

OPINION NO. 86-035

Syllabus:

A person who is employed as an assistant prosecuting attorney for the exclusive purpose of prosecuting civil child support collection actions on behalf of the county department of human services may also serve as an assistant city law director of a city within the same county.

To: Frederick D. Pepple, Auglaize County Prosecuting Attorney, Wapakoneta, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 21, 1986

You have requested my opinion regarding the compatibility of the positions of assistant prosecuting attorney and assistant city law director. In your letter you state that you have recently employed an individual to serve as an assistant prosecuting attorney for the purpose of prosecuting civil child support collection actions against delinquent obligors, pursuant to contract with the Auglaize County Department of Human Services, as approved by the Ohio Department of Human Services. According to additional information you have provided a member of my staff, this same individual also maintains a private law practice as a member of a law firm, and is also employed, on a part-time basis, as an assistant city law director for a city within the county. You have also indicated that it is the policy of your office that law firms with which your assistants maintain private law practices are disqualified from serving as defense counsel in criminal actions prosecuted by your office, and that such firms are further prohibited from providing legal counsel to parties maintaining civil actions against the county and its agencies.

I note initially that because an assistant prosecuting attorney is empowered to act for, and in place of the prosecuting attorney in most matters, see R.C. 309.06, the assistant is subject to the same limitations as the prosecuting attorney and may not hold any office that the prosecuting attorney may not hold. See 1983 Op. Att'y Gen. No. 83-030; 1971 Op. Att'y Gen. No. 71-050; 1971 Op. Att'y Gen. No. 71-037; 1971 Op. Att'y Gen. No. 71-025; 1963 Op. Att'y Gen. No. 25, p. 113; 1945 Op. Att'y Gen. No. 184, p. 163. Thus, statutory, as well as common law, restrictions on a prosecuting attorney's outside activities have been held applicable to assistant prosecuting attorneys. 1970 Op. Att'y Gen. No. 70-022. Similarly, 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. See R.C. 733.51; R.C. 733.52; 1979 Op. Att'y Gen. No. 79-100 at 2-311 ("[a]n assistant city solicitor performs, under the supervision of the solicitor, all the duties of the solicitor"). Thus, if the positions of prosecuting attorney and city law director are incompatible, the positions of assistant prosecuting attorney and assistant city law director are, as a general matter, also incompatible. But see note two, infra. Consequently, in considering the compatibility of the two positions about which you have inquired I must also consider the compatibility of the positions of prosecuting attorney and city law director.

In 1979 Op. Att'y Gen. No. 79-111, a seven-question analysis was set forth for determining the compatibility of different public positions. In order to determine whether two public positions are compatible, it is necessary to consider the following seven questions:

1. Is either of the positions classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment permissible?
3. Is one office subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?

5. Is there a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

Question number four asks whether it is physically possible for one person to discharge the duties of both positions. This test must take into account the time demands that each position will make upon the individual involved. It is, therefore, a factual question, which can best be resolved by the interested parties. See Op. No. 79-111.

Questions number six and number seven are of local concern, and I assume, for the purpose of this opinion, that there are no local or departmental regulations that limit the holding of outside employment by a prosecuting attorney or a city law director, or their assistants.

Question number one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits classified employees from engaging in political activity other than to vote and freely express their opinions. The prosecuting attorney and the city law director, being officers elected by popular vote, see R.C. 309.01; R.C. 733.49, are not positions of classified employment, R.C. 124.11(A)(1), and thus neither a prosecuting attorney nor a city law director is subject to the prohibition of R.C. 124.57. Further, R.C. 124.11(A)(11) provides, in part, that an assistant prosecuting attorney and an assistant city law director do not occupy positions of classified employment, and thus neither an assistant prosecuting attorney nor an assistant city law director is subject to the prohibition of R.C. 124.57.

Question number two asks whether the empowering statutes of either position limit outside employment. There are certain offices that a prosecuting attorney may not hold because of statutory inhibition. R.C. 3.11, for example, states that, "[n]o person shall hold at the same time by appointment or election more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, and probate judge." R.C. 309.02 also provides, in part, that, "[n]o prosecuting attorney shall be a member of the general assembly of this state or mayor of a municipal corporation," and "[n]o county auditor, county recorder, county engineer, or sheriff shall be eligible as a candidate for, or elected to, the office of prosecuting attorney." Additionally, several statutory provisions prohibit the prosecuting attorney from serving on certain public boards or commissions. See, e.g., R.C. 3313.13 (a prosecuting attorney may not serve as a member of a board of education); R.C. 5126.03(A)(1)(a) (a prosecuting attorney, as an elected public official, may not serve as a member of a county board of mental retardation and developmental disabilities). See also Op. No. 83-030 at 2-113 (the prohibition contained in R.C. 5126.03(A)(1) also applies to an assistant prosecuting attorney); 1969 Op. Att'y Gen. No. 69-133 at 2-291 (the prohibition contained in R.C. 3313.13 also applies to an assistant prosecuting attorney). I am unaware, however, of any statutes that prohibit a prosecuting attorney from also serving as a city law director. Further, with the exception of R.C. 120.39(C), which prohibits a prosecuting attorney, city law director, or their assistants and employees from serving on a

