

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 91-2

Issued February 8, 1991

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

[Not Current-subsequent rule amendments to Canons 1 through 6, Ohio Code of Judicial Conduct, eff. May 1, 1997]

SYLLABUS: Under the appropriate circumstances a county court judge in his part-time practice of law may represent a defendant on a traffic violation pending in a municipal court of another county.

OPINION: We have before us your request for an opinion on questions dealing with county court judges and their outside practice of law. You inquire as to whether a judge of a county court may represent a defendant on a traffic violation pending in a municipal court of another county. Further, you ask if the particular defendant in question previously appeared before the county court judge, whether this fact disqualifies him as an attorney from representing this same defendant. You further stipulate that the defendant charged with the traffic offense is not on probation or serving a suspended sentence or in anyway subject to the judge's continuing jurisdiction.

The Board of Commissioners in Op. 87-29 addressed the first branch of the question posed. This opinion noted that under OH. REV. CODE ANN. § 1907.16 a judge of a county court is disqualified from the practice of law only as to matters pending or originating in that county court during his term of office. In Op. 87-029, the Board stated that county court judges may engage in the practice of law provided they do not practice in a county court in which they serve as judge.

Ordinarily, the Code of Judicial Conduct prohibits a sitting judge from the outside practice of law. See Canon 5 (F), Code of Judicial Conduct. However, the Ohio Legislature has endorsed the limited part-time practice by a county court judge in OH. REV. CODE ANN. § 1907.16. The intent of the legislature is clear on this point. Further, OH. REV. CODE ANN. § 4705.01 forbids judges from practicing law with an exception for part-time judges found in OH. REV. CODE ANN. § 1901.11 (A) (2). OH. REV. CODE ANN. § 1901.11 (A) (2) provides that part-time judges are disqualified from the practice only as to matters pending or originating in the courts in which they serve.

In 1967, the Attorney General rendered Op. 67-119 stating the following:

A county court judge may not represent defendants wherein the State of Ohio is plaintiff in criminal actions instituted in a county court to which that judge is elected. A county court judge may, however, represent defendants wherein the State of Ohio is plaintiff in criminal actions which originate in courts of the county other than the one to which he was elected to serve as judge.

The Ohio State Bar Association provides additional authority in Informal Op. 81-4 by agreeing with the analysis and opinion of the Ohio Attorney General that a county court judge could represent defendants in a court other than his own. The Board concurs.

The more difficult aspect of your hypothetical question is whether the part-time county court judge in his capacity as a criminal defense attorney should represent someone who has appeared before him in his judicial capacity albeit in an unconnected matter. DR 9-101 (A) of the Code of Professional Responsibility states that a lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

Various opinions have discussed the precise meaning of the language contained in DR 9-101. The American Bar Association in Formal Op. 342 defined "matter" as it appears in DR 9-101: "the same lawsuit or litigation, (or facts material to an issue) is the same matter." This opinion defining "matter" also squares with Informal Op. 79-1 and Op. 81-1 issued by the Ohio State Bar Association. Therefore, because your question contemplates representation on a totally new criminal charge, it would not be ethically improper under DR 9-101 (A) for the county court judge in his part-time practice of law to represent the same person who had appeared before him in a judicial capacity on a different criminal case.

In Ohio, county court judges are defined as part-time judges for purposes of compliance with the Code of Judicial Conduct. Section A (2) of the compliance provisions also regulates the outside practice of law that part-time judges may engage in.

[A part-time judge] should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he

serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto. CJC Compliance § A (2).

As discussed above, the Board does not find that your question of representation of a criminal defendant would be a "related proceeding." The appellate jurisdiction language in (A) (2) forbids the judge from appearing in an inferior court from which an appeal could be taken to the court on which he or she serves. This forbids a county court judge from representing anyone in mayor's court as well as his or her county court.

In undertaking any representation, the part-time judge practicing as an attorney must make certain that such representation does not give the appearance of impropriety or in any way trade upon his position and influence. Code of Judicial Conduct Canon 2. There are facts and circumstances that might lead observers to believe that the judge (practicing as an attorney) is engaged in conduct prejudicial to the administration of justice in violation of DR 1-102 (A) (5). In a similar vein, once the judge acts as an attorney for an individual defendant he may be disqualified from ever taking any judicial action against that individual in the future because of personal knowledge that would come to him in the attorney/client relationship. Future actions undertaken as a judge would then be circumscribed by the terms of Canon 3 C (1) (a), (b) and (d) (ii) of the Code of Judicial Conduct.

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