

**OPINION NO. 89-023**

**Syllabus:**

**The positions of city director of law and assistant public defender in a joint county public defender's office are incompatible.**

**To: Ronald L. Collins, Tuscarawas County Prosecuting Attorney, New Philadelphia, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, April 5, 1989**

I have before me your request for an opinion as to whether a part-time city law director may serve as an assistant to a public defender in a joint county public defender's office. You state that the part-time city law director for the City of Uhrichsville, located in Tuscarawas County, is also an assistant public defender with the Joint County Public Defender's Office, which serves Harrison, Carroll, Tuscarawas Counties and numerous cities and villages, including the City of Uhrichsville. Your letter also indicates that:

The Carroll County branch of the Joint County Public Defender's Office is staffed by one attorney [the part-time City Law Director of Uhrichsville] and one secretary. The Carroll County office is separate from the Tuscarawas County Office [which is the main office] literally in that the Carroll County Attorney has a separate office address. The Carroll County files are kept in his office and are not kept at the main office. The secretary for the Carroll County Office is solely in charge of Carroll County cases and does not work for any other county or subdivision in the Joint County area. The Carroll County Attorney has no keys to the main office or access to any files other than Carroll County files which are kept at his office.<sup>1</sup> (Footnote added.)

In 1979 Op. Att'y Gen. No. 79-111, my predecessor set forth seven questions which must be considered in determining whether two public positions are compatible. Two positions are incompatible if, *inter alia*, an individual serving in both positions would be subject to a conflict of interest. 1985 Op. Att'y Gen. No. 85-042 at 2-150 ("[o]ne person may not simultaneously hold two public positions if he would be subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public"); see 1985 Op. Att'y Gen. No. 85-021; 1984 Op. Att'y Gen. No. 84-070; Op. No. 79-111. I must now examine the powers and duties of the respective positions to see whether there is any material reason why an individual occupying both positions would be subject to conflicting interests or divided loyalties. Op. No. 79-111.

R.C. 733.51 describes the general powers and duties of the law director as follows:

The city director of law shall prepare all contracts, bonds, and other instruments in writing in which the city is concerned, and shall serve the several directors and officers provided in Title VII [7] of the Revised Code as legal counsel and attorney.

The director of law shall be prosecuting attorney of the mayor's court. When the legislative authority of the city allows assistants to the director of law, he may designate the assistants to act as

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<sup>1</sup> I note that your letter uses the phrase "part-time city law director" when referring to the position in the City of Uhrichsville. I will assume, from the language used, that the position of city law director is in question and not that of assistant city law director. The distinction between the two positions may not be relevant, however, because the assistant city law director is empowered to act for, and in place of the city law director in some matters. See R.C. 733.51 and 733.52; see also 1979 Op. Att'y Gen. No. 79-100 at 2-311 ("[t]n assistant city solicitor [now called city director of law] performs, under the supervision of the solicitor, all the duties of the solicitor"). Also, the assistant city law director is subject to the same limitations as the city law director and may not hold any office that the city law director may not hold. See 1986 Op. Att'y Gen. No. 86-035 at 2-178 ("an assistant city law director, who is authorized to act on behalf of the city law director may not hold a position the law director is prohibited from holding").

prosecuting attorneys of the mayor's court. The person designated shall be subject to the approval of the legislative authority.

*See also* R.C. 705.11; 1986 Op. Att'y Gen. No. 86-035.<sup>2</sup> With regard to the duties of the city law director as prosecuting attorney of the municipal court, R.C. 1901.34 provides as follows:

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

....  
(C) The village solicitor, *city director of law*, or similar chief legal officer *shall perform the same duties*, as far as they are *applicable thereto*, as are required of the prosecuting attorney of the county....(Emphasis added.)

*See also* R.C. 733.52 (prosecution of criminal cases by city director of law in mayor's court).

