Attorney  
FROM: Jonathan H. Gardner   
Date: January 22, 2016  
RE: Appointment of County Legislator as Town Prosecutor

As a follow-up to our Memorandum of January 20, 2016 you have asked us whether the Legislator "accepted" his appointment as West Seneca Town Prosecutor such that his acceptance of that office triggered the automatic resignation from his office as County Legislator. You have posed this question in light of additional facts and developments since our prior Memorandum.

We concluded in our Memorandum of January 20, 2016, that the Legislator vacated his position as County Legislator by operation of law by accepting the appointment as Town Prosecutor and that his seat in the Erie County Legislature is now vacant. It has now been suggested that such acceptance was not made because there was no formal approval by the District Attorney pursuant to §700 of the County Law.

There are a number of pertinent facts.

At the 2016 organization meeting of the West Seneca Town Board, held on January 4, 2016, the County Legislator was appointed to the office of Town Prosecutor, effective January 1, 2016.<sup>1</sup>

On January 15, 2016, it is our understanding that the Legislator appeared in West Seneca Town Court as Town Prosecutor. It is our further understanding that the Erie County District Attorney had not confirmed or rejected his appointment at the time of his appearance in Court and has not confirmed or rejected his appointment as of the date of this Memorandum. We further assume that, as Town Prosecutor, he handled multiple cases and that he executed documents under his name as Town Prosecutor.

As discussed in our Memorandum dated January 20, 2016, it is well settled in New York that a person who accepts a second and incompatible public office is generally held to vacate or by implication resign from the first position as of the time of his acceptance of the second position. At the point he accepted the appointment as Town Prosecutor, the Legislator had an

---

<sup>1</sup> The County Legislator was also appointed the Town Americans with Disabilities Officer and Harassment Compliance Officer for the Town of West Seneca and given an annual stipend of \$1,000. The resolution appointing him to this office required no further action by Erie County.

interest in the District Attorney's acting on his appointment, whether by way of confirmation, disapproval or withdrawal of authority. The incompatibility was present. The issue is whether the Legislator's actions as described above amount to acceptance of the office, notwithstanding the absence of the District Attorney's confirmation. It has been suggested that if he did not accept the office, his seat in the Legislature was not vacated.

In *People v. Soddano*, 86 N.Y.2d 727 (N.Y. 1995) the Court of Appeals ruled that the district attorneys may allow appearances by public officers provided they are "kept aware of all the criminal prosecutions in the county." This decision suggests that something less than a formal designation is sufficient for the District Attorney to delegate prosecutorial authority.

In *Fauci v. Lee*, 38 Misc. 2d 564, the Court stated that the issue of whether an office is deemed to be accepted can be determined by an official act, or a less than official act (such as taking an oath of office), but some positive showing of acceptance must be made on the office holder's part. Given that the County Legislator has appeared in West Seneca Town Court as Town Prosecutor and conducted the business of that office in Court, the "official act" threshold is met. Further, the Courts have consistently held that "The acts of one who carries out the functions of a public office under color of authority [are valid] . . . as to third persons and the public, and hence immune from collateral attack, notwithstanding irregularities in the manner in which the officer was appointed" *Whitman v. City of Troy*, 3 Misc. 3d 794 (N.Y. Sup. Ct. 2004).

The Legislator formally accepted his appointment by the West Seneca Town Board to the office of Town Prosecutor, and appeared in Court on behalf of the people of the State of New York based upon this appointment. We do not believe that express confirmation from the District Attorney is a necessary prerequisite for his having accepted the office.

The larger concern is whether the actions of the Erie County Legislature may be vulnerable to challenge if the issue of whether the Legislator has inadvertently vacated his seat is not resolved definitively. If a challenge was mounted after three months of operations by the Legislature, for example, it is possible that the legitimacy of everything that was approved by the Legislature during that three-month period could be cast in doubt or even ruled improper. If the County budget was approved during that period and it was later determined by a Court that the Legislator resigned his seat by operation of law as of January 15, 2016, the County may be deemed to be operating under an improperly approved budget.

In short, while we believe that the issue is esoteric and that a Court might lean as best it could in the direction of allowing the Legislator to retain his seat in the Legislature (assuming he promptly resigns as Town Prosecutor<sup>2</sup>), we cannot say that this outcome is assured. What we

---

<sup>2</sup> We think resignation is the correct path. By appearing and acting as Town Prosecutor and taking the oath of office, the Legislator has evidenced a clear intent to accept the position. His intent changed upon being informed of the incompatibility of his two positions and the effect of that incompatibility. Since he intended to take the position and essentially did take the position, we think that the correct way for him to remove himself from the position is to resign.

can say is that the consequences of a challenge being decided against the Legislator retaining his seat are unpredictable and potentially chaotic<sup>3</sup>.

There are several options that could address the situation, assuming the Legislator wants to retain his seat in the County Legislature and give up his position as Town Prosecutor. The other members of the Legislature could undertake a process to re-appoint the Legislator, as if he vacated the seat and just in case a Court later found that he vacated the seat.<sup>4</sup> This would create the clearest record for the legitimacy of the Legislature's proceedings going forward. Alternatively, you could seek an opinion from the New York State Attorney General on an expedited basis. While such an opinion would not be binding on a Court, it would be strong persuasion for a Court. Better, a declaratory judgment could be obtained from a Court resolving the status of the legislative seat. Any one of these options would stand the County Legislature in better stead than the mere resignation of the Legislator as Town Prosecutor.

451837.1

---

<sup>3</sup> We note that any challenge so mounted would likely result in the Legislator being enjoined from voting while such action was pending, thus depriving the County Legislator's constituents their right of representation and potentially causing gridlock in the Legislature.

<sup>4</sup> This re-appointment to fill a vacancy would trigger the requirement that the legislator who was appointed by the Legislature to fill a vacancy run for election in the year of that appointment.

# EXHIBIT E

**Phillips Lytle LLP**

**Memorandum**

**To:** Joseph Lorigo, Esq.  
**From:** Phillips Lytle LLP, Kevin J. English   
**Date:** January 28, 2016  
**Re:** Compatibility of Service as an Erie County Legislator and a West Seneca Town Prosecutor

---

**QUESTION PRESENTED**

Is service as an Erie County Legislator representing the Town of West Seneca compatible with service as a West Seneca Town Prosecutor, paid by the Town of West Seneca and appointed by the West Seneca Town Council?

