July 5, 2011

The Honorable Carol H. O'Brien
Delaware County Prosecuting Attorney
P.O. Box 8006
140 North Sandusky Street
Delaware, Ohio 43015

SYLLABUS: 2011-024

A private attorney serving as a court-appointed counsel for an indigent defendant under an appointed counsel system established pursuant to R.C. 120.33 may serve as a member of a county law library resources board, provided that in his capacity as a board member (1) he does not participate in deliberations, discussions, negotiations, or votes concerning a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium; and (2) he discharges his fiduciary duties in a manner that does not provide a special, exclusive benefit to him in his private practice of law or in his capacity as a court-appointed attorney.

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OPINION NO. 2011-024

The Honorable Carol H. O'Brien
Delaware County Prosecuting Attorney
P.O. Box 8006
140 North Sandusky Street
Delaware, Ohio 43015

Dear Prosecutor O'Brien:

Your office has asked whether a private attorney who is appointed by a court to represent an indigent adult or juvenile may serve as a member of a county law library resources board (CLLRB), and if so, whether as a member of the CLLRB he may participate in deliberations or votes regarding requests or authorizations for the purchase of legal resources for the office of the county prosecuting attorney.[1] One concern is that such a board member may confront a conflict of interest if he participates in board deliberations or votes regarding requests or authorizations for the purchase of legal resources for the office of the county prosecuting attorney. Apart from this potential conflict of interest, this board member also may confront a conflict of interest if, as a member of the CLLRB, he participates in board matters that provide a special, exclusive benefit to him in his capacity as a court-appointed attorney for an indigent defendant.

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[1] We understand that your county employs an appointed counsel system established pursuant to R.C. 120.33 to provide legal representation to indigent adults and juveniles who are charged with committing an offense or act that may lead to a loss of liberty. *See* 2006 Op. Att'y Gen. No. 2006-025, at 2-214 (discussing an appointed counsel system under R.C. 120.33). *See generally State ex rel. Butler v. Demis*, 66 Ohio St. 2d 123, 125-126, 420 N.E.2d 116 (1981) ("R.C. Chapter 120 provides for the establishment of state, county and joint county public defender programs, while R.C. 120.33 permits a county to establish an alternate system by which private counsel may be appointed by the court in lieu of a public defender"); *see also* 1999 Op. Att'y Gen. No. 99-031, at 2-206 n.1 ("[a] county may provide legal representation to indigent defendants through the state public defender, R.C. 120.04-.06, a county public defender system, R.C. 120.13-.18, a joint county public defender system, R.C. 120.23-.28, or a system of appointed counsel, R.C. 120.33."); 1984 Op. Att'y Gen. No. 84-023, at 2-72.

Compatibility Test

The Attorney General has developed the following five-question inquiry to determine whether a person may hold a public position and private position[2] at the same time:

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

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

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

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

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

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[2] Pursuant to R.C. 120.33(A), in an appointed counsel system a board of county commissioners may adopt a resolution to pay a private attorney who is either personally selected by an indigent person or appointed by the court to represent the indigent person at the various stages of a case as are set forth in R.C. 120.16. *See* R.C. 120.33(B) (providing, in part, that "[i]n lieu of using a county public defender or joint county public defender to represent indigent persons in the proceedings set forth in [R.C. 120.16(A)], and in lieu of adopting the resolution and following the procedure described in [R.C. 120.33(A)], the board of county commissioners of any county may contract with the state public defender for the state public defender's legal representation of indigent persons").

Ohio Professional Conduct Rule 5.4(c) provides that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Thus, although in an appointed counsel system established pursuant to R.C. 120.33 a county may pay a private attorney who is court-appointed to represent an indigent defendant, the county may not direct, control, or regulate the court-appointed attorney's exercise of professional judgment. As a consequence, the county may not control the performance of a court-appointed attorney's work or direct the manner in which a court-appointed attorney's work is completed, which are key indicia of an employment relationship. *See Miller v. Hochstetler*, No. 2445, 1989 Ohio App. LEXIS 2942, at **3-4 (Wayne County July 26, 1989). Absent any indicia of an employment relationship between a county and a court-appointed counsel, a private attorney serving as a court-appointed defense counsel for an indigent defendant is not a public position for purposes of a compatibility analysis. Accordingly, in this opinion we shall apply the five-question compatibility test used to determine whether a person may hold a public and private position at the same time. *See* 1995 Op. Att'y Gen. No. 95-044; 1989 Op. Att'y Gen. No. 89-037.

