

## OPINION NO. 76-069

## Syllabus:

1. The court exercising jurisdiction over the proceeding will approve fees and expenses not to exceed amounts fixed by county commissioners for payments to counsel for legal services provided pursuant to R.C. 120.33.
2. A public defender, provided pursuant to R.C. 120.33, for municipal court appearances on misdemeanors, and felony preliminary hearings and bindovers should be paid after presentation and processing of the proper order from the court fixing and certifying the amount.
3. The municipal court fixes and certifies amounts to be paid pursuant to R.C. 120.33, which are not to exceed the amounts previously approved by the county commissioners.
4. (A) Partners, associates and employees of village solicitors may be appointed to represent indigent defendants pursuant to R.C. Chapter 120, and are not proscribed from such appointment by R.C. 120.39.  
  
(B) A village solicitor of a village with no police or municipal court, who has not contracted to be a "prosecutor", may be appointed to represent indigent defendants pursuant to R.C. Chapter 120.
5. Absent other provision, the payment for the typing of municipal court transcripts, requested by the county prosecuting attorney, of preliminary hearings is to be made from the county treasury out of the county general fund as provided for in R.C. 325.12.

To: Gene Wetherholt, Gallia County Pros. Atty., Gallipolis, Ohio

By: William J. Brown, Attorney General, October 1, 1976

You have requested my opinion on the five questions which are set out and separately discussed below:

- "1. Under Section 120.33 of the Ohio Revised Code, should the common pleas court, or the municipal court with county-wide jurisdiction, determine and approve the appointed defense counsel fees for municipal court appearances on misdemeanors and felony preliminary hearings and bindovers particularly when a county auditor is involved and is to use county funds for payment?"

R.C. 120.33(C) is explicit in stating that county commissioners shall establish the fees to be paid for legal services pursuant to R.C. 120.33:

"The county commissioners shall establish a schedule of fees by case or on an hourly basis to be paid to counsel for legal services provided pursuant to this section. Prior to establishing the schedule, the county commissioners shall

request the bar association or associations of the county to submit a proposed schedule. The schedule submitted shall be subject to the review, amendment, and approval of the county commissioners."

R.C. 120.33(D) allows the court to approve the fees and expenses, so long as the amount so approved does not exceed the amounts fixed by the county commissioners:

"Counsel selected by the indigent person or appointed by the court at the request of an indigent person, except for counsel appointed to represent a person charged with any violation of an ordinance of a municipal corporation that has not contracted with the county commissioners for the payment of appointed counsel, shall be paid by the county and shall receive the compensation and expenses the court approves. Compensation and expenses shall not exceed the amounts fixed by the county commissioners in the schedule adopted pursuant to division (C) of this section."

"Court" as used in the statute means the court exercising jurisdiction over the proceeding. Logical reasoning dictates that such court would be the court most appropriate for the power being exercised, and R.C. 120.33(B) makes specific reference to "court having jurisdiction over the proceeding." Therefore, the county commissioners duly set the fees under authority and direction of the statute and the court, before which the attorney is practicing, performs a regulatory function in that compensation and fees are approved only after the court has certified what services have been provided. The county auditor reports on the payments to the county commissioners, thereby completing the controlling process.

- "2. When should a public defender, provided pursuant to R.C. 120.33 for municipal court appearances on misdemeanors and felony preliminary hearings and bindovers, be paid?"

R.C. 120.33(D), third paragraph, directs the county auditor to draw his warrant on the county treasurer after the court fixes and certifies the amount. The time of payment, though not specific, is controlled by R.C. 319.16:

"[T]he county auditor shall issue warrants on the county treasurer for all moneys payable from the county treasury, upon presentation of the proper order or voucher for the moneys. . . ."  
(Emphasis added.)

- "3. How is the county able to control its funds if the municipal court can order payment from funds that are not municipal funds?"

The municipal court is not ordering payment, but according to R.C. 120.33(D) paragraph 3, the court only "fixes" and "certifies" the amounts to be paid which are not to exceed the amounts previously approved by the county commissioners. Your question, however, is not one to be answered by legal analysis.

- "4. Under Section 120.39 of the Ohio Revised Code, can village solicitors, their partners, associates or employees be appointed to represent indigent defendants?"

This question seems answered directly by reference to R.C. 120.39 ("Conflict prohibited") which 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 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 issue, however, is whether a village solicitor is a "similar officer." R.C. 733.48 provides that villages are to contract for legal counsel:

"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."

The issue of whether a village solicitor is an "officer" has been addressed many times by my predecessors. If he is not an officer, then logically he cannot be a "similar officer" to a prosecuting attorney, city attorney or director of law, even though his duties may be similar. In 1915 Op. Att'y. Gen. 217, at page 412, the syllabus stated:

"The position of village solicitor is not an 'office' within the meaning of Section 5617, G.C."

My predecessor quoted from 1912 Op. Att'y. Gen., 173, at page 487:

"The village solicitor being appointed by contract, fulfilling only contractual duties, serving for an indefinite term and not being obligated to take oath or give bonds, is not an 'official' within the meaning of 4762, General Code, which stipulates that these duties shall fall upon any official serving in a similar capacity to that of prosecuting attorney or city solicitor."