**BRIEF ANSWER**

Yes. The two positions are compatible, and an Erie County Legislator should be able to serve as the West Seneca Town Prosecutor at the same time.

**DOCUMENTS REVIEWED**

In preparing this opinion, we have reviewed: (1) the Memorandum issued by Jonathan H. Gardner, Esq., of Kavinoky Cook LLP, to Erie County Attorney Michael A. Siragusa, Esq., on January 20, 2016, regarding the "Appointment of County Legislator as Town Prosecutor" (the "Gardner Memorandum"); and (2) the Memorandum issued by Daniel A. Spitzer, Esq., of Hodgson Russ LLP, to Erie County Attorney Siragusa on January 20, 2016, regarding the "Compatibility of Elected County Legislator and Appointed Town Prosecutor Positions" (the "Spitzer Memorandum").

## **FACTUAL BACKGROUND**

On November 3, 2015, Joseph Lorigo was elected to a two-year term as the representative of the 10th Legislative District, which includes the Town of West Seneca, New York, to the Erie County Legislature. Although his term of office began on January 1, 2016, he was officially sworn as an Erie County Legislator at the Legislature's reorganization meeting on January 7, 2016.

On January 4, 2016, the West Seneca Town Council also appointed Legislator Lorigo to serve as a Town Prosecutor. Legislator Lorigo, however, did not take office as Town Prosecutor. We understand that he did not accept the appointment, because he never executed the oath of office required of a Town Prosecutor. And, the Erie County District Attorney did not ratify Legislator Lorigo's appointment as Town Prosecutor.<sup>1</sup>

Even so, Legislator Lorigo requests this opinion as to whether he may serve simultaneously as an Erie County Legislator and as West Seneca Town Prosecutor, should he desire to occupy both offices in the future.

## **DISCUSSION**

**Pursuant to existing authority, service as an Erie County Legislator representing West Seneca is not incompatible with service as a West Seneca Town Prosecutor.**

"As a general rule, county legislators may hold any other public office unless: (1) there is an express statutory or constitutional prohibition; (2) a local legislative enactment is applicable; (3) it is a position to which the county legislator individually, or as a member of a board, has the power of appointment . . . ; and (4) the offices are incompatible at common law . . ." *Matter of Dykeman v. Symonds*, 54 A.D.2d

---

<sup>1</sup> The District Attorney "must set up a system whereby he knows of all the criminal prosecutions in his county and either appears therein in person or by assistant or consents to appearance on his behalf by other public officers . . ." *People v. Van Sickle*, 13 N.Y.2d 61, 62-63 (1963) (emphasis added). As such, before Legislator Lorigo could take office as Town Prosecutor, the Erie County District Attorney was required to "properly empower [him] to act pursuant to specific appointment and delegation of appropriate prosecutorial authority . . ." *People v. Cooper*, 156 Misc. 2d 483, 484 n.1 (Erie County Ct. 1992) (internal citation omitted). No such appointment by the District Attorney ever took place. For these two reasons alone, the Gardner Memorandum's conclusion that Legislator Lorigo "has vacated his position as County Legislator by operation of law by accepting the appointment as Town Prosecutor and that his seat in the Erie County Legislature is now vacant" is erroneous.

159, 162 (4th Dep't 1976) (internal quotation marks and citations omitted). The Gardner Memorandum and the Spitzer Memorandum do not claim the existence of any statute, local law, or constitutional provision that would prohibit Legislator Lorigo from serving concurrently as West Seneca Town Prosecutor, and do not contend that the Erie County Legislature appoints town prosecutors. Rather, they argue, however incorrectly, only that the offices of Erie County Legislator and West Seneca Town Prosecutor are "incompatible," and cannot be held simultaneously. Gardner Mem. p. 6, Spitzer Mem. p. 3.

The standard for determining incompatibility of two public offices is well settled. Incompatibility exists where there is an inconsistency in the functions of the two; as judge and clerk of the same court[,] [or an] officer who presents his personal account subject to audit, and officer whose duty it is to audit it. . . . *Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other.* The force of the word . . . is, that from the nature and relations to each other, . . . they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. . . . *The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.*

*People ex rel. Ryan v. Green*, 58 N.Y. 295, 304-05 (1874) (emphasis added).

The Spitzer and Gardner Memoranda argue alternatively that the public offices of Erie County Legislator and West Seneca Town Prosecutor are incompatible, because:

- (1) the Erie County Legislature "approves all shared services contracts with the Town" and "decides which capital projects throughout the County will receive County support" (Spitzer Mem. p. 6),
- (2) simultaneous service in both offices "creates an impermissible conflict of interest (or appearance thereof) under the New York Rules of Professional Conduct" (Gardner Mem. p. 6), and

(3) the Erie County Legislature "establish[es] the budget of the District Attorney" (Spitzer Mem. p. 5).

The common law, for at least three reasons, does not support their arguments.

First, the Erie County Legislature's role in approving certain contracts with or capital projects in the Town of West Seneca would not prevent a County Legislator's service as West Seneca Town Attorney. *O'Malley v. Macejka* ("*O'Malley*"), 44 N.Y.2d 530 (1978), ignored by both the Gardner and Spitzer Memoranda, is persuasive. In *O'Malley*, the plaintiff alleged that the Town of Rotterdam Assessor, appointed to that position by the Rotterdam Town Council, could not concurrently serve as an elected legislator representing Rotterdam on the Schenectady County Board of Representatives, Schenectady County's equivalent to the Erie County Legislature. The Court of Appeals disagreed, noting that "it has been common practice for executive officers of a town to simultaneously hold office in a county-wide legislature . . . ." *Id.* at 534 (internal citations omitted). Even though a town assessor "must certify the valuations he has placed on the real property within the town for use by the county legislature as a base for the application of the county-wide taxes it levies," the Court commented, "neither local assessors nor county legislators review each other's work." *Id.* at 535. The offices of appointed town assessor and elected county legislator were therefore held to be compatible, notwithstanding the certain role of the Schenectady County Board of Representatives in ratifying contracts with or capital spending in the Town of Rotterdam or other Schenectady County municipalities. *Id.* at 535.

