

OPINION NO. 78-026**Syllabus:**

R.C. 120.39 prohibits a village solicitor (appointed pursuant to R.C. 733.48) and members of his office, his partners, and his employees from being appointed as counsel to represent an indigent criminal defendant under R.C. Chapter 120.

To: Lowell S. Peterson, Ottawa County Pros. Atty., Port Clinton, Ohio
By: William J. Brown, Attorney General, May 4, 1978

I have before me your request for my opinion which raises the following questions:

1. May an attorney who is employed as legal counsel by a village under Section 733.48 O.R.C., accept appointment by a Court (Municipal or Common Pleas) of Ottawa County, Ohio, as legal counsel for indigent defendants in criminal cases where he is paid out of county funds or state funds for fees set by the appointing court?
2. May an attorney who is employed by or a member of a firm of an attorney who is employed as legal counsel of a village under Section 733.48 O.R.C., accept appointment by a Court (Municipal or Common Pleas) of Ottawa County, Ohio, as legal counsel for indigent defendants in criminal cases where he is paid out of county funds or state funds for fees set by the appointing court?

R.C. 733.48 provides

When it deems it necessary, the legislative authority of a village may provide legal counsel for the village, or for any department or official thereof, for a period not to exceed two years, and provide compensation for such counsel.

According to the information you have supplied, the village solicitors appointed under this section perform the following duties.

1. Attend council meetings.
2. Handle routine affairs and contracts of the village.
3. Prosecute civil claims in courts or administrative agencies.
4. Handle bond issues.
5. Act as prosecutor of ordinance cases in municipal courts in whose territorial jurisdiction the village is situated.

As you indicate in your request, appointing village solicitors, or their professional associates, to represent indigent criminal defendants under R.C. Chapter 120 may be violative of R.C. 120.39(A). That section provides:

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 nor employee of any prosecuting attorney nor of any city solicitor, city attorney, director of law, or similar officer. (Emphasis added.)

Under this section, it appears that the correct answer to your question depends upon whether or not a village solicitor is a "similar officer."

The obvious purpose of R.C. Chapter 120 is to insure that indigents throughout the state are afforded adequate counsel. To this end the chapter provides for state reimbursement of fifty percent of the cost of each county's public defender system. R.C. 120.18(A). Standards are set by the Ohio Public Defender Commission. R.C. 120.01, R.C. 120.03. One of the programs through which a county may qualify for state reimbursement is a court appointment system under R.C. 120.33. It is my understanding that this is the type of program established in your county. The only statutory restriction on the operation of the county program is that set forth in R.C. 120.39(A), supra. The apparent purpose of R.C. 120.39(A) is to avoid the problems inherent in having attorneys switching from defense to prosecution within the county.

In order to determine whether the office of village solicitor is an office that is "similar" to the office of "city solicitor, city attorney, [or] director of law," the statutory functions of each must be compared. The statutory office of city law director is established by R.C. 733.49. That section requires that the city law director be an elector of the city, and shall be elected for a term of four years. Among the duties of the office set forth in R.C. 733.51 is that the city law director "shall be prosecuting attorney of the mayor's court." Under R.C. 733.48, supra, the prosecutorial function of the village solicitor is not at all clear. The only indication of the village solicitor's function set forth in that section is that the solicitor "provide legal counsel for the village." But just as the city attorney must prosecute all cases in mayor's court under R.C. 733.51, the village solicitor must

prosecute them in a village mayor's court. Moreover, under R.C. 1901.34, the city law director and village solicitor share identical prosecutorial duties with respect to state violations occurring within their own municipality. R.C. 1901.34, as amended by 1977 H.B. 312 (effective 1-1-78) provides:

The village solicitor or city law director for each municipal corporation within the territory shall prosecute all criminal cases brought before the municipal court for violations of the ordinances of the municipal corporation for which he is solicitor or law director, or for violations of state statutes or other criminal offenses occurring within the municipal corporation for which he is solicitor or director of law . . .

(Emphasis added.)

Cf. 1968 Op. Att'y Gen. No. 68-117. Thus, at least with respect to the prosecution of ordinance violations and state misdemeanors, the function of the village solicitor is similar, indeed identical, to the function of the city law director. There is, however, another factor to be considered.

Under Art. XVIII, §3, Ohio Const., municipalities have "powers of local self-government." Among those home-rule powers is the power to adopt a charter which establishes a form of government other than that prescribed by statute. Switzer v. State, ex rel. Silvey, 103 Ohio St. 306 (1921). In adopting a charter, the municipality may create offices with functions and titles which differ from those set forth in R.C. Chapter 733. It could be that when R.C. 120.39(A) refers to "any city solicitor, city attorney, director of law, or similar office," it is merely acknowledging the fact that a chartered city would establish an office which has a function similar to the enumerated offices, but an office which has a different title.

In resolving this question, as in all cases of statutory interpretation, the primary objective is to determine the intent of the legislature. Carter v. Youngstown, 146 Ohio St. 203 (1946). As stated, supra, the apparent purpose of R.C. 120.39 is to avoid problems that might arise when a lawyer represents both the state and defendants in original prosecutions. In that respect there appears to be no logical reason to differentiate between city law directors and village solicitors. Both have the duty to prosecute violations of state statutes. Since R.C. 120.39 prohibits a city law director from representing any indigent defendants, it would be anomalous to conclude that no such prohibition applies to village solicitors although they have the same duties. While it could be argued that a village solicitor is not an "officer," but rather an independent contractor under R.C. 733.48, supra, I am inclined to view the argument as myopic. The purpose of R.C. 120.39 is to prevent problems that may occur where attorneys represent both the state and indigent defendants and are paid for both functions with public funds. It is the duties of the job rather than the title which should control.

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

R.C. 120.39 prohibits a village solicitor (appointed pursuant to R.C. 733.48) and members of his office, his partners, and his employees from being appointed as counsel to represent an indigent criminal defendant under R.C. Chapter 120.