

OPINION NO. 77-060**Syllabus:**

By virtue of R.C. 120.39(A), an assistant city solicitor, as an employee of a city solicitor, may not receive any payment for representation of indigents by court appointment in any proceedings listed in R.C. 120.16(A).

To: William F. McKee, Richland County Pros. Atty., Mansfield, Ohio
By: William J. Brown, Attorney General, October 11, 1977

I have before me your request for my opinion on payment of court appointed counsel under R.C. Chapter 120. Your request reads as follows:

As counties are currently faced with permitted payments for counsel under the now existing public defender law, and particularly those areas which may extend beyond anticipated criminal areas, I would request your opinion as to the effect of such law on the appointment of counsel in Probate Court and those eligible for payment if appointed.

Specifically in a county which has elected the appointed counsel system under Section 120.33, Revised Code and to which the prohibitions of Section 120.39(A), Revised Code, apply, and in light of the duties prescribed in Section 120.16(A)(3), may an assistant city solicitor appointed by the Probate Court for proceedings under Chapter 5122, Revised Code, be paid for such services? If such assistant would norm-

ally be ineligible if the specific inquiry is a determination of competency, would payment be permitted in cases not involving indeterminate hospitalization.

R.C. Chapter 120. establishes the state and county public defender commissions. It also provides for partial state funding of representation of indigents in certain enumerated cases. Counties, as creatures of statute, possess only such powers as are conferred upon them by the General Assembly, and this is particularly true in matters of spending. State ex rel. Locher v. Menning, 95 Ohio St. 97 (1916). R.C. Chapter 120. controls payment for legal representation of indigents, and therefore, payments which are not authorized by that Chapter may not be made.

R.C. 120.16(A) lists those instances where counsel is to be provided for indigents. It provides, in pertinent part, as follows:

- (A) (1) The county public defender shall provide legal representation to indigent persons charged with violation of a state statute that is a serious offense . . .
- (2) The county public defender may provide legal representation to persons charged with violation of an ordinance. . .
- (3) The county public defender shall represent, when designated by the court, juveniles, other than juveniles charged with the violation of a municipal ordinance, persons whose competency is being determined, or is to be determined by the probate court, and all other persons, except persons charged with violation of a municipal ordinance, in any proceeding the outcome of which could result in a loss of liberty. (Emphasis added)

Under R.C. 120.33, the counties may elect to adopt a system for court appointment of attorneys rather than establishing a county public defender's office. The section also provides for state reimbursement to counties under such a system. It provides, in part, as follows:

In lieu of using a county or joint county public defender to represent indigent persons in the proceedings set forth in division (A) of section 120.16 of the Revised Code, the county commissioners of any county may adopt a resolution to pay counsel who are either personally selected by the indigent person or appointed by the court.

. . . .

(D). . . The fees and expenses approved by the court shall not be taxed as part of the costs and shall be paid by the county.

The county auditor shall draw his warrant on the county treasurer for the payment of counsel in the amount fixed by the court. . . . The county auditor shall report periodically, but not less than annually, to the county commissioners the amounts paid out pursuant to approval of the court. The county commissioners, after review and approval of the auditor's report, may then certify it to the auditor of state for reimbursement. Fifty per cent of the total cost of each county appointed counsel system shall be paid by the state to the order of the county commissioners.

(E) If any county appointed counsel system fails to maintain the standards for the conduct of the system established by the rules of the Ohio public defender commission pursuant to division (B) of section 120.03 of the Revised Code, the Ohio public defender commission shall notify the county commissioners of the county that the county appointed counsel system has failed to comply with its rules. Unless the county commissioners correct the conduct of their appointed counsel system to comply with the rules . . . , the county's right to reimbursement from the state provided for in division (D) of this section shall terminate at the close of the current fiscal year

The clear import of this section is to allow the counties to establish a system by which the court appoints counsel from the bar at large who are then paid by the county which is, in turn, partially reimbursed by the state. County payments, however, are limited to those instances enumerated in R.C. 120.16(A), supra.

The final provision of R.C. Chapter 120. which relates to your question is R.C. 120.39(A). That section prohibits certain attorneys from court appointments, and provides:

(A) Counsel appointed by the court, co-counsel appointed to assist the state public defender or a county or joint county public defender, and any public defender, county public defender, or joint county public defender, or member of their offices, shall not be a partner nor employee of any prosecuting attorney nor of any city solicitor, city attorney, director of law, or similar officer. (Emphasis added)

The language of this statute, being clear and unambiguous, requires a negative answer to the first branch of your question. The General Assembly has simply prohibited the counties from paying certain attorneys, and an assistant city solicitor is one of those attorneys. This rule applies to any case where the court appointed counsel provisions of R.C. 120.33 and R.C. 120.16(A) require that an indigent

be represented, and it requires little argument to establish that an involuntary commitment proceeding is such a proceeding. See, R.C. 120.16(A)(3), supra. Therefore, it is my opinion that R.C. 120.39(A) prohibits payments by the county to an assistant city for representation of an indigent by court appointment.

The second branch of your question concerns a similar problem. You ask whether an assistant city solicitor can receive county monies for representing an indigent by court appointment "in cases not involving indeterminate hospitalization?" I see two obstacles to payment in such a case. First, under R.C. 120.16(A)(3), supra, the public defender or court appointed counsel may only represent " . . . persons whose competency is being determined, or is to be determined, by the probate court, and all other persons, . . . in any proceeding the outcome of which could result in the loss of liberty". If the case does not fit within this description, the county would not be required or permitted to pay any court appointed counsel under R.C. Chapter 120. Second, even if no "indeterminate hospitalization" of the person is possible as an outcome of the proceeding, where-ever there is a potential "loss of liberty," counsel must be provided. In any such case, however, the restrictions of R.C. 120.39(A) would prevent the appointment of an assistant city solicitor to represent the indigent.

Accordingly, it is my opinion, and you are so advised that:

By virtue of R.C. 120.39(A), an assistant city solicitor, as an employee of a city solicitor, may not receive any payment for representation of indigents by court appointment in any proceedings listed in R.C. 120.16(A).