2009 Op. Att'y Gen. No. 2009-053, at 2-398 to 2-399. *See Esler v. Summit County*, 39 Ohio Misc. 2d 8, 530 N.E.2d 973 (C.P. Summit County 1985); 2 Ohio Admin. Code 123:1-46-02.

Service as a Member of a County Law Library Resources Board Is Not a Classified Employment For Purposes of R.C. 124.57

The first question of the five-question test asks whether the public position is a classified civil service employment within the terms of R.C. 124.57. R.C. 124.57(A) provides, in part:

> No officer or employee in the classified service of the state, the several counties … shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political party or for any candidate for public office; … nor shall any officer or employee in the classified service of the state, the several counties … be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions.

R.C. 124.57 "has been construed as prohibiting an officer or employee in the classified service of the state or [a county] from being elected to a public office in a partisan election or accepting a party-sponsored appointment to a public office that is normally filled by partisan election." 2007 Op. Att'y Gen. No. 2007-037, at 2-379 (footnote omitted); *see also* 2002 Op. Att'y Gen. No. 2002-028, at 2-187. *See, e.g.*, *Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955) (syllabus, paragraph 2). But, R.C. 124.57 "does not … prohibit such a classified officer or employee from being elected to a public office in a nonpartisan election or accepting appointment to a public office that is normally filled by nonpartisan election." 2007 Op. Att'y Gen. No. 2007-037, at 2-379.

A county law library resources board exists and operates in each Ohio county. R.C. 307.51(B). Unlike law library associations that formerly operated county law libraries, a CLLRB is a county agency. 2010 Op. Att'y Gen. No. 2010-014, at 2-94; 2010 Op. Att'y Gen. No. 2010-001, at 2-2; *see* 2009 Op. Att'y Gen. No. 2009-049, at 2-370 n.5. A CLLRB consists of five members. R.C. 307.51(B). "[Board] members are appointed pursuant to R.C. 307.511(A) and, after their initial appointment terms expire, serve five-year terms." 2010 Op. Att'y Gen. No. 2010-014, at 2-94 (citing R.C. 307.511(A); R.C. 307.511(D)).

Whether a position is classified or unclassified may depend upon the nature of the duties assigned to, and performed by, a person holding that position. *See* 2009 Op. Att'y Gen. No. 2009-037, at 2-279; *see also Baker v. Columbiana County Auditor*, 2004-Ohio-839, 2004 Ohio App. LEXIS 755 (Franklin County), at ¶15; *Suso v. Ohio Dept. of Dev.*, 93 Ohio App. 3d 493, 502, 639 N.E.2d 117 (Franklin County 1993). *Compare* R.C. 124.11(A) (unclassified civil service) *with* R.C. 124.11(B) (classified civil service). A member of a CLLRB has duties of a fiduciary nature involving, *inter alia*, the determination of policy, R.C. 307.51(D)(1) (providing a CLLRB with authority to adopt rules for, among other things, expenditure of funds, public access to a county law library, and a county law library's operation); financial integrity, R.C. 307.513(A) (requiring a CLLRB to prepare an annual estimate of revenue and expenditures); and employment, R.C. 307.51(C) (providing a CLLRB with authority to employ a county law librarian and additional staff, all of whom "shall be in the

unclassified civil service of the county"). These fiduciary duties suggest that the position of a member of a CLLRB is within the unclassified civil service. *See* 1991 Op. Att'y Gen. No. 91-011, at 2-59 ("[p]ositions, generally, are placed in the unclassified service because they involve policy-making or fiduciary responsibility"). *Accord* 2009 Op. Att'y Gen. No. 2009-049, at 2-368 ("[n]either the position of assistant county prosecuting attorney nor member of the county law library resources board is in the classified civil service"); *see also* R.C. 124.11(A)(9) (unclassified civil service includes, among others, "those persons employed by and directly responsible to elected county officials … and holding a fiduciary or administrative relationship to such elected county officials"). Because the position of board member of a CLLRB is not in the classified civil service, *see* 2009 Op. Att'y Gen. No. 2009-049, at 2-368, R.C. 124.57's prohibition is inapplicable to this public position.