Likewise, the prospect that the Erie County Legislature might approve contracts or capital projects affecting the Town of West Seneca, without more, would not prohibit an Erie County Legislator's appointment by the West Seneca Town Council to the position of Town Prosecutor or any other public office in the Town. To conclude otherwise would prohibit the "common practice," endorsed by the Court of Appeals, of concurrent service by a town's public officers as elected county legislators. *O'Malley*, 44 N.Y.2d at 534.

Second, the prospect that a county legislator's service as a town prosecutor could "present a prohibited conflict of interest" that might require his

disqualification from prosecuting a future criminal matter (Gardner Mem. p. 5) does not preclude him from occupying both offices. “[A]bsent an evidentiary showing of the existence of any direct clash between [the legislator’s] personal interests and his public duties and responsibilities in either office,” the “mere possibility that such an eventuality might arise does not disqualify an officeholder from assuming or retaining his position . . . .” *O’Malley*, 44 N.Y.2d at 533 (citing *People ex rel. Ryan v. Green*, 58 N.Y. at 304-05).

Aside from referencing unidentified opinions of the New York State Bar Association’s Professional Ethics Committee, citing attorney disciplinary rules and canons that New York replaced in April 2009, and describing when a county legislator would be prohibited from representing a *defendant* in a criminal proceeding (Gardner Mem. pp. 5-6), the Gardner Memorandum sets forth no “direct clash” between Legislator Lorigo’s personal interests and his official duties as an Erie County Legislator or a prospective West Seneca Town Prosecutor. *O’Malley*, 44 N.Y.2d at 533. A county legislator also serving as a town prosecutor is required to “refrain from participating” in any circumstance that gives rise to an actual conflict of interest (*id.*), but a hypothetical concern of a future conflict does not prohibit such simultaneous service.

Third, the Erie County Legislature’s “power over the budget of the . . . [Erie County] District Attorney” (Spitzer Mem. p. 5) – who consents to a West Seneca Town Prosecutor’s appointment, but does not employ the Town Prosecutor or supervise his work – should not prevent an individual legislator’s appointment as Town Prosecutor.<sup>2</sup> In arguing to the contrary, the Gardner and Spitzer Memoranda rely upon two cases – *Matter of Dupras v. County of Clinton* (“*Dupras*”), 213 A.D.2d 952 (3d Dep’t 1995), and *Held v. Hall* (“*Held*”), 191 Misc. 2d 427 (Sup. Ct. Westchester County 2002) – which determined that a county legislator occupied another incompatible public office. Both cases were decided, however, on distinguishable facts.

*Dupras* concerned a Clinton County Legislator who concurrently “was employed as a senior clerk in the Clinton County Board of Elections.” *Dupras*, 213 A.D.2d at 952. The Court held that the incompatibility of the two offices was “readily

---

<sup>2</sup> Indeed, Ralph Mohr and Ronald Bennett, Esqs., previously served as town prosecutors in various towns in Erie County during their prior tenures as members of the Erie County Legislature.

apparent since in her legislative capacity [the County Legislator would] be in a position to vote upon the budget and personnel of the Board of Elections" – her own department of county government in which she worked and was paid – "as well as the salary of the commissioners *who are her supervisors* and who may remove her at their pleasure . . . ." *Id.* at 953 (emphasis added). *Dupras*, therefore, stands for the incompatibility of two public offices "where one position involves an element of budgetary control over the other . . . ." *Held*, 191 Misc. 2d at 432.

Given that principle, *Held* similarly ruled that the Chief of Police in the Village of Harrison, New York, could not serve simultaneously as a Westchester County Legislator, because the Legislature traditionally had awarded, and would vote in the future to award, funding for the Harrison Police Department's programs as part of the Westchester County Budget.

As a member of the County [Legislature], [the Village of Harrison Police Chief] would be voting upon the [County] budget, thereby deciding whether, and how much, funding should be awarded *to the police department which he supervises*. This is precisely the type of conflict of interest that falls within the bar against *concurrent occupation of positions, one of which "is subordinate to the other or subject to audit or review by the second"* . . . .

*Held*, 191 Misc. 2d at 432 (quoting, in part, *Dupras*, 213 A.D.2d at 953) (emphasis added).

The position of West Seneca Town Prosecutor, by contrast, is not subordinate to the office of Erie County Legislator, or subject to the County Legislature's review or supervision. Whereas the Clinton County Legislature in *Dupras* funded the election clerk's salary, and the Westchester County Legislature in *Held* approved monetary grants for the Harrison Police Chief's department, the Erie County Legislature is not claimed to approve any payments to the West Seneca Town Prosecutor or the West Seneca Town Attorney's Office. To the contrary, the West Seneca Town Prosecutor is appointed, and his or her salary is set and paid, by the Town of West Seneca, acting pursuant to votes of its Town Council. Neither the District Attorney – nor the Erie County Legislature or any other department of County government – employs the Town Prosecutor, funds the Town Prosecutor's salary, or

directs or oversees the Town Prosecutor's work. The function of the West Seneca Town Prosecutor, therefore, is not at all subject to supervision or interference by any Erie County Legislator, and the offices are compatible with each other.

The Gardner and Spitzer Memoranda make the attenuated claim that, because the Erie County District Attorney must consent to West Seneca's selection of an Erie County Legislator as Town Prosecutor, and because the Erie County Legislature approves the District Attorney's Office's annual budget, the offices are incompatible. Gardner Mem. p. 2, Spitzer Mem. p. 5. Their conclusion misses the mark, because the incompatibility of two public offices depends upon their relationship to each other - viz., whether one "is subordinate to the other or subject to audit or review by the second . . . ." *Dupras*, 213 A.D.2d at 953 (citing *O'Malley*, 44 N.Y.2d at 535). *Accord, Held*, 191 Misc. 2d at 432. Although the Gardner and Spitzer Memoranda, like *Dupras*, might demonstrate the incompatibility of the position of Erie County Legislator with the office of Erie County District Attorney or Assistant District Attorney, they do not demonstrate a County Legislator's incompatibility with a Town Prosecutor, appointed, employed, and compensated entirely by a different municipal entity. Because the West Seneca Town Prosecutor is not subordinate to or supervised by the Erie County Legislature, one should be able to occupy the positions of Town Prosecutor and County Legislator at the same time.