state public defender commission or any county or joint county public defender commission, there are no other statutes of which I am aware that expressly limit the outside public employment of an assistant prosecuting attorney. A city law director is similarly prohibited by R.C. 3313.13 from serving as a member of a board of education. See also 1979 Op. Att'y Gen. No. 79-100 at 2-311 (the prohibition contained in R.C. 3313.13 also applies to an assistant city solicitor). I am unaware of any statutes, however, that prohibit a city law director from also serving as a prosecuting attorney. Further, with the exception of R.C. 120.39(C), there are no other statutes of which I am aware that limit the outside public employment of an assistant city law director. Thus, there are no statutory impediments to one person simultaneously serving as assistant prosecuting attorney and assistant city law director. Cf. R.C. 120.39(A) (employees of a prosecuting attorney or city law director may not be appointed by a court to serve as defense counsel in a criminal prosecution).

Question number three of the compatibility analysis asks whether one office or employment is subordinate to, or a check upon, the other, see State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274, 276 (Cir. Ct. Franklin County 1909). A determination whether one position is subordinate to, or a check upon, another office or employment requires a careful scrutiny of both positions and the powers, duties, and functions inherent in each.

Specific provisions within R.C. Chapters 309 (prosecuting attorney) and 733 (officers of municipal corporations) address the powers and functions of a prosecuting attorney and a city law director. R.C. 309.08 describes the general powers and duties of the prosecuting attorney as follows:

The prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, and such other suits, matters, and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals. In conjunction with the attorney general, such prosecuting attorney shall prosecute cases arising in his county in the supreme court. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and he shall faithfully urge the collection until it is effected or found to be impracticable to collect, and shall forthwith pay to the county treasurer all moneys belonging to the state or county which come into his possession.

R.C. 309.09 further describes the individuals and entities to whom the prosecuting attorney serves as legal adviser. R.C. 309.09(A) provides as follows:

The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and

actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.

Such prosecuting attorney shall be the legal adviser for all township officers. When the board of township trustees deems its advisable or necessary to have additional legal counsel it may employ an attorney other than the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers in their official capacities and to advise them on legal matters. No such counsel or attorney may be employed, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund.

Cf. R.C. 309.09(B) (a board of county commissioners may employ an attorney other than the prosecuting attorney to represent the board in its official capacity); R.C. 309.10 (a school board, a board of county hospital trustees, and a board of library trustees may, in certain circumstances, employ legal counsel other than the prosecuting attorney).

In addition to the duties and functions prescribed in R.C. 309.08 and R.C. 309.09, the prosecuting attorney is also responsible for preparing official bonds for all county officers, R.C. 309.11, prosecuting actions to restrain the misapplication of county funds or public moneys in the hands of the county treasurer, R.C. 309.12, prosecuting persons who in any way unlawfully cut down or injure timber growing on land belonging to the state or any school district, R.C. 309.14, and bringing actions to recover property of a decedent held by another person, in those instances in which the administration of such decedent's estate has not been commenced, R.C. 309.17.

Numerous other provisions throughout the Revised Code also elaborate upon specific duties of the prosecuting attorney with respect to his representation of various governmental entities, the actions he may take on their behalf, and his membership on certain boards and commissions. See, e.g., R.C. 321.42 (the prosecuting attorney shall commence action upon the bond of the county auditor or county treasurer in the event such bond is breached); R.C. 327.01 (the prosecuting attorney shall be a member and president of the county board of trustees of the sinking fund); R.C. 901.25 (when directed by the Attorney General, the prosecuting attorney shall institute and prosecute all necessary actions for the enforcement of the agricultural laws); R.C. 1515.11 (the prosecuting attorney of a county in which there is a soil and water conservation district shall be the legal adviser of the district, and shall represent the district in all civil actions); R.C. 1719.05 (the prosecuting attorney may bring an action in court to enforce the administration of a charitable trust); R.C. 1747.11(A) (the prosecuting attorney may bring a forfeiture action against a real estate investment trust that transacts real estate business in the state without authority); R.C. 2733.04 (when directed by the Governor, Ohio Supreme Court, Secretary of State, or General Assembly, the prosecuting attorney shall commence an action in quo warranto); R.C. 4123.92 (when

directed by the Attorney General, the prosecuting attorney shall institute and prosecute all necessary actions pertaining to the workers' compensation law); R.C. 5705.27 (the prosecuting attorney is a member of the county budget commission).

