

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 88-013**

Issued June 17, 1988

*Withdrawn by Adv. Op. 2022-01*

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*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:** Nothing in the Code of Professional Responsibility specifically prohibits a prosecuting attorney from appearing before a part-time municipal court judge who employs the prosecutor's assistant in his or her private practice. However, if the prosecutor's professional judgment will be or reasonably may be affected by the assistant's conflict of interest then he or she should not appear before the judge. The prosecutor should also avoid the appearance of impropriety.

**OPINION:** We have before us your request for our opinion on whether a conflict of interest or the appearance of impropriety arises due to your handling of felony bind-overs before a part-time Municipal Court Judge who employs one of your assistant prosecutors as an associate in his law firm. You indicate in your letter that the assistant prosecutor will not appear in the Judge's courtroom.

The Code of Professional Responsibility expresses the general standards of conduct expected of lawyers and provides a guide from which lawyers may follow to ensure that their activities as lawyers positively reflect the legal system. Code of Professional Responsibility, Preface. Under DR 5-101(A), lawyers are precluded from accepting employment if the exercise of their professional judgment on behalf of their clients will be or reasonably may be affected for whatever reason, unless the client consents after full disclosure.

Therefore, if your professional judgment in proceedings before a part-time Municipal Court Judge will be, or reasonably may be affected by the fact that one of your assistant prosecutors also practices law with that Judge, then perhaps you should not appear before the Judge.

Disciplinary Rule 5-101(A) states that a lawyer may accept employment where his judgment may be affected by other interests if, the client consents after full disclosure. However, as a prosecutor your “client” is the public which cannot consent. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1235 (1972). As prosecuting attorney you should especially guard against conflicts that may arise, given the fact that consent by the public to possible conflicts of interest is unavailable.

Canon 9 of the Code of Professional Responsibility also applies to the question presented. Expressly stated, Canon 9 recommends that lawyers should avoid even the appearance of professional impropriety. Furthermore, EC 9-1 states that lawyers need to promote public confidence in the legal profession. Once the public’s confidence is gained it should be carefully guarded against any appearance of impropriety. Under EC 9-2, a lawyer is encouraged to determine his or her conduct, when explicit ethical guidance does not exist, by acting in a manner which promotes public confidence in the integrity of the legal profession.

If, in your own professional judgment, you believe that the appearance of impropriety may exist which does not promote public confidence in your office, then perhaps refraining from appearing before the particular Municipal Court Judge is well advised. It has been suggested that when an ethical decision regarding a possible appearance of impropriety arises, a useful maxim may be, “when in doubt, don’t.” Washington State Bar Assn. Op. 161 (1975).

While the conflict with regard to your assistant is evident, the question becomes whether that conflict can be imputed to you as prosecuting attorney. An assistant prosecuting attorney is an extension of the prosecuting attorney and therefore subject to any of the same limitations. An Ohio Attorney General Opinion states that “because an assistant prosecuting attorney is authorized to and often does stand in the place of his principal, it is only logical that such an assistant be subject to the same limitations and restrictions placed by law upon the prosecuting attorney.” Ohio Att’y Gen. Op. 71-050 (1971).

Therefore, depending upon the circumstances surrounding the working relationship between you and your assistant and the potential for any appearance of impropriety that may arise by appearing before the Municipal Court Judge, you, as prosecutor, are in the best position to weigh any conflicting interests

involved and make the proper decision. One factor to consider is, whether disqualification of the Judge or yourself would create a substantial hardship which might outweigh any appearance of impropriety.

In this Board's Opinion 87-022, a conflict of interest was said to exist between father and son law partners whereby each served respectively as Municipal Court Judge and as city law director. Our opinion was that the conflict arose not only out of their father/son relationship but also out of the law partnership. Their relationship as law partners created a conflict which could not be eliminated by the city law director hiring an assistant since the assistant would be affected by the direction and control of the Judge's son.

Therefore, if the working relationship between you and your assistant is closely intertwined then you may wish to disqualify yourself from appearing before the Judge. Again, the feasibility of refraining from appearing before the part-time Municipal Court Judge should be weighed against your duty to promote public confidence and avoid any appearance of impropriety.

One final consideration relates to the Municipal Court Judge and Canon 3C of the Code of Judicial Conduct which states, "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned... ." Furthermore, the ABA has held that nothing precludes a lawyer from appearing before a judge where the judge has not disqualified himself. In this regard, you may prevent possible disqualification problems for the Judge by voluntarily refraining from appearing before him and thus keeping yourself and the Judge free from encountering any conflict of interest or impartiality allegations.

In conclusion, it is our opinion and you are so advised that nothing in the Code of Professional Responsibility prevents a prosecutor from appearing before a Municipal Court Judge who employs the prosecutor's assistant as an associate in his or her law practice. However, the prosecutor is in the best position to weigh any potential conflict of interest against the hardships involved in refraining from appearing before the Judge. The prosecutor should consider his or her legal obligation to promote public confidence in the legal system when determining whether an assistant's disqualification should be imputed to the prosecutor in order to avoid any appearance of impropriety.

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