Doc #01-2922773

# **EXHIBIT F**

« [Medicaid Czar: NYC Cost Shift Remains In Budget](#)

[Teachout Launches Bid For NY-19](#) »

## Erie County Legislature Majority Leader Offered West Seneca Town Prosecutor Position

UPDATE: Erie County Legislature Majority Leader Joe Lorigo, C, confirmed Monday he was appointed as West Seneca town prosecutor but will not be taking the job.

Regardless, Lorigo said he's waiting on a formal legal opinion to see if it would've been alright to accept the appointment and continue in his elected capacity.

He said the Legislature gave him an informal opinion that it would be okay. The Erie County Attorney's Office disagreed and said he needed to choose.

Republicans currently hold a one-seat majority in the Legislature. Lorigo said he should have a formal opinion within a few days.

[Share |](#)

[Share this post!](#)

[Print article](#)

This entry was posted by [Ryan Whalen](#) on January 25, 2016 at 11:57 am, and is filed under [2016](#), [Erie County](#), [Mark Poloncarz](#), [Republicans](#). Follow any responses to this post through [RSS 2.0](#). Both comments and pings are currently closed.

Comments are closed.

[Search](#)

**SUBN**

The **STATE of POLITICS** blog is a running statewide conversation about NY politics - the debate and the drama, the victories and defeats. We invite you to be part of the discussion. Please share your comments on our posts or (please!) send us a news tip.

[liz.benjamin@twcnews.com](mailto:liz.benjamin@twcnews.com)

[feedback@capitalltonight.com](mailto:feedback@capitalltonight.com)

**WATCH VIDEO**

# EXHIBIT G



## MEMORANDUM

TO: Michael A. Siragusa, County Attorney  
FROM: Jonathan H. Gardner  
Date: February 1, 2016  
RE: Response to Memorandum of Phillips Lytle LLP dated January 28, 2016

### Background

On January 20, 2016 we furnished you with a memorandum concluding that the offices of West Seneca Town Prosecutor and Erie County Legislator are incompatible, and that under the common law rule in New York, Mr. Lorigo may be deemed to have resigned his seat in the Legislature by accepting the second, incompatible appointment. On January 20, 2016, Daniel A. Spitzer on behalf of Hodgson Russ LLP, provided a memorandum to you reaching similar conclusions (the "Hodgson Memorandum"). On January 29, 2016, we provided a supplemental memorandum concluding that, by appearing in Town Court on January 15, 2016, Mr. Lorigo accepted the position of Town Prosecutor.

It is our further understanding that since the date of our first memorandum and the Hodgson Memorandum, Mr. Lorigo sought counsel from Phillips Lytle LLP. We have reviewed the Memorandum of Kevin J. English on behalf of Phillips Lytle LLP (the "Phillips Memorandum") dated January 28, 2016, which concluded that (1) that the positions are not incompatible and (2) that Mr. Lorigo did not accept the office of Town Prosecutor. We are responding to what we believe are certain factual inaccuracies and incorrect conclusions contained in the Phillips Memorandum.

### The offices of Town Prosecutor and County Legislator are incompatible.

The Phillips Memorandum characterizes our conclusion that the two positions are incompatible as "attenuated." In order to reach that conclusion, the Phillips Memorandum ignores its own facts and conclusions of law and makes the simplistic assertion that the District Attorney does not direct or oversee the Town Prosecutor's work. This assertion is in direct opposition to the Phillips Memorandum's position that Mr. Lorigo had never taken office as Town Prosecutor because "no such appointment by the District Attorney [of Mr. Lorigo] had ever taken place." (Phillips Mem. p. 2). As noted in the Phillips Memorandum, the District Attorney "must set up a system whereby he knows of all of the criminal prosecutions in his county and either appears therein or by assistants or consents to appearance on his behalf by other public officers..." (Phillips Mem. p. 1 citing *People v Van Sickle* 13 N.Y. 2d 61, 62-63 (1963)).

The continuing duty of oversight springs from this delegation of authority, and may be withdrawn at any time, in the District Attorney's sole discretion, a point that is omitted from the Phillips Memorandum. Such power of confirmation, delegation and oversight is hardly an "attenuated relationship." It is a relationship that is fundamental to both offices and meets the test laid down by the Court of Appeals. "Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by the other" *O'Malley v. Macejka*, 44 N.Y.2d 530 (1978).

What greater interference can there be than the very power of appointment that Mr. Lorigo concedes is necessary for him to perform as Town Prosecutor?

While the District Attorney's position is superior to that of the Town Prosecutor, in turn the County Legislator's position is superior to that of the District Attorney. As Majority Leader and Chairman of the Legislature's Finance and Management Committee, the County Legislator has power, through the annual County budget process, to review the District Attorney's performance of his public office and determine whether County resources are properly allocated. The relationship between the County Legislator and the District Attorney is not "attenuated." Rather, it is direct and complex as a matter of law. Confirmation of the Town Prosecutor by the District Attorney occurs on an annual basis. Review and approval or disapproval of the District Attorney's budget by the County Legislature also occurs on an annual basis. Consequently, at least once each year, the checks and balances that would normally apply to the independent exercise of public duties by a Legislator and the District Attorney will be undermined.