R.C. 733.51 describes the general powers and duties of the city 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 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. With respect to the duties of the city law director as prosecuting attorney of the mayor's court, R.C. 733.52 also provides as follows:

The city director of law as prosecuting attorney of the mayor's court shall prosecute all cases brought before the court, and perform the same duties, as far as they are applicable thereto, as required of the prosecuting attorney of the county.

The director of law or the assistants whom he designates to act as prosecuting attorneys of the mayor's court shall receive such compensation for the service provided by this section as the legislative authority of the city prescribes, and such additional compensation as the board of county commissioners allows.

See also R.C. 1901.34 (prosecution of criminal cases by city director of law in municipal court).

R.C. 733.53 further describes the responsibilities of the city law director in representing the city in all suits in which the city is a party as follows:

The city director of law, when required to do so by resolution of the legislative authority of the city, shall prosecute or defend on behalf of the city, all complaints, suits, and controversies in which the city is a party, and such other suits, matters, and controversies as he is, by resolution or ordinance, directed to prosecute. He shall not be required to prosecute any action before the mayor of the city for the violation of an ordinance without first advising such action.

In addition to the duties and functions prescribed in R.C. 733.51-.53, the city law director is also responsible for 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 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 adviser 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).

From my review of the foregoing statutory provisions as they pertain to the powers and functions of a prosecuting attorney and a city law director, it does not appear that, as a general matter, either office is subordinate to, or a check upon, the other. This conclusion is supported by 1932 Op. Att'y Gen. No. 4869, vol. III, p. 1479 and 1912 Op. Att'y Gen. No. 747, vol. II, p. 1874. In 1912 Op. No. 747, my predecessor examined, with respect to the powers and duties of a prosecuting attorney and city solicitor,¹ the statutory predecessors of many of the Revised Code provisions I have enumerated herein. After a careful analysis of those various sections, my predecessor concluded that common law incompatibility considerations do not prohibit a prosecuting attorney from serving simultaneously as a city solicitor, provided it is physically possible for the same person to perform the duties of both offices. 1912 Op. No. 747 at 1880. See also 1932 Op. No. 4869 at 1480 (concurring in the result reached in 1912 Op. No. 747, and noting that, "there has been no material change in the statutes which would adversely affect the holding in such opinion"). While I may be inclined to concur in the results reached in 1932 Op. No. 4869 and 1912 Op. No. 747 in this regard, I find it unnecessary, for purposes of this opinion, to make a conclusive determination whether such

¹ 1977-1978 Ohio Laws, Part II, 2091 (Am. Sub. H.B. 219, eff. Nov. 1, 1977) amended pertinent sections of the Revised Code for the purpose of changing the name of the chief legal advisor of a city from "city solicitor" to "city director of law."

is, in fact, the case.² Instead, I believe it sufficient to confine my analysis on this point to the particular factual situation described in your request.

You have indicated that your office is authorized, pursuant to R.C. 5101.31 and regulations promulgated thereunder by the Ohio Department of Human Services, to prosecute civil child support collection actions against delinquent obligors on behalf of the Auglaize County Department of Human Services. See R.C. 5101.31(A) (the bureau of child support and fraud of the Department of Human Services shall establish and administer a program of child support enforcement, which shall meet the requirements of Title IV-D of the Social Security Act, 42 U.S.C. §651, as amended); 8 Ohio Admin. Code 5101:1-29-01 (the Title IV-D unit of each county's department of human services is responsible for implementation of the Title IV-D program at the local level); 5101:1-29-51 (cooperative agreements for the collection of child support obligations may be made between the local Title IV-D agency and appropriate law enforcement officials, including the county prosecuting attorney whenever possible); 5101:1-29-57 (county prosecuting attorneys have authority to provide any Title IV-D legal services on behalf of the local Title IV-D agency). See also R.C. 329.04(B) (the county department of human services shall exercise and perform, under the control and direction of the board of county commissioners, such duties relative to the provision of public social services authorized under Title IV-D of the Social Security Act, including contracting with other government agencies to perform such services).³ You have also indicated

² I have already stated that if the positions of prosecuting attorney and city law director are incompatible, the positions of assistant prosecuting attorney and assistant city law director are also incompatible. See page two, supra. I believe it reasonable, however, to further qualify this general proposition by noting that a finding that the positions of prosecuting attorney and city law director are incompatible on the basis that one position is subordinate to or a check upon the other or that there is a conflict of interest between the two positions may not, in all instances, lead to a similar finding with respect to the positions of assistant prosecuting attorney and assistant city law director. In this regard, I believe an exception to the general rule may be appropriate in the case of an assistant prosecuting attorney who performs, on behalf of the prosecuting attorney, only limited duties of a specialized nature, such that his performance of those duties in no way renders his position subordinate to or a check upon the position of assistant city law director or conflicts with any of the duties and responsibilities he undertakes as an assistant city law director. Cf. 1970 Op. Att'y Gen. No. 70-053 (an assistant prosecuting attorney, even though he serves in a limited capacity as a special assistant prosecutor, may not hold the position of mayor of a municipality since the prosecuting attorney is prohibited by statute from serving as mayor).