No Constitutional Provision or Statute Prohibits the Holding of Both Positions at the Same Time

The second question asks whether a constitutional provision or statute prohibits a person from serving in both positions at the same time. Our research reveals no constitutional or statutory provision that prevents a person from serving as a member of a CLLRB and concurrently serving as a court-appointed counsel for an indigent defendant under an appointed counsel system established pursuant to R.C. 120.33.

Subject to Certain Limitations, Conflicts of Interest Do Not Prohibit a Court-Appointed Attorney from Serving as a Member of a County Law Library Resources Board

We now consider whether an impermissible conflict of interest exists between the two positions. "A public officer or employee may not hold a private position if he will be subject to divided loyalties and conflicting duties or to the temptation to act other than in the best interests of the public." 2002 Op. Att'y Gen. No. 2002-028, at 2-190. To determine whether a person who holds both a public and private position is subject to a conflict of interest, the powers, duties, and responsibilities of each position must be reviewed. *Id.* "Where possible conflicts are remote and speculative, common law compatibility or conflict of interest rules are not violated." 1979 Op. Att'y Gen. No. 79-111 (syllabus, paragraph 3). "The factors to be considered with respect to questions of potential conflicts are the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls." *Id.* at 2-372.

Pursuant to R.C. 307.51(B), a CLLRB "shall provide legal research, reference, and library services to the county and to the municipal corporations, townships, and courts within the county and shall manage the coordination, acquisition, and utilization of legal resources." According to R.C. 307.51(G), "no county office shall purchase, lease, rent, operate, or contract for the use of any legal research or reference materials available in print, audio, visual, or other medium or, notwithstanding

[R.C. 307.842], any equipment necessary to support the utilization of that medium without prior approval of the board."[3] A CLLRB also "shall employ a county law librarian who shall be the chief administrator of the county law library resources board and may employ additional staff to perform any functions as determined by the board." R.C. 307.51(C). Under R.C. 307.51(D)(1)(a)-(d), a CLLRB shall adopt rules for the expenditure of funds appropriated for the CLLRB's use, as well as rules regarding public access to a county law library and hours of operation of a county law library, fees for services, and the receipt of gifts to the county law library resources fund, which "receives revenue from certain fines, penalties, and forfeited bails collected by the courts and previously paid to the law library associations." 2010 Op. Att'y Gen. No. 2010-014, at 2-94. Pursuant to R.C. 307.513(A), a CLLRB is required to prepare an annual estimate of the revenue and expenditures of the CLLRB and submit this estimate to the board of county commissioners as provided in R.C. 5705.28.

A court-appointed defense attorney under an appointed counsel system established pursuant to R.C. 120.33 is an officer of the court who represents an indigent defendant under the rules of an adversarial system of justice. *See State v. Livingston*, 30 Ohio App. 2d 232, 235, 285 N.E.2d 75 (Summit County 1972) ("[t]he adversary system of justice is predicated upon the proposition that justice will most surely prevail when adversaries are pitted one against the other. Under that system, it is the sworn duty of defense counsel to use all honorable and legal means to defend a client charged with a crime"). As advisor, an attorney appointed by a court to represent an indigent defendant "provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." Preamble: A Lawyer's Responsibilities, Ohio Rules of Professional Conduct, at (2). As advocate, such an attorney "asserts the client's position under the rules of the adversary system," and as negotiator such an attorney "seeks a result advantageous to the client and consistent with requirements of honest dealings with others." *Id.*; *see generally* Roberta K. Flowers, *The Role of the Defense Attorney: Not Just an Advocate*, 7 Ohio St. J. Crim. L. 647 (2010) (identifying three roles of a criminal defense attorney—advocate; officer of the court; and minister of justice). *Cf.* R.C. 120.06; 120.16; R.C. 120.26.

A criminal trial in which a defense attorney and a prosecuting attorney represent clients often will be charged with emotion. *See United States v. Wexler*, 79 F.2d 526, 529-530 (2nd Cir. 1935) ("[i]t is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion"). Thus, it is not remote or speculative that a private attorney serving as a court-appointed defense counsel, who is also a member of a CLLRB, may be tempted to act other than in the best interests of the public if he were to participate in a CLLRB's deliberations or votes regarding the purchase of legal resources or equipment for his legal adversary, the county prosecuting attorney. *See State v. Skorvanek*, Lorain

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[3] Pursuant to R.C. 307.51(G), "[i]f such approval is denied, the county office, notwithstanding [R.C. 307.842], may purchase, lease, rent, operate, or contract for the use of any legal research or reference materials available in print, audio, visual, or other medium at its own expense." *See* R.C. 307.842 (duties and powers of a county automatic data processing board).

