

OPINION NO. 88-086**Syllabus:**

1. Under R.C. 1901.34(D), apart from those prosecuting attorneys specifically excepted, the prosecuting attorney of a county may enter into an agreement with a city whereby the prosecuting attorney agrees to prosecute in municipal court those criminal cases within the municipal court's jurisdiction which arise out of offenses occurring within the city.
2. Under R.C. 1901.34(D), the prosecuting attorney of a county is not authorized to enter into an agreement with a city in which a municipal court is located whereby the prosecuting attorney agrees to prosecute in that municipal court those criminal cases within the municipal court's jurisdiction arising in unincorporated areas within the territory of the municipal court.
3. An assistant prosecuting attorney whose only duty is to prosecute criminal cases may also serve as an assistant city law director employed for the exclusive purpose of prosecuting criminal cases in municipal court.

To: Wilfrid G. Dues, Preble County Prosecuting Attorney, Eaton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 25, 1988

I have before me your request for my opinion concerning the prosecution of criminal cases in municipal court. You ask the following:

1. May a county prosecuting attorney enter into a contract with a city, whereby the prosecuting attorney agrees to prosecute all criminal cases in municipal court which the city law director has the duty to prosecute?
2. May an assistant city law director employed for the exclusive purpose of prosecuting criminal cases in municipal court also serve as an assistant prosecuting attorney?

The duty to prosecute criminal cases in municipal court is imposed on various officials by R.C. 1901.34, which provides:

(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. Except as provided in division (B) of this section, the village solicitor, city director of law, or similar chief legal officer of the municipal corporation in which a municipal court is located shall prosecute all criminal cases brought before the court arising in the unincorporated areas within the territory of the municipal court.

(B) The Auglaize county, Hocking county, Jackson county, Ottawa county, and Portage county prosecuting attorneys shall prosecute in municipal court all violations of state law arising in their respective counties. The Crawford county, Hamilton county, Madison county, and Wayne county prosecuting attorneys shall prosecute all violations of state law arising within the unincorporated areas of their respective counties.

The prosecuting attorney of any county given the duty of prosecuting in municipal court violations of state law shall receive no additional compensation for assuming these additional duties, except that the prosecuting attorney of Hamilton, Portage, and Wayne counties shall receive compensation at the rate of four thousand eight hundred dollars per year, and the prosecuting attorney of Auglaize county shall receive compensation at the rate of one thousand eight hundred dollars per year, each payable from the county treasury of the respective counties in semimonthly installments.

(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. He or his assistants whom he may appoint shall receive for such services additional compensation to be paid from the treasury of the county as the board of county commissioners prescribes.

(D) The prosecuting attorney of any county, other than Auglaize, Hocking, Jackson, Ottawa, or Portage county, may enter into an agreement with any municipal corporation in the county in which he serves pursuant to which the prosecuting attorney prosecutes all criminal cases brought before the municipal court that has territorial jurisdiction over that municipal corporation for criminal offenses occurring within the municipal corporation. The prosecuting attorney of Auglaize, Hocking, Jackson, Ottawa, or Portage county may enter into an agreement with any municipal corporation in the county in which he serves pursuant to which the respective prosecuting attorney prosecutes all cases brought before the Auglaize, Hocking, Jackson, or Portage county municipal court or the Port Clinton municipal court for violations of the ordinances of the municipal corporation or for criminal offenses other than violations of state law occurring within the municipal corporation. For prosecuting these cases, the prosecuting attorney and the municipal corporation may agree upon a fee to be paid by the municipal corporation, which fee shall be paid into the county treasury, to be used to cover expenses of the office of the prosecuting attorney.

In your case, the municipal corporation involved is the City of Eaton. The municipal court of Eaton has countywide jurisdiction within Preble County. R.C.

1901.02(B). Preble County is not one of those counties listed in R.C. 1901.34(B), which imposes on certain prosecuting attorneys the duty to prosecute violations of state law arising in the unincorporated areas of their counties or to prosecute in municipal court all violations of state law arising in their counties. Thus, R.C. 1901.34 imposes no duty on you as prosecuting attorney of Preble County to prosecute criminal cases in the municipal court of Eaton. You indicate that you wish to enter into an agreement with the City of Eaton, whereby you would prosecute those cases which the city law director of Eaton has the duty to prosecute.

Under R.C. 1901.34(A), the city law director of Eaton has the duty to prosecute all criminal cases brought before the Eaton Municipal Court for offenses that occur within the City of Eaton. Because the Eaton court has jurisdiction over all of Preble County, the law director of Eaton also has the duty, under R.C. 1901.34(A), to prosecute all those cases which arise in the unincorporated areas within Preble County. *See generally* 1987 Op. Att'y Gen. No. 87-093.