In addition to the incompatibility between the two public positions due to their common linkage to the District Attorney, we also believe there exists a direct conflict of interest between Mr. Lorigo's duties as an employee of the Town of West Seneca (as its Town Prosecutor) and his authority as a County Legislator over the Town of West Seneca. The Phillips Memorandum dismisses the conflict saying, "[T]he prospect that the Erie County Legislature *might* approve contracts or capital projects affecting the Town of West Seneca without more, would not prohibit [the dual office holding]" (Phillips Memorandum p. 4, *emphasis added*). This statement seems to ignore the fundamental functions of the Legislature - that every year the County Legislature approves all shared service contracts and decides which capital projects throughout the County will receive support.<sup>1 2</sup> As an employee of the Town of West Seneca, Mr. Lorigo would have a greater personal interest in its funding and could be more pressured by the Town Board's influence

---

<sup>1</sup> We also note that, as Chairman of the Finance and Management Committee, Mr. Lorigo arguably has even more influence over the budgetary process. "The Legislature's Finance and Management Committee holds responsibility for oversight of the county's over \$1 billion annual fiscal budget....More so than any other committee, the finance committee works to ensure that taxpayer dollars are spent in a responsible and appropriate manner." Finance Committee Description available at <http://www2.erie.gov/legislature/index.php?q=finance-and-management-committee>

<sup>2</sup> For example, the County-wide "Assigned Counsel" program uses County funding to pay public defenders who appear in West Seneca Town Court. Mr. Lorigo would appear on the other side of those public defenders as Town Prosecutor while also being responsible for reviewing and voting on their budget as County Legislator under County Law 18B.

when acting as a Legislator. This is the type of incompatibility that the Court prohibited in *Dupras v. County of Clinton*, 213 A.D.2d 952 (3d Dep't 1995)(discussed below).

Finally, there are significant ethical obligations associated with the legal system that are not addressed in the Phillips Memorandum. In reaching the conclusion that the offices are compatible, the Phillips Memorandum largely relies on two cases, *O'Malley* and *Dupras*. Both of these cases address (potential) incompatibility between the office of a county legislator and that of an appointed officer - a town assessor and county board of elections clerk, respectively. Neither position is comparable to that of Town Prosecutor, an office that carries enormous discretion to make decisions about prosecution and disposition of violations and offenses. The office of Town Prosecutor, by its nature, involves the ethical obligations of attorneys, the court system and the right of the people of the State of New York to see justice served. In neither *O'Malley* nor *Dupras* was an office demanding this higher level of review present.

In *Matter of Sedore v. Epstein*, 56 A.D.3d 60 (2<sup>nd</sup> Dep't 2008) the Court stated that, "[T]he practical obligations that flow from the prosecutor's duty to do justice have given heightened recognition to the singular nature of that role." At issue in *Sedore* was whether a delegation of authority by a district attorney to an attorney retained by a complainant was permissible. In denying the delegation, the Court held that "[t]he administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach." Given the conflicts inherent in Mr. Lorigo's holding these multiple offices, it strains credulity to say that Mr. Lorigo could administer justice "beyond the suspicion of reproach."

**By appearing in Court on as Town Prosecutor, the Erie County Legislator accepted a second, incompatible position.**

In concluding that Mr. Lorigo did not accept his appointment as Town Prosecutor, the Phillips Memorandum ignores the fact that on January 15, 2016, Mr. Lorigo appeared in West Seneca Town Court, as the Town Prosecutor, and appears to have fulfilled the functions of that office.<sup>3</sup> In an article appearing in the Buffalo News on January 28, 2016, Mr. Lorigo is reported to have stated that he gave up his appointment as Town Prosecutor. According to the article, he stated that any work he "may have already done for the town was unofficial."<sup>4</sup> Presumably, Mr. Lorigo entered into plea deals with violators of traffic laws, prosecuted some violators and in all of those transactions signed off as Town Prosecutor, purporting to be a representative of the District Attorney. It is unclear how this could be anything less than an "official act."

The Phillips Memorandum claims that because Mr. Lorigo purportedly did not take his oath of office as Town Prosecutor and that the District Attorney did not confirm his appointment,

---

<sup>3</sup> We recommend reviewing all actions taken by Mr. Lorigo as Town Prosecutor on January 15, 2016. For example, copies of plea deals negotiated by Mr. Lorigo and documents Mr. Lorigo signed as Town Prosecutor should be obtained. The facts relative to his appearance as Town Prosecutor may be dispositive.

<sup>4</sup> Buffalo News, January 28, 2016, "Erie County legislator gives up West Seneca government posts" Sandra Tan.

he could not have accepted the position.<sup>5</sup> Each of these actions are outside Mr. Lorigo's control. What was within Mr. Lorigo's control was his appearance in Court as Town Prosecutor and his conduct of official business in that capacity. His appearance and conduct of business clearly indicate an intent to accept the appointment, and as discussed below, are the strongest indicators that appointment was in fact accepted.<sup>6</sup>

In *People v. Soddano*, 86 N.Y.2d 727 (N.Y. 1995) the Court of Appeals ruled that the district attorneys may allow appearances by public officers provided they are "kept aware of all the criminal prosecutions in the county." This decision suggests that something less than a formal designation is sufficient for the District Attorney to delegate prosecutorial authority. It further indicates that the District Attorney's formal approval is not necessary for public officers to carry out their functions, as did Mr. Lorigo on January 15, 2016. We view the delegation of authority to town prosecutors generally as a delegation to the office, as opposed to the individual. While the individual must be confirmed, the delegation of authority to the office stands until revoked.

Further, the lack of an oath of office was not determinative of whether a public official accepted his office in *Fauci v. Lee*, 38 Misc. 2d 564. In that case, the Court stated that the issue of whether an office is deemed to be accepted can be determined by an official act, or a less than official act (such as taking an oath of office) indicating a positive showing of acceptance on the office holder's part. Generally, Courts have held that "The acts of one who carries out the functions of a public office under color of authority [are valid] . . . as to third persons and the public, and hence immune from collateral attack, notwithstanding irregularities in the manner in which the officer was appointed" *Whitman v. City of Troy*, 3 Misc. 3d 794 (N.Y. Sup. Ct. 2004). The lack of an oath of office and confirmation by the District Attorney appear to fit better in category of "irregularities" than a denial of acceptance of the office.

If Mr. Lorigo did not accept the office of Town Prosecutor, then his appearance in Court as Town Prosecutor and acting as such raises other issues beyond the scope of this Memorandum (e.g. Are the dispositions of matters in which he participated valid and in effect? What was his intention if not to act as Town Prosecutor?)

### Recommendation

Our conclusion in our Memorandum of January 20, 2016 was that: (a) by his actions and under applicable case law Mr. Lorigo accepted the position of Town Prosecutor and (b) because that position is incompatible with his position as County Legislator, under New York law he may be deemed to have vacated his first position – that of Legislator – effective as of the date he accepted the second one (January 15, 2016). We do not see in the Phillips Memorandum convincing arguments that our conclusion was wrong.