App. No. 05CA008743, 2006-Ohio-69, 2006 Ohio App. LEXIS 54, at ¶19 ("[t]he office of the prosecutor is responsible for the filing of charges, preparing court documents, and bringing the alleged criminal to trial"). A potential conflict of interest therefore may arise if a private counsel appointed by a court to represent an indigent defendant participates in deliberations or votes on the purchase of legal resources or equipment for the county prosecuting attorney's office.

In 2009 Op. Att'y Gen. No. 2009-049, the Attorney General considered whether an assistant county prosecuting attorney may serve on a CLLRB in his county.[4] In that opinion the Attorney General recognized that a county prosecuting attorney, as a county officer, may find it necessary under R.C. 307.51(G) to ask a CLLRB to approve a request for legal research materials, reference materials, or any equipment necessary to support the utilization of such materials for the office of the county prosecuting attorney. 2009 Op. Att'y Gen. No. 2009-049, at 2-371. The Attorney General further recognized that if an assistant prosecuting attorney were to serve on a CLLRB, he might be less than objective in evaluating his superior's request. *See id.* ("it might be difficult for a member [of a CLLRB] who also serves as an assistant county prosecuting attorney to perform his duties and exercise his discretion in a completely objective, disinterested manner because of his position as an assistant county prosecuting attorney"). *See generally State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 344 (Ct. App. Butler County 1934) (stating, in part, that "[i]t has long been the rule in this state that one may not hold two positions of public employment when the duties of one may be so administered and discharged that favoritism and preference may be accorded the other").

However, with respect to that particular situation, the Attorney General found that, although a conflict of interest could arise if an assistant prosecuting attorney were to serve as a member of a CLLRB, the mere possibility of it occurring did not prohibit that dual service. 2009 Op. Att'y Gen. No. 2009-049, at 2-371. Specifically, the Attorney General observed that "[n]o statute requires a county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium." *Id.*. Consequently, the Attorney General determined that "the occasions in which a person who serves as a member of the county law library resources board and an assistant county prosecuting attorney would be required to discuss, deliberate, negotiate, or vote on a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium should be infrequent." *Id.* The Attorney General further determined that "a member of the county law library resources board may remove himself from any such deliberations, discussions, negotiations, and votes should they arise without impairing the board's ability to consider such a proposal from the county prosecuting attorney." *Id.* The Attorney General therefore advised:

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[4] In 2009 Op. Att'y Gen. No. 2009-049 (syllabus, paragraph 1), the Attorney General also advised that a county prosecuting attorney may not appoint himself to a county law library resources board.

> A member of a county law library resources board who also serves as an assistant county prosecuting attorney in the same county may not participate in deliberations, discussions, negotiations, or votes concerning a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium.

2009 Op. Att'y Gen. No. 2009-049 (syllabus, paragraph 3).

The reasoning of 2009 Op. Att'y Gen. No. 2009-049 also applies when a private attorney appointed by a court as a defense counsel under an appointed counsel system established pursuant to R.C. 120.33 serves as a member of a CLLRB. No statute requires a county prosecuting attorney to purchase, lease, rent, operate, or contract for the use of any legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium. Thus, the occasions in which a member of a CLLRB, who also serves a court-appointed defense counsel in the same county in which a county prosecuting attorney serves, will be required to discuss, deliberate, negotiate, or vote on a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium should be infrequent. If any deliberations, discussions, negotiations, or votes should arise concerning such a proposal by the county prosecuting attorney, a member of a CLLRB who serves as a court-appointed defense counsel under an appointed counsel system may remove himself from these deliberations, discussions, negotiations, or votes without impairing the CLLRB's ability to consider the county prosecuting attorney's proposal.

We conclude, therefore, that a private attorney serving as a court-appointed counsel for an indigent defendant under an appointed counsel system established pursuant to R.C. 120.33 may serve as a member of a county law library resources board, provided that he does not participate in deliberations, discussions, negotiations, or votes concerning a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium. *Accord* 1994 Op. Att'y Gen. No. 94-079 (syllabus, paragraph 1) ("[a] member of a board of county commissioners who is appointed by a court to serve as defense counsel in a criminal case in which he is compensated pursuant to R.C. 120.33 is not subject to a conflict of interest provided he abstains from any discussions or votes by the board of county commissioners on any matter that may concern or affect the compensation paid to court appointed criminal defense counsel under R.C. 120.33").