R.C. 1901.34(D), which authorizes the prosecuting attorney of a county to enter into an agreement whereby he assumes the prosecutorial duties of a city law director, provides in pertinent part:

The prosecuting attorney of any county, other than Auglaize, Hocking, Jackson, Ottawa, or Portage county, may enter into an agreement with any municipal corporation in the county in which he serves pursuant to which the prosecuting attorney prosecutes all criminal cases brought before the municipal court that has territorial jurisdiction over that municipal corporation for criminal offenses occurring *within the municipal corporation*. (Emphasis added.)

Pursuant to R.C. 1901.34(D), you may enter into an agreement with the City of Eaton, whereby you agree to prosecute in Eaton Municipal Court those cases which arise out of criminal offenses occurring within Eaton.

You ask whether you may agree to prosecute in municipal court *all* criminal cases that the Eaton city law director has the duty to prosecute. It is a well established rule of statutory construction that the specification of one thing implies the exclusion of another. *See Craftsman Type, Inc. v. Lindley*, 6 Ohio St. 3d 82, 451 N.E.2d 768 (1983); *Kroger Co. v. Bowers*, 3 Ohio St. 2d 76, 209 N.E.2d 209 (1965). Under R.C. 1901.34(D), a county prosecutor may contract with a municipal corporation for the prosecutor to prosecute cases which arise in the municipal corporation. However, R.C. 1901.34(D) does not authorize a prosecuting attorney to contract with a municipal corporation to prosecute cases which arise in unincorporated areas. *See also* 138 Ohio Laws, Part I, 1183 (Am. S.B. 357, eff. Jan. 9, 1981)(amending R.C. 1901.34 "to permit the prosecuting attorney of any county to enter into agreements with any municipal corporation in a county whereby he agrees to prosecute all criminal cases *arising in the municipal corporation* that are brought before the municipal court...")(emphasis added). The fact that R.C. 1901.34(D) fails to authorize such a contract for offenses committed in unincorporated areas appears to be an oversight on the part of the General Assembly. However, in light of the specific language in R.C. 1901.34(A) and (D), I am compelled to conclude that a prosecuting attorney of a county is not authorized under R.C. 1901.34(D) to enter into an agreement with a municipal corporation whereby he agrees to prosecute, in municipal court, criminal cases that arise in unincorporated areas. *See generally* 1988 Op. Att'y Gen. No. 88-014 at 2-56 (in the absence of clear and manifest error on the part of the General Assembly, a statute must be accorded its plain meaning); 1980 Op. Att'y Gen. No. 80-011 at 2-58 (the Attorney General does not have the power to make law; that power rests solely with the General Assembly).

I turn now to your second question, in which you ask whether an assistant city law director employed for the exclusive purpose of prosecuting criminal cases in municipal court may also serve as an assistant county prosecutor. In 1986 Op. Att'y Gen. No. 86-035, I concluded that the positions of assistant prosecuting attorney and assistant city law director are compatible when the assistant prosecutor is employed for the exclusive purpose of prosecuting civil child support collections actions for the county department of human services. To a large extent, Op. No. 86-035 applies

to the question at hand. I therefore will restrict the compatibility analysis in this opinion to concerns raised by the fact that some different duties are involved here.

As I noted in Op. No. 86-035 at 2-184 n.2, an assistant prosecuting attorney who performs limited duties may also serve as an assistant city law director, as long as the performance of the duties of both positions in no way renders either position subordinate to or a check upon the other or subjects the person to an impermissible conflict of interest. See 1985 Op. Att'y Gen. No. 85-042 at 2-150 (a "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 also 1979 Op. Att'y Gen. No. 79-111.

You indicate that the person in question would have limited duties both as an assistant prosecuting attorney and as an assistant city law director. As assistant prosecuting attorney he would be responsible for prosecuting criminal actions and would not be involved with the civil side of the prosecuting attorney's duties. As assistant city law director he would be employed for the exclusive purpose of prosecuting criminal cases in municipal court.

Under R.C. 1901.34, the city law director of Eaton has the duty to prosecute in Eaton Municipal Court all criminal cases within the jurisdiction of a municipal court that arise in Eaton or in unincorporated areas in Preble County. Under R.C. 309.08, the prosecuting attorney has the duty to prosecute "all complaints...in which the state is a party." Thus, the person in question would prosecute misdemeanor cases in municipal court for the city law director and could prosecute misdemeanor cases in common pleas court for the prosecuting attorney. Cf. R.C. 1901.20(A)(a municipal court has jurisdiction over misdemeanors committed within its territory); *State ex rel. Coss v. Hoddinott*, 16 Ohio St. 2d 163, 243 N.E.2d 59 (1968)(a court of common pleas has concurrent jurisdiction over misdemeanors unless jurisdiction has been vested exclusively in another court).¹ As assistant city law director, the person in question would handle the preliminary hearing on a felony case in municipal court and then, as assistant prosecuting attorney, could prosecute the case after it has been bound over to the common pleas court. Cf. R.C. 1901.20(B)(municipal courts have jurisdiction to hold preliminary hearings on felonies); *State v. Nelson*, 51 Ohio App. 2d 31, 365 N.E.2d 1268 (Cuyahoga County 1977)(a municipal court may conduct a preliminary hearing on a felony case and bind the defendant over to the court of common pleas, but a municipal court does not have jurisdiction to determine the guilt or innocence of the defendant). Given the nature and fairly narrow scope of the duties of both positions, I conclude that neither position is subordinate to or a check upon the other.