---

<sup>5</sup> The argument seems to assume that Mr. Lorigo could not accept the position without the District Attorney's sign-off. We disagree. The Town of West Seneca Board is the appointing authority. There is no formal acceptance process. We believe Mr. Lorigo's appearance in Town court is an act indicating acceptance, subject to the District Attorney's confirmation.

As of the date of this Memorandum, we understand that Mr. Lorigo has reversed his earlier desire to "give up" or resign from the Town Prosecutor position. We understand now that, upon advice of counsel (presumably Phillips), he wishes to hold both positions, raising questions as to the validity of both legislative actions and criminal proceedings in which Mr. Lorigo participates, and whether Mr. Lorigo should continue to be paid his County salary. Because legal opinions are just that – opinions, we think a judicial review is warranted to provide definitive conclusions that enable the Legislature to go forward in carrying out its functions.

# EXHIBIT H

MEMORANDUM FROM



Daniel A. Spitzer, Esq.  
Direct Dial: 716-848-1420  
Email: [Dspitzer@hodgsonruss.com](mailto:Dspitzer@hodgsonruss.com)

---

**To:** Michael Siragusa, County Attorney  
**Date:** February 2, 2016  
**Subject:** Compatibility of Elected County Legislator and Appointed Town Prosecutor Positions

We have reviewed the January 28th, 2016 memorandum of Kevin English, Esq. (the "English memorandum"), asserting the positions of Erie County Legislator and Town of West Seneca Town Prosecutor are not incompatible, and therefore Joseph Lorigo has neither vacated his position as County Legislator, nor is precluded from retaining both positions. As the memorandum is correct on neither its facts nor the law, evidences little understanding of the interactions between towns and counties, and ignores the actual questions presented, nothing in it changes our position.

First, there is much that is not in disagreement. There is no statute, as all the memos noted, preventing one person from holding both positions. Nor is it uncommon for a County official to also serve as a town, village, or city official. And, it is important to note, there is no evidence that Mr. Lorigo acted in anything other than good faith when he accepted the position of County Legislator, undertook to act in that position on January 7, 2016, and then in the following week appeared as a West Seneca Town Prosecutor. Rather, it is the consequence of those actions and the interrelationship between the positions (without regard to the individual who holds them) which determines their compatibility.

Among other things, Mr. English argues that since the District Attorney (“DA”) never approved of his appointment, Mr. Lorigo could not have assumed the position of Town Prosecutor, and therefore his seat could not now be deemed vacant.<sup>1</sup> This assertion is based upon *People v Van Sickle*, 13 N.Y.2d 61 (1963), which set the standard that the DA is required to establish a system wherein he approves of any person who appears on his behalf. Unfortunately, *Van Sickle* does not support Mr. English’s conclusion. There, the Court upheld the conviction in a case prosecuted by the complaining witness, *i.e.*, the victim of the crime at issue, rather than the DA. *Van Sickle* does not address the issue of whether a prosecutor unapproved by the DA has assumed the office of town prosecutor by appearing on behalf of the People in court and carrying out the duties of a prosecutor, which is the situation here and now.

We are aware that Mr. Lorigo has stated to the Buffalo News that he was only acting in an “unofficial” position when he appeared on behalf of the People. We are unaware of any position of “unofficial prosecutor.” We would respectfully suggest that the position of prosecutor, like pregnancy, is not something that can be undertaken in a partial capacity. The fact that Mr. Lorigo was not fully authorized to act as Prosecutor does not mean that he was not fully qualified to do so, nor does it mean that his actions were improper. It is our understanding that Mr. Lorigo entered, on behalf of the People of the State of New York, into plea deals with various violators of traffic laws and undertook other actions typical of a prosecutor. Under our understanding of the Criminal Procedure Law, these must be official acts because they legally and finally terminated the prosecutions.<sup>2</sup> We also do not believe the infirmity of his appointment invalidates these acts, or renders them unofficial. The Court of Appeals has repeatedly upheld

---

<sup>1</sup> English Memorandum, January 28, 2016, at footnote 1.

<sup>2</sup> Criminal Procedure Law § 340.20.

convictions obtained by prosecutors not qualified by law to serve in that position. For example, in *People v. Carter*, 77 N.Y.2d 95 (1990), the Court upheld a conviction where the grand jury proceedings involved a non-licensed attorney who appeared as an Assistant DA. Mr. Lorigo's actions manifest an intent to assume the office of Town Prosecutor and the fact that he did so without the express consent of the DA does not unwind his actions.

More importantly, Mr. English's argument misses the essential question: What is the relationship between the DA and the Town Board's appointed Town Prosecutor? Upon being appointed by the Town Board, Mr. Lorigo was in a position where he had a financial interest in obtaining the DA's permission in order to continue his employment with the Town. It is that interest, and the incompatibility between needing the DA's permission and having control over the DA's budget, that renders the positions incompatible. The English memorandum simply does not discuss this issue. The fact that Mr. Lorigo did not receive the permission misses the point — the incompatibility arises because he needed it.

The English memorandum misstates the issue by noting that "the Town Prosecutor, by contrast, is not subordinate to the office of Erie County Legislator, or subject to the County Legislatures review or supervision." A completely true point — and one not made by either Mr. Gardner or myself, or relevant to the discussion presented. Rather, the question is whether or not this particular Town Prosecutor is also in control of the DA's budget.

The memorandum then steers into factual inaccuracy, when — utterly ignoring the *Van Sickle* decision it claims to rely upon — it suggests there is no relationship between the work of the Town Prosecutor and the power of the DA, asserting the DA has no oversight role.<sup>3</sup>

---

<sup>3</sup> English Memorandum, at 7.

In fact, it is, under County Law § 700 and *Van Sickle*, the DA who is responsible for all prosecutions and it is the DA who can remove a prosecutor at any time. As noted in our initial memorandum, the last DA exercised that precise authority by revoking his approval of two locally hired prosecutors in Cheektowaga and Lackawanna. Further, the form used by the Erie County DA to approve town prosecutors states the “[d]esignation will continue in effect until it is duly revoked by me.” Thus, Mr. Lorigo’s employment as Town Prosecutor is and always would be subject to the approval of the DA, while Mr. Lorigo has direct, contemporaneous approval power over the DA’s budget, thereby triggering the incompatibility found in both *Dupras* and *Held*.

