

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 88-008

Issued June 17, 1988

WITHDRAWN. IN PART. BY OPINION 2014-2 ON AUGUST 8, 2014

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: A part time prosecutor, whose duty it is to represent the State of Ohio in criminal cases, may not represent criminal defendants against the State of Ohio in his or her private practice. There are very limited instances, which are set forth in this opinion, when a part time city or municipal prosecutor may represent criminal defendants in his or her private practice. When a member of a law firm may not accept employment pursuant to DR 5-105, then other members of that law firm are likewise precluded from accepting such employment.

OPINION: We have before us two requests for informal advisory opinions regarding part time prosecutors practicing criminal defense law. The first request relates to a part time prosecutor for a municipal court who wants to know if representing a criminal defendant in another court is a violation of any ethical provisions.

The second request asks the following questions regarding county prosecutors:

- (1) under what circumstances, if any, may a lawyer (or members of the firm with whom the lawyer is associated) who prosecutes criminal cases, represent criminal defendants in the State of Ohio and
- (2) if there are circumstances under which such lawyers may not represent criminal defendants, by what methods may such prohibition be enforced and who may enforce such prohibitions?

The ABA Standards relating to the prosecution function state that “an important step in achieving the goal of professionalism is to make the position of prosecutor a full-time occupation for its holder.” ABA Standards Relating to the Prosecution Function 58 (1971). However, the majority of prosecutors in the United States are not full-time positions. Wolfram, Modern Legal Ethics 454-455 (1986). Therefore, as long as there are part time prosecutors the potential for conflicts of interests must be dealt with.

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Under DR 5-105 a lawyer is required to refuse to accept, or continue employment if the interests of another client may impair the independent professional judgment of the lawyer. A client may consent, after full disclosure, to the representation under DR 5-105(C). However, if a conflict exists between a prosecutor's client and his private clients, the exception contained in DR 5-101(C) would not eliminate the conflict because the "public is a party and cannot consent." Ohio State Bar Assn. Op. 81-4 (1981).

In regard to city or municipal prosecutors, Ohio Rev. Code §733.52 states that the city director of law or his assistant prosecuting attorney are required to prosecute all cases brought before the municipal court and perform the same duties, if applicable, that the county prosecuting attorney does. The city director of law is required, under Ohio Rev. Code §733.53, to prosecute or defend on behalf of the city, all complaints, suits, and controversies as he is, by resolution or ordinance of the legislative authority of the city, directed to prosecute. These prosecutorial duties preclude any prosecuting attorney or city law director from representing criminal defendants either in municipal court or the court of common pleas. Cain v. Calhoun, 61 Ohio App. 240, 401 N.E.2d 947, 950 (Gallia 1979). The same holds true for assistant prosecutors for, "an assistant is subject to the same limitations and restrictions placed by law upon the prosecuting attorney." Ohio Attorney General Opinion 71-050. Therefore, if the city prosecuting attorney's duties require him to represent the State of Ohio in criminal cases then he is necessarily precluded from representing private clients in criminal cases against the State of Ohio. Id.

There is however, a narrow set of circumstances under which a city prosecutor may be allowed to represent criminal defendants. In this regard, we concur with an ABA opinion which allows a city attorney to represent a criminal defendant in cases not involving the city or its ordinances. ABA Committee on Ethics and Professional Responsibility Informal Op. 1045 (1968).

The Committee based their decision on the following factors:

- (1) the ordinance violations as to which the city attorney acts as prosecutor are of an entirely different character from the criminal charges as to which he acts as defense counsel
- (2) the criminal charges as to which he acts as defense counsel do not involve the city or its ordinances or officials
- (3) the types of investigation officers (city officials, law enforcement officers) involved in the prosecution and defense matter are entirely different,
- (4) the city attorney does not represent city residents as defense counsel in criminal matters, and
- (5) the city attorney's conduct in that capacity has no impact outside of the city's own limited jurisdiction.

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The ABA has issued another opinion which allows municipal attorneys who only prosecute violations of municipal ordinances to represent criminal defendants in situations where no municipal police officers from the municipality are involved, the criminal charges are based solely on alleged violations of state law, and the municipality is not otherwise directly or indirectly involved or affected. ABA Comm. on Ethics and Professional Responsibility Informal Op. 1285 (1974). See also, Ohio Att’y Gen. Op. 70-059 (1970). We concur with both of these opinions.

In regard to county prosecutors, we agree with an Ohio Attorney General Opinion which concluded that an assistant prosecuting attorney is not permitted to represent clients in criminal proceedings either within or outside of the county in which he is appointed. The opinion states that:

an attorney holding a public office, the official duties of which require him to represent the State of Ohio in criminal cases, is necessarily precluded from representing private clients in criminal cases against the State of Ohio. . . . [s]ince a county prosecuting attorney is required, by statute, to “prosecute, on behalf of the state all complaints, suits and controversies in which the state is a party,” and since the duties of an assistant prosecuting attorney are the same, it may be concluded that an assistant prosecuting attorney is not permitted to represent clients in criminal cases against the state. Ohio Att’y Gen. Op. 71-050 (1971).

The Ohio State Bar Association has issued a similar opinion which states that it would be “improper for an attorney who holds the public office of County Prosecutor or Assistant County Prosecutor to accept employment adverse to his employer, the public.” Ohio State Bar Assn. Op. 67-1 (1967). See also, ABA Comm. on Professional Ethics Op. 142 (1935). The ability of a county prosecutor to obtain the consent of all concerned, after a full disclosure of the facts, cannot be utilized by a person holding public office for, the public cannot consent. Ohio St. Bar Ass'n. Op. 67-1 (1967).

Members of a prosecuting attorney's law firm may not represent criminal defendants if their colleague, as prosecutor, is precluded from accepting employment under DR 5-105. Code of Professional Responsibility DR 5-105(D)¹. In addition, partners or employees of any prosecuting attorney or city law director are prohibited from being appointed counsel to represent indigent clients. Ohio Rev. Code §120.39.

The methods of enforcing the prohibition on prosecutors representing criminal defendants would be through the disciplinary process. See, Gov. Bar R. V. The Supreme Court of Ohio has held that a municipal judge was without the authority to issue an order prohibiting prosecutors from representing clients in criminal matters before his court. Melling v. Stralka, 12 Ohio St.3d 105, 465 N.E.2d 857, 859 (1984).

In conclusion, it is our opinion and you are so advised that a city or municipal prosecuting attorney whose duties included representing the State of Ohio in criminal cases may not represent private clients in criminal cases against the State of Ohio. A city or municipal prosecuting attorney

¹ This sentence is withdrawn by Advisory Opinion 2014-2.

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may represent criminal defendants if the narrow circumstances set forth above are met. A county prosecuting attorney, whose duty it is to prosecute, on behalf of the State, all complaints, suits and controversies in which that state is party, may not represent private clients in criminal cases against the State of Ohio. Members of a part time prosecuting attorney's law office may not accept employment that the prosecutor is precluded from accepting.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.