I turn now to the question of whether an impermissible conflict of interest prohibits one person from holding both positions. A potential conflict of interest may be so great as to prohibit a person from holding two positions. However, a conflict that is very speculative and remote will not render two positions incompatible. See Op. No. 79-111. I note that a person serving as both an assistant prosecuting attorney and an assistant city law director could be vulnerable to a conflict of interest under certain circumstances. If he were paid hourly in either position, he would have a financial interest in increasing the hours worked in that position, and that financial interest could affect his prosecutorial decisions. For instance, if he were paid by the hour as assistant city law director, he could increase his hours by choosing to prosecute misdemeanor cases in municipal rather than common pleas court. He could also increase his hours by reducing felony charges to misdemeanor charges, thus enabling him to prosecute the cases in municipal court. Therefore, holding both positions could expose him to a conflict of

¹ I note that there is no county court in Preble County. See R.C. 1901.02(B)(the municipal court of Eaton has countywide jurisdiction within Preble County); R.C. 1907.01 (establishing a county court in each county where the boundaries of the municipal court or courts are not coextensive with the county). In a county court, both a prosecuting attorney of the county and a city law director have the duty to see that the prosecution for violation of a state statute is carried out. R.C. 2938.13; 1981 Op. Att'y Gen. No. 81-094.

interest. However, this conflict is speculative in that it depends on the existence of several factors, including hourly pay and a certain amount of unsupervised prosecutorial discretion.² I find, therefore, that this potential conflict is too speculative and remote to support the conclusion that one person must be prohibited from holding both positions. A person holding both positions should, however, be aware of this area of possible conflict and should take care to prevent questions of personal gain from affecting the exercise of his professional judgment. See generally Code of Professional Responsibility DR 5-101(A)(1982)(unless he has his client's consent, a lawyer shall not accept employment if the exercise of his professional judgment will be or reasonably may be affected by his own financial interests).

I am unaware of any other impermissible conflicts of interest in this situation. Moreover, I note that in certain counties the prosecuting attorney is under a duty to prosecute in municipal court all violations of state law which arise in the county. In certain other counties the prosecuting attorney is under a duty to prosecute all violations of state law arising in the unincorporated areas in the county. R.C. 1901.34(B). Thus, an assistant prosecuting attorney in some counties may perform the duties of both the positions in question. By authorizing some assistant prosecuting attorneys to prosecute municipal court criminal cases, the General Assembly has indicated that no conflict of interest is involved or that other concerns override a possible conflict of interest. Cf. 1988 Op. Att'y Gen. No. 88-041 at 2-199 (because community action agencies are statutorily required to have elected officials serve on their boards, the General Assembly apparently determined that the attendant conflict of interest for the officials is overridden by the benefits derived from having the officials on such boards).

Thus, I conclude that a person employed as an assistant prosecuting attorney and assistant city law director having criminal prosecutorial duties only would not be subject to a conflict of interest that would prohibit him from holding both positions. I assume that it is physically possible for one person to perform the duties of both positions. Therefore, I conclude that an assistant prosecuting attorney whose only duty is to prosecute criminal cases may also serve as an assistant city law director employed for the exclusive purpose of prosecuting criminal cases in municipal court.

Therefore, it is my opinion and you are advised that:

1. Under R.C. 1901.34(D), apart from those prosecuting attorneys specifically excepted, the prosecuting attorney of a county may enter into an agreement with a city whereby the prosecuting attorney agrees to prosecute in municipal court those criminal cases within the municipal court's jurisdiction which arise out of offenses occurring within the city.
2. Under R.C. 1901.34(D), the prosecuting attorney of a county is not authorized to enter into an agreement with a city in which a municipal court is located whereby the prosecuting attorney agrees to prosecute in that municipal court those criminal cases within the municipal court's jurisdiction arising in unincorporated areas within the territory of the municipal court.
3. An assistant prosecuting attorney whose only duty is to prosecute criminal cases may also serve as an assistant city law director employed for the exclusive purpose of prosecuting criminal cases in municipal court.

² You have indicated that the person in question is not paid by the hour for his duties as assistant prosecuting attorney. It is not known at this point whether he will be paid by the hour as assistant city law director. You have also indicated that he does not, as assistant prosecutor, have discretion to determine the court in which misdemeanor cases are filed.