The other position about which you ask, assistant joint county public defender, is also authorized by statute. Pursuant to R.C. 120.25(B)(4), the joint county public defender appoints such assistant joint county public defenders as are necessary to fulfill the duties of his office. These duties are set forth in R.C. 120.26:

(A)(1) The joint county public defender shall provide legal representation to indigent adults and juveniles who are charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes

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<sup>2</sup> The city law director is also responsible for representing the city in all suits in which the city is a party, R.C. 733.53, rendering legal opinions on questions of law to any city officer, R.C. 733.54, applying for injunctions to restrain the misapplication of city funds and abuse of the city's corporate powers, R.C. 733.56, applying for the specific performance of an obligation or contract made on behalf of the city, R.C. 733.57, applying for a writ of mandamus to compel a city officer or board to perform any duty expressly enjoined by law or ordinance, R.C. 733.58, and preparing official bonds for all officers of the city, R.C. 733.70. Several other provisions in the Revised Code also address specific duties of the city law director with respect to his representation of a city's legal interests. *See, e.g.*, R.C. 705.09 (following an audit of the accounts of a city officer, if the officer is found indebted to the city, the city law director shall proceed to collect the indebtedness); R.C. 715.011 (the city law director shall approve lease agreements entered into by the city and construction contractors); R.C. 727.30 (the city law director may act as attorney for the county treasurer in actions brought for enforcement of the lien upon delinquent special assessments levied pursuant to R.C. 727.25); R.C. 749.09 (before entering into a contract for the erection of a hospital building, the city's board of hospital commissioners may have the specifications, forms of bids, and a form of contract and bid guaranty prepared by the city law director); R.C. 3313.35 (in city school districts, the city law director shall be the legal advisor for the board thereof); R.C. 3319.16 (in any court action involving the termination of a teacher's contract, a city board of education may utilize the services of the city law director); R.C. 3349.10 (the city law director may represent the board of directors of a municipal university, college, or other educational institution in all suits in which the board or the city is a party); R.C. 5705.412 (the city law director may bring an action to recover school district funds that have been expended unlawfully). *See also* 1986 Op. Att'y Gen. No. 86-035 at 2-182 to 2-183.

the potential loss of liberty and in postconviction proceedings as defined in this section.

(2) The joint county public defender may provide legal representation to indigent adults and juveniles charged with the violation of an ordinance of a municipal corporation for which the penalty or any possible adjudication includes the potential loss of liberty, if the joint county public defender commission has contracted with the municipal corporation to provide legal representation for indigent persons charged with a violation of an ordinance of the municipal corporation.

(B) The joint county public defender shall provide the legal representation authorized by division (A) of this section at every stage of the proceedings following arrest, detention, service of summons, or indictment.

(C) The joint county public defender...may provide legal representation in parole and probation revocation matters.

An assistant joint county public defender, therefore, may have a duty to represent indigent adults and juveniles who are charged with the commission of an act or violation of a state statute or municipal ordinance for which the possible penalty is imprisonment.

While the Revised Code imposes certain duties upon an assistant joint public defender, it also restricts the positions which such assistant public defender may hold. R.C. 120.39(A) provides that:

Except as provided in division (B) of this section, 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 defender, or member of their offices, shall not be a partner or employee of any prosecuting attorney, city director of law, village solicitor, or similar chief legal officer.

The purpose of R.C. 120.39(A) is to prevent conflicts that might arise when an attorney represents both the state and indigent defendants in original prosecutions. 1978 Op. Att'y Gen. No. 78-026 at 2-64.

Under R.C. 120.39(A) an assistant joint county public defender is required to refrain from becoming a partner or employee of the city law director. Although the express language of 120.39(A) does not prohibit an assistant joint county public defender from holding the city law director position,

...the omission in R.C. 120.39 of the enumerated officers was not a legislative oversight, but rather was a recognition that, *because of the prosecutorial duties imposed by law*, such persons were already disqualified from representing criminal defendants, either in Municipal or Common Pleas Courts. (Emphasis added.)