Apart from the preceding conflict of interest, another conflict of interest may arise if a member of the CLLRB participates in board matters that confer a benefit to him that is unique, particular, or distinguished in any way from the benefit secured by all other persons or entities served by the

CLLRB. *See* Ohio Ethics Comm'n, Advisory Op. No. 2001-06, slip op. at 5.[5] *See generally State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902) ("[t]he self interest of the public official and the public interests which he represents, must not be brought into conflict"); 1973 Op. Att'y Gen. No. 73-043, at 2-167 to 2-168 ("[a] public officer must be beyond temptation and he should not be in a position to profit from his public office. His position is one of a fiduciary nature to the community which requires that all his public decisions be completely objective"). This means that a member of a CLLRB may not discharge his fiduciary duties in a manner that provides a special, exclusive benefit to him in his private practice of law or in his capacity as a court-appointed attorney. If a matter should come before the CLLRB that would have that result, then he must withdraw from deliberating, discussing, negotiating, or voting on the matter.[6] But, a member of a CLLRB may

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[5] In Ohio Ethics Comm'n, Advisory Op. No. 2001-06, slip op. at 5, the Ohio Ethics Commission declared:

> In its advisory opinions, the Commission has stated that R.C. 102.03(D) and (E) do not prohibit a public official from participating in matters being considered by his public agency that result in a general, uniform benefit for all individuals served by or connected with his public agency. The Commission has stated that a public official should not be precluded from participating in such decisions that he was duly elected or appointed to make, unless he would secure a benefit for himself, or another party with whom he has a close family, economic, or fiduciary relationship, if the benefit that is unique, particular, or distinguished in any way from the benefit secured by all other persons served by the public entity. It is the unique, particular, or distinguished benefit that gives rise to a conflict of interest for a public official or employee.

[6] A member of a county law library resources board who concurrently serves as a court-appointed attorney for an indigent defendant must comply with Ohio ethics statutes pertaining to restrictions on public officials and interests in a public contract. *See* R.C. Chapter 102; R.C. 2921.42-.43. And, because in this instance the CLLRB member under discussion is an attorney, such a board member also must comply with the Ohio Rules of Professional Conduct. *See, e.g.*, Ohio Prof. Cond. R. 1.7-.10 (conflicts of interest).

The Ohio Ethics Commission has authority to issue advisory opinions concerning the ethics and conflict of interest provisions contained in R.C. Chapter 102 and R.C. 2921.42-.43. *See* R.C. 102.08. And, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio has authority to issue advisory ethics opinions for Ohio attorneys. *See* R.C. 102.08; Ohio Gov. Bar R. V, § 2(C). Because these governmental entities have been granted authority to render advisory opinions interpreting provisions contained in R.C. Chapter 102 and R.C. 2921.42-.43 and the rules related to attorney conduct, respectively, we shall refrain interpreting these statutory and administrative provisions by means of a formal opinion. *See* 2009 Op. Att'y Gen. No. 2009-049, at 2-369 n.4; *see also* 2009 Op. Att'y Gen. No. 2009-018, at 2-130, at n.4; 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph 3) ("[t]he Attorney General will abstain from rendering an opinion where

exercise his authority in a manner that confers the same uniform benefit upon the various constituencies of the CLLRB even while benefitting the CLLRB member. *See* 2000 Op. Att'y Gen. No. 2000-015, at 2-90 ("[a] public official is not prohibited from obtaining, as a citizen, benefits that are available to the general public"); 1997 Op. Att'y Gen. No. 97-061, at 2-379 ("[o]btaining personal profit or gain from the exercise of a public office is prohibited by statute, but there is no prohibition against securing benefits that are made generally available to the citizenry").