Similarly unavailing is Mr. English’s interpretation of the *O’Malley v. Mcejka*<sup>4</sup> case as giving sanction to the proposed dual office holding. In *O’Malley*, the Court of Appeals found no incompatibility between a Town Assessor appointed by the Town Board, and an elected County Legislator. Mr. English cites this case for the proposition that there is no conflict between the positions because of the County – Town financial interactions. But, *O’Malley* did not address that issue. Rather, *O’Malley* is specifically limited to the question of whether or not the Assessor’s activities under the Real Property Tax Law, which resulted in setting the tax base for the County, created incompatibility of positions. Had the case addressed County – Town interactions, such as a County contract to pay for part of the assessment services, then the issue might have been before the court. But Mr. English is citing a decision which did not address the significant financial determinations that a County makes that impact a Town budget.

---

<sup>4</sup> 44 N.Y.2d 530 (1978).

He then misrepresents the examples given in the memorandum and limits the *Held* case to find that since the County does not fund the Town Prosecutor position, neither *Held* (nor *Dupras*) apply. Mr. English suggests since there is no direct funding of the Town Prosecutor, there is no incompatibility. But nothing in *Held* suggests the funding was not received by the Town/Village of Harrison — the Police Chief's employer — and applied to the Police Department budget; indeed, we are aware of no authority of a local police department to accept grants that may be disbursed without compliance with the municipality's audit and payment procedures — including approval by the governing body. As in *Held*, Mr. Lorigo would be voting on contracts with his employer, and that further makes the positions incompatible.

Thus, the matter here is settled as in *Held*: "No clearer case of incompatibility can arise than, as here, where one position involves an element of budgetary control over the other." *Held v. Hall*, 191 Misc. 2d 427, 432 (N.Y. Sup. Ct. 2002).

### Resolving the Issue

We believe at this point there are three paths forward for the County. First, there is a very serious question of whether or not Mr. Lorigo has already vacated his position as a County Legislator and therefore, whether any action he takes in that position — especially after the conflict was made known to him — renders that action void, be it a job appointment, adoption of local laws, or even the next budget.

Because he found no incompatibility, Mr. English did not address the issue of automatic vacancy in the first position, but as we noted, the overwhelming authority follows the

common law rule that where upon assuming the second position the public officer implicitly resigns from the first office.<sup>5</sup> Not only have most courts and Attorney General opinions followed this rule, but so has the Court of Appeals in what is continually cited as the controlling case on incompatibility, *People ex rel. Ryan v. Green*, 58 N.Y. 295, 304 (1874) (“one office is *ipso facto* vacated by accepting another”), and in what appears to be the leading modern case on this issue in the Fourth Department, *Dykeman v. Symonds*, 54 A.D.2d 159, 163-164 (4th Dep’t 1976) (“The rule has thus evolved, ‘that when two public offices or trusts are incompatible with each other, the [holder of] one is not disqualified to be appointed or elected to the other, but his acceptance of the second is in law an implied resignation of the first.’” (internal citations omitted)). Thus, the consequences of what may be an already vacant seat must be considered.

We are particularly concerned with any debt that may be issued by the County. Consultation with the County’s Bond Counsel is essential. Bond issues usually require execution of a “Certificate As To Incumbency” as to all members of the approving body; that may not be possible now. The situation may well require disclosure to both current and future bond holders, and could impact the rating agency’s view of the viability of the debt.

As Mr. Gardner recommended in his second memo, we believe the clearest path forward, if Mr. Lorigo wishes to remain in the Legislature, is for him to formally resign and, if they wish to, for his colleagues to reappoint him to his position. The Legislature may also wish to revisit any acts taken in 2016 and ratify their actions, to the extent necessary, to remove doubt as to their legality.

---

<sup>5</sup> 3 McQuillin MUNICIPAL CORPORATIONS, § 12.112, at 500 (3d ed. rev.).

A second method that would give clearance is to seek a court's view on whether the position of County Legislator has been vacated. A judicial ruling on whether or not the positions are incompatible, and, if they are, whether the Legislator position was vacated, would resolve any issues as to the validity of actions taken by the Legislature while Mr. Lorigo was a member. The court may also apply the *Dupras* decision, allowing Mr. Lorigo to remain as Legislator, rather than enforcing the automatic vacating of the office that the overwhelming majority of cases applies. We note, however, that if he remains a member while such litigation is underway, the result may well be a determination that undermines the validity of his actions taken in that period.

Finally, your office could seek an opinion from the Office of the Attorney General. The opinions of the Attorney General are informal and thus nonbinding, but are generally considered definitive in the area of incompatibility of offices. But legally it may have limited value. Obtaining a ruling from the Attorney General would not insulate the acts of the Legislature from challenge, nor require Mr. Lorigo to cease action as a legislator, or prosecutor, if he disagreed with the conclusion. Thus, seeking this opinion may be best used in conjunction with resignation and reappointment, as it would allow the Legislature to proceed on clearly legal grounds, while resolving the issue of whether he can take on the second job in the future. We have attached a proposed letter to the Office of the Attorney General requesting such an opinion, for your use.

[LETTERHEAD OF THE ERIE COUNTY ATTORNEY]

February \_\_\_\_, 2016

Kathryn J. Sheingold, Esq.  
Office of the Attorney General  
Division of Appeals and Opinions  
Assistant Solicitor General, Opinions  
The Capitol  
Albany, New York 12224-0341

Dear Ms. Sheingold:

Re: Request for an Informal Opinion of the Office of the Attorney General  
Regarding Incompatibility of Offices

I am the County Attorney for Erie County, New York. I submit this letter to request an informal opinion from the Office of the Attorney General as to whether the office of an elected County Legislator and an appointed Town Prosecutor are incompatible, as a matter of State law and, if such offices are incompatible, the legal effect of a County Legislator accepting and/or qualifying for a second, incompatible office.

**Relevant Factual Background**

Pursuant to the General Guidelines for Requesting an Informal Opinion, the following constitutes an account of all pertinent facts that the Office of the Attorney General may rely upon. On November 10, 2015, elections were held for each seat in the Erie County Legislature. A member of the County Legislature (the "County Legislator") was re-elected and, along with other members of the Legislature, was sworn in on January 7, 2016, with his term beginning on January 1, 2016. The County Legislator participated in a meeting of the County Legislature on January 7, 2015.

