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THERE IS NO INCOMPATIBILITY BETWEEN THE POSITIONS OF ASSISTANT PROSECUTING ATTORNEY OF A COUNTY AND CLERK OF COUNCIL OF A CITY IN THE COUNTY—§309.06, R.C. 705.10, R.C.

## SYLLABUS:

There is no incompatibility between the positions of assistant prosecuting attorney of a county, appointed pursuant to Section 309.06, Revised Code, and clerk of council of a city in the county, appointed pursuant to Section 705.10, Revised Code.

Columbus, Ohio, March 9, 1961

Hon. Thomas R. Spellerberg, Prosecuting Attorney  
Seneca County, Tiffin, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The following question has been asked of me, to-wit:

“Is the position of clerk of council of a city compatible with the position of assistant prosecuting attorney of the county?”

“I would call to your attention the 1923 Ohio Attorney General’s Opinion No. 947, wherein the attorney general held that the clerk of council could be appointed city solicitor and receive the compensation fixed for each possession.

“Further, neither of these offices is elected by the public at large, nor is civil service involved, nor can I see any conflict in the duties of the assistant prosecuting attorney and the duties of the clerk of the council of the city.”

Authority for the prosecuting attorney to appoint assistant prosecuting attorneys is found in Section 309.06, Revised Code. The clerk of council is appointed pursuant to Section 705.10, Revised Code. Neither of these sections precludes a person from serving in both positions, and I am unable to find any other provision of law making the two positions incompatible. If the two positions are to be held incompatible, therefore, it must be because of the common law rule as to incompatibility.

The Ohio general rule as to incompatibility is set forth in *State, ex rel. v. Gebert*, 12 O.C.C., (N.S.) 274, at page 275, as follows:

“Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both.”

The duties of an assistant prosecuting attorney of a county are in no way related to those of a clerk of council of a city in the county. The assistant prosecutor is concerned only with representing *county* and *township* officers and with representing the *state* in criminal matters (Chapter 309., Revised Code). The clerk of council keeps the records of the council and performs such other duties as are required by ordinance or resolution (Section 705.10, *supra*). The city is, of course, a subdivision separate and apart from the county, and the council is the legislative branch of the city government. I cannot, therefore, see where the position of assistant prosecuting attorney of the county could be considered subordinate to, or a check upon, the position of clerk of council of a city in the county. Nor do I believe that said position of clerk is subordinate to, or a check upon, the position of assistant prosecuting attorney.

As to whether it is physically possible for one person to discharge the duties of both positions, this is a question of fact, not of law. I might note, however, that the position of clerk is not a full-time job; nor is the assistant prosecuting attorney generally required to work full time in that position. Accordingly, it would appear that it is not physically impossible for one person to discharge the duties of both offices.

Answering your specific question, therefore, it is my opinion that there is no incompatibility between the positions of assistant prosecuting attorney of a county, appointed pursuant to Section 309.06, Revised Code, and clerk of council of a city in the county, appointed pursuant to Section 705.10, Revised Code.

Respectfully,  
MARK McELROY  
Attorney General