³ Title IV, Part D of the Social Security Act, 42 U.S.C. §§651-666, establishes a federal scheme designed to aid the various states in "enforcing the support obligations owed

that the individual in question was hired as an assistant prosecuting attorney for the exclusive purpose of litigating such civil child support collection actions as are prosecuted by your office. It is my understanding that the duties and responsibilities of this particular individual are limited to the management and supervision of such cases and do not extend to other areas, such as the prosecution of criminal offenses generally or handling other types of civil litigation on behalf of the county and its agencies.

Given the nature and fairly narrow scope of the functions performed on behalf of your office by the individual in question, I do not believe that his position as assistant prosecuting attorney is subordinate to, or a check upon, his position as assistant city law director. For the same reason, I also conclude that his position as assistant city law director is not subordinate to, or a check upon, his position as assistant prosecuting attorney.

Question number five requires an examination of whether a person serving in two public capacities is subject to a conflict of interest. As was stated in 1970 Op. Att'y Gen. No. 70-168 (overruled on other grounds by 1981 Op. Att'y Gen. No. 81-100) at 2-336, one in the public service "owes an undivided duty to the public. It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public."

I again find it unnecessary, however, for purposes of this opinion, to resolve the larger issue of whether a person occupying the offices of prosecuting attorney and city law director is subject to a conflict of interest as a result thereof.⁴ Rather, I believe it sufficient to restrict my inquiry on this point to the particular factual situation described in your request. In this regard I do not believe that this particular individual will be faced with a conflict of

by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available...to all children." 42 U.S.C. §651. 42 U.S.C. §§654 and 666 further describe the requirements a state plan for child and spousal support must satisfy if the state wishes to participate in the various benefits afforded the states under the federal legislation. Regulations pertaining to the administration of 42 U.S.C. §§651-666, as promulgated by the Department of Health and Human Services, appear in 45 C.F.R. §§301.0-307.40 (1985).

⁴ I note in passing, however, that a person who serves both as prosecuting attorney and city law director, may, in one particular instance, be subject to an obvious conflict of interest by reason of R.C. 733.73, which reads as follows:

On the day fixed by the probate judge for the return of the citation issued pursuant to section 733.72 of the Revised Code, the village solicitor or city director of law shall appear on behalf of the complainant to conduct the prosecution, and the accused may also appear by

interest between his duties as assistant prosecuting attorney and assistant city law director, inasmuch as his duties as assistant prosecuting attorney are confined exclusively to the prosecution and management of civil child support collection actions. I believe that his duties in this regard are unrelated to any of the duties he performs as assistant city law director, and I can conceive of no instance in which the former would conflict with the latter.⁵

Accordingly, it is my opinion, and you are advised that a person who is employed as an assistant prosecuting attorney for the exclusive purpose of prosecuting civil child support collection actions on behalf of the county department of human services may also serve as an assistant city law director of a city within the same county.

counsel. A time shall be set for hearing the case, which shall be not more than ten days after such return. If a jury is demanded by either party, the probate judge shall direct the summoning of twelve men [jurors] in the manner provided by sections 2313.19 to 2313.26 of the Revised Code. In a municipal corporation having no village solicitor or city director of law, or in case the village solicitor or city director of law is accused of any misfeasance or malfeasance in his office, the prosecuting attorney shall appear on behalf of the complainant to conduct the prosecution. (Emphasis added).

R.C. 733.72 provides, in part, for the filing of a complaint by the electors of a municipal corporation against a municipal corporation officer, including the city director of law, charging the officer with misfeasance or malfeasance in office. See R.C. 733.72(C). In the event such a complaint were filed against a city law director who also serves as prosecuting attorney for the county, such individual would find himself in the untenable position of conducting the prosecution against himself.

⁵ In your letter you state that the city law director to whom the individual in question serves as an assistant maintains a private law practice at the same law firm as that individual. Insofar as I have concluded that the position of assistant prosecuting attorney is compatible, in this particular instance, with the position of assistant city law director, I see no additional difficulty presented in this regard by this individual and the city director of law being affiliated with the same law firm. Cf. State ex rel. Waite v. Berry, 11 Ohio St. 3d 53, 54, 463 N.E.2d 386, 387 (1984)(there is no provision in Ohio law that prohibits a county prosecuting attorney from maintaining a private law practice, and noting that the "arrangement of allowing county prosecutors in smaller populated counties to engage in a private practice of law can be beneficial to subdivisions such as [counties], in that it ensures that the county is able to attract competent and experienced attorneys to the office of prosecuting attorney").