For this reason, a member of a CLLRB may participate in deliberations, discussions, negotiations, or votes concerning a county law library's acquisition of legal research or reference materials in a particular area of the law that may have relevance to the board member's private law practice or service as a court-appointed defense attorney, provided that the proposed acquisitions do not solely benefit the board member in his private practice of law or in his capacity as a court-appointed attorney, and the proposed acquisitions confer the same uniform benefit to the various constituencies of the CLLRB. *See, e.g.*, 2006 Op. Att'y Gen. No. 2006-003, at 2-33 n.15 (a person serving concurrently as a township trustee and member of a board of directors of a port authority may, in his capacity as a township trustee, "participate in deliberations, discussions, negotiations, or votes concerning matters, such as zoning and road construction, that may affect or have some bearing upon the general development or use of port authority property, facilities, or services"); 2004 Op. Att'y Gen. No. 2004-015, at 2-130 ("to the extent that a member of a county rural zoning commission who serves as township trustee acts for the good of the county, there is no prohibition against the commission member participating in deliberations, discussions, and votes that may affect the use of real property owned by the township"); *see also* 1945 Op. Att'y Gen. No. 208, p. 181 (syllabus, paragraph 1) ("[t]he fact that a township road passes the farm residence of a county commissioner does not of itself disqualify him from voting in favor of a resolution to add the road to the county highway system"). *See generally Hamilton v. Bd. of Comm'rs of Hardin County*, 108 Ohio St. 566, 141 N.E. 684 (1923) (syllabus) ("[t]he fact that a county commissioner owns real estate within the assessable area of an improvement to be taxed by a special assessment for the construction of a road does not of itself disqualify him to act as a county commissioner in proceedings relative to laying out and making a road under [G.C.] 6906" (now R.C. 5555.02)); *see also Goodwin v. Comm'rs of Van Wert County*, 41 Ohio St. 399 (1884).

Accordingly, a private attorney serving as a court-appointed counsel for an indigent defendant under an appointed counsel system established pursuant to R.C. 120.33 may serve as a member of a county law library resources board, provided that in his capacity as a board member (1) he does not participate in deliberations, discussions, negotiations, or votes concerning a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium; and (2) he discharges his fiduciary duties in a manner that does not provide a special, exclusive benefit to him in his private practice of law or in his capacity as a court-appointed attorney.

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another governmental entity has been granted the authority to render advisory opinions concerning the relevant subject matter").

Whether There Are Controlling Local Charter Provisions, Resolutions, or Ordinances

The fourth question of the five-question test asks whether any local charter provisions, resolutions, or ordinances are controlling. Whether there are controlling local charter provisions, resolutions, or ordinances that prohibit a private attorney from concurrently serving as a court-appointed defense counsel and a member of a CLLRB is a matter that must be resolved by local officials. *See, e.g.*, 2009 Op. Att'y Gen. No. 2009-049, at 2-372. Absent a local charter provision, resolution, or ordinance rendering these positions incompatible, a private attorney serving as a court-appointed defense counsel under an appointed counsel system established pursuant to R.C. 120.33 may serve as a member of a CLLRB, provided that as a member of a CLLRB (1) he does not participate in deliberations, discussions, negotiations, or votes concerning a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium, and (2) he discharges his fiduciary duties in a manner that does not provide a special, exclusive benefit to him in his private practice of law or in his capacity as a court-appointed attorney.

Whether a Federal, State, or Local Departmental Regulation Exists to Prohibit the Holding of Both Positions At The Same Time

Finally, we consider whether any federal, state, or local departmental regulation is applicable. Whether any local departmental regulation bars a person from holding both positions ordinarily is a matter that must be resolved by local officials. In 2009 Op. Att'y Gen. No. 2009-049, at 372, the Attorney General determined that "[n]o federal or state regulation prohibits a person from serving simultaneously in the positions [of an assistant county prosecuting attorney and member of a CLLRB]." In our research, we have not found any federal or state regulation that prohibits a private attorney from concurrently serving as a court-appointed defense counsel under an appointed counsel system established pursuant to R.C. 120.33 and a member of a CLLRB. Absent such a provision, the positions are compatible, provided that in his capacity as a board member (1) he does not participate in deliberations, discussions, negotiations, or votes concerning a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium; and (2) he discharges his fiduciary duties in a manner that does not provide a special, exclusive benefit to him in his private practice of law or in his capacity as a court-appointed attorney.

Conclusion

In sum, it is my opinion, and you are hereby advised that a private attorney serving as a court-appointed counsel for an indigent defendant under an appointed counsel system established pursuant to R.C. 120.33 may serve as a member of a county law library resources board, provided that in his capacity as a board member (1) he does not participate in deliberations, discussions, negotiations, or votes concerning a proposal by the county prosecuting attorney to procure the use of legal research or reference materials available in print, audio, visual, or other medium or equipment necessary to support the utilization of that medium; and (2) he discharges his fiduciary duties in a

manner that does not provide a special, exclusive benefit to him in his private practice of law or in his capacity as a court-appointed attorney.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General