*Cain v. Calhoun*, 61 Ohio App. 2d 240, 245, 401 N.E.2d 947, 951 (1979). See 1971 Op. Att'y Gen. No. 71-050 at 2-173 ("[t]he rationale is that an attorney holding a public office, the official duties of which require him to represent the State of Ohio in criminal cases, is necessarily precluded from representing private clients in criminal cases against the State of Ohio"); 1967 Op. Att'y Gen. No. 67-112; 1966 Op. Att'y Gen. No. 66-159. As a consequence, city law directors, who have statutorily imposed prosecutorial duties, have been precluded from representing defendants in criminal proceedings where the State of Ohio is the plaintiff. 61 Ohio App. 2d 240, 401 N.E.2d 947; Op. No. 67-112; Op. No. 66-159 (syllabus, paragraph four) ("[a] city solicitor<sup>3</sup> may not represent defendants in a criminal case wherein the State of Ohio is plaintiff" (footnote added)).

<sup>3</sup> City solicitors are now referred to as city directors of law in the Revised Code. 1977-1978 Ohio Laws, Part II, 2091 (Am. Sub. H.B. 219, eff. Nov. 1, 1977).

As set forth above, the city law director prosecutes all cases brought before his municipal court for criminal offenses occurring within his municipal corporation and has the same duties as are applicable thereto as the county prosecuting attorney. R.C. 1901.34. *See also* R.C. 309.08 (prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits and controversies in which the state is a party). Municipal courts have jurisdiction over all misdemeanors committed within their territorial limits and over certain pre-trial proceedings with respect to felonies committed within their territorial limits. R.C. 1901.20.

A review of the foregoing statutes reveals that the legislature intended that the city law director shall represent the State of Ohio in criminal proceedings which arise within the jurisdiction of his municipal court. 61 Ohio App. 2d at 245, 401 N.E.2d at 951 ("[i]nasmuch as the duties of a city attorney for a municipal corporation are the same as those of all prosecuting attorneys, as far as such are applicable, it follows that the General Assembly intended a city attorney to represent only the state in criminal prosecutions"); Op. No. 67-112 at 2-177 ("it is common practice for the city solicitor to represent the state in municipal court in prosecutions under state statutes"); Op. No. 66-159 at 2-337 ("the city solicitor must represent the state in all other state cases arising within the territory of his municipal court and he would be precluded from representing the defendants in a criminal case when the State of Ohio is plaintiff").

I note you indicate that the assistant public defender does not represent indigents in the county in which he serves as law director of a municipality. This fact, however, is irrelevant to this discussion of conflict of interest. In Op. No. 71-050 at 2-170, my predecessor concluded that "[a]n assistant prosecuting attorney is not permitted to represent clients in criminal proceedings either within or outside of the county in which he is appointed." (Emphasis added.) By analogy, a city law director, who performs the same prosecutorial duties as the prosecuting attorney, is also prohibited from representing indigents in any county. *See* R.C. 733.52 ("city director of law as prosecuting attorney of the mayor's court shall...perform the same duties, as far as they are applicable thereto, as required of the prosecuting attorney of the county"); R.C. 1901.34 ("city director of law...shall perform the same duties, as far as they are applicable thereto, as are required of the prosecuting attorney of the county"); Op. No. 71-050 at 2-172 ("[i]t is important to note that the office of city solicitor is almost identical to that of a prosecuting attorney [because a] city solicitor performs substantially the same duties in relation to a municipal corporation as a prosecuting attorney does in relation to a county"). Therefore, if the prosecuting attorney is prohibited from representing indigent defendants either within or outside of the county in which he is appointed, it logically can be concluded that the same limitation should apply to city law directors.

It is my opinion, and you are hereby advised, that the positions of city director of law and assistant public defender in a joint county public defender's office are incompatible.