A town located within the County Legislator's district (the "Town") held its annual reorganization meeting on January 4, 2016. The County Legislator was appointed one of two Town Prosecutors, effective January 1, 2016. New York State law does not create a position of Town Prosecutor, but does allow town boards to either create the position of Town Attorney, or hire attorneys to handle the legal duties of the town. N.Y. TOWN LAW § 20(2)(a). While Town Attorneys are appointed for a specific term, governed by Section 24 of the New York Town Law, other attorneys, including in this case the Town Prosecutor, serve at the pleasure of the Town Board. Town Prosecutors prosecute lesser offenses, such as alleged violations of local laws and ordinances and minor traffic violations. They are typically not permitted to prosecute misdemeanors and felonies.

Town Prosecutors in Erie County must be authorized by both the Erie County District Attorney and the Town Board to prosecute offenses. Under Section 700(1) of the New York County Law, the County District Attorney is charged with conducting "all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected or appointed." Before a Town Prosecutor (whether a Town Attorney or attorney retained by the Town) may appear before a court and conduct a prosecution, he or she must be authorized to do so by that County's District Attorney. *People v. Van Sickle*, 13 N.Y.2d 61, 62-63 (1963) ("[T]he District Attorney, as the elected representative of the people and charged with this responsibility, must carry the responsibility and must set up a system whereby he knows of all the criminal prosecutions in his county and either appears therein in person or by assistant or consents to appearance on his behalf by other public officers or private attorneys.").

Therefore, a Town Prosecutor who is not the Town Attorney (and thus does not have a specific term of office), serves at the pleasure of both the Town Board and the District Attorney.<sup>1</sup>

Following his appointment as Town Prosecutor, the County Legislator appeared in court on January 15, 2016 to prosecute offenses, including negotiating pleas on behalf of the People. He did so prior to obtaining the consent of the Erie County District Attorney.

Certain of the tasks of a County Legislator are also relevant here. Adoption of the County Budget, including the budget of the Erie County District Attorney, is part of the County Legislature's power. N.Y. COUNTY LAW § 360. The County Legislator at issue here is both the Majority Leader and the Chair of the Finance and Management Committee, giving him significant power over the budget of the County official — the District Attorney — at whose pleasure he holds his office as Town Prosecutor.<sup>2</sup>

The County Legislature also approves all shared services contracts with the Town and approves those capital projects throughout the County that will receive support. The amount of payment by the County to the Towns under snow plowing contracts, for example, has a direct impact on a town's need to raise funds through its Highway Fund budget. Thus the County Legislator would pass on contracts with a significant financial impact to his employer, the Town Board.

---

<sup>1</sup> This was demonstrated when the Erie County District Attorney revoked the Town of Cheektowaga Town Prosecutor's authority to serve as a public prosecutor. "Appointed by the Town Board in 2007, [the Town Prosecutor] said she no longer can perform her job without the designation from the District Attorney's Office." Janice L. Habuda, *District Attorney Revokes Cheektowaga Prosecutor's Authority Over Letter to the Editor*, BUFFALO NEWS, April 29, 2014, at <http://www.buffalonews.com/city-region/cheektowaga/district-attorney-revokes-cheektowaga-prosecutors-authority-over-letter-to-the-editor-20140429>.

<sup>2</sup> It should be noted that a prior Erie County District Attorney has commenced litigation against the County Legislature over budget cuts, demonstrating that the District Attorney's budget can become a contentious issue.

There is no State or County statute prohibiting the County Legislator from holding the position of County Legislator and Town Prosecutor.

**Specific Requests for an Informal Opinion**

**1. Are the offices of County Legislator and Town Prosecutor incompatible?**

Absent a statutory provision to the contrary, there is no general prohibition on holding two public offices, as long as the offices (and their respective duties and powers) are independent of the other. *See People ex rel. Ryan v. Green*, 58 N.Y. 295, 304-305 (1874) (“The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.”). Inconsistency has been found where one position has budgetary control over the other. *See Dupras v. Clinton*, 213 A.D.2d 952 (3d Dep’t 1995); *Held v. Hall*, 191 Misc. 2d 427 (Sup. Ct. Westchester Cty. 2002).

**2. If the offices of County Legislator and Town Prosecutor are incompatible, has the County Legislator vacated his office by accepting and performing the duties of Town Prosecutor?** The common law rule is that where a public officer accepts and qualifies for a second, incompatible office, the officer vacates or implicitly resigns from the first office. 3 McQuillin, MUNICIPAL CORPORATIONS, § 12.112, at 500 (3d ed. rev.). New York courts have generally followed this rule, as has the Office of the Attorney General in issuing previous informal opinions. *Dykeman v. Symonds*, 54 A.D.2d 159, 163-164 (4th Dep’t 1976) (“The rule has thus evolved, ‘that when two public offices or trusts are incompatible with each other, the [holder of] one is not disqualified to be appointed or elected to the other, *but his acceptance of the second is in law an implied resignation of the first.*’” (internal citations omitted, emphasis added); *Held*, 191 Misc. 2d at 445 (“[T]he officeholder vacates, or by implication, resigns, from his first position when he ‘accepts and qualifies for [the] second and incompatible office.’ *An individual may accept a second office by entering upon the performance of the duties of that office*, or ‘by less than an official act, such as taking the oath of office.’” (internal citations omitted, emphasis added)); *Id.* at 444 (The remedy for “incompatible office holding has been established in New York since at least 1874, when our state’s highest court declared that when incompatibility exists, ‘one office is *ipso facto* vacated by accepting another.’” (quoting *People ex rel. Ryan v. Green*, 58 N.Y. 295, 304 (1874))).

The County and the individual legislator involved have obtained several opinions on this matter, copies of which are attached.

Thank you for your kind attention to this matter. Please contact me if you require any additional information.

Sincerely,

**Kathryn J. Sheingold, Esq.**  
**February \_\_\_\_\_, 2016**  
**Page 4**

**Michael A. Siragusa**  
**Erie County Attorney**