In the course of the opinion it is stated as follows:

"As stated by Gilmore, J., in State v. Wilson, 29 O.S. 345, let us examine to determine whether 'some of the indicia' of an officer may be found. Is he appointed for a definite term? No, he is hired by contract and the hiring may be for one case, or for one month, or for any other time, so long as it does not exceed the limitation two years fixed by law. Must he take an oath of office or give a bond? No, no more than any other mere employee of the village. Must he be an elector of the village? Not at all; many cases have come to my notice where, by reason of there being no attorney-at-law in a village, or for some other good and sufficient cause, legal counsel have been employed from neighboring jurisdictions. In fact, I cannot find any legal necessity for his being an elector at all, nor (though I do not pass upon the question) would I see any objection to the employment of an alien or a woman counsel, if the village counsel saw fit. It does not appear to me that this position is such an 'office' as, under article 15, section 4, of the constitution, would render it necessary for the person to be possessed of the qualifications of an elector. The duties of village counsel are not prescribed by statute but fixed by contract. If he die or resign his duties are not cast upon a successor; a new contract is necessary, with a new party.

"So, I conclude that the legal counsel of the village is not an official in the true sense of the word, and was not contemplated under the provisions of section 4762, General Code."

(Emphasis added.)

The 1915 opinion was further followed and cited in 69 Op. Att'y. Gen. 039 in construing R.C. 733.48 (which has almost identical language to G.C. 4220 in effect in 1915). I adhere to this reasoning of my predecessors and hold that neither partners, associates nor employees of village solicitors are proscribed from being appointed to represent indigent defendants under R.C. 120.39.

Even though the village solicitor is not an officer and is not covered by the language of R.C. 120.39, however, he may still be precluded by virtue of conflict of interest. Another of my predecessors in 67 Op. Att'y Gen. 112, first syllabus, concerning city solicitors held:

"A city solicitor may not represent defendants in criminal cases wherein the State of Ohio is plaintiff. (Opinion No. 66-159, Opinions of the Attorney General for 1966, approved and followed.)"

In the text he wrote:

"[L]et me state that it is common practice for the city solicitor to represent the state in municipal court in prosecutions under state statutes. For such a solicitor to represent an accused in the court of common pleas would be inappropriate as he would in essence be aligning himself against his at least part-time employers."

Though many of the duties of the village and city solicitors are similar, the duty which would control in this instance is the duty to prosecute. The legislature, through the following statutes, has indicated that there are times when a village solicitor may be called upon to prosecute:

1. R.C. 705.11 (Solicitor duties).  
"[H]e or his assistants shall be the prosecutor in any police or municipal court. . . ."
2. R.C. 2935.01(C) (Definitions).  
"'Prosecutor' . . . in the case of courts inferior to court of common pleas, includes city or village solicitor. . . ."

However, if there is no court in the village then the village attorney naturally would not prosecute. The issue here is decided by whether a particular village solicitor has the duty to prosecute defendants in any court. If he has that duty he may not be appointed to represent indigent defendants pursuant to R.C. 120. If he has not contracted to be a prosecutor, and if the village has no police or municipal court, he may be so appointed.

"5. Who is to pay for the typing of municipal court transcripts of preliminary hearings when such transcripts are requested by the prosecuting attorney?"

Where there is no statutory provision for the payment of specific expenses of the county prosecutor in the performance of his official duties, the General Assembly has enacted R.C. 325.12 (formerly GC 3004) whereby additional allowances for expenses shall be paid by the county treasurer. R.C. 325.12 reads in part:

"There shall be allowed annually to the prosecuting attorney, in addition to his salary and to the allowance provided for by section 309.06 of the Revised Code, an amount equal to one half of the official salary, to provide for expenses which may be incurred by him in the performance

of his official duties and in the furtherance of justice. Upon the order of the prosecuting attorney, the county auditor shall draw his warrant on the county treasurer, payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided by this section to be paid out of the general fund of the county."

In 1929 Op. Att'y. Gen. No. 1111 (at page 1669) the second syllabus states:

"A prosecuting attorney in the expenditure of the funds allowed by him by virtue of Section 3004, General Code, is limited only in such expenditures to expenses incurred by him in the performance of his official duties and in the furtherance of justice not otherwise provided for."  
(Emphasis added.)

The payment for the typing of municipal court transcripts requested by the prosecuting attorney is not otherwise provided for.

It is appropriate to point out that my predecessor in 1969 Op. Att'y. Gen. No. 159 wrote:

"A continuation of past practices of this office ruling on specific requests (concerning use of R.C. 325.12) can only result in the placing of artificial restrictions upon the use of the fund which were not intended by the general assembly."

In this opinion I am not disavowing the above opinion, only reciting the function of R.C. 325.12. However, the expenditure referred to here is so obviously within the parameters of the section that I do not feel that I am substituting my judgment for the prosecuting attorney's judgment in making such a determination.

In specific response to your question it is, then, my opinion that:

1. The court exercising jurisdiction over the proceeding will approve fees and expenses not to exceed amounts fixed by county commissioners for the payment to counsel for legal services provided pursuant to R.C. 120.33.
2. A public defender, provided pursuant to R.C. 120.33, for municipal court appearances on misdemeanors, and felony preliminary hearings and bindovers should be paid after presentation and processing of the proper order from the court fixing and certifying the amount.
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(B) A village solicitor of a village with no police or municipal court, who has not contracted to be a "prosecutor", may be appointed to represent indigent defendants pursuant to R.C. Chapter 120.

5. Absent other provision, the payment for the typing of municipal court transcripts, requested by the county prosecuting attorney, of preliminary hearings is to be made from the county treasury out of the county general fund as provided for in R.C. 325.12.