

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 91-22

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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: Representation of opposing parties by a prosecuting attorney and a criminal defense attorney who are siblings creates a conflict because the sibling relationship is a personal interest which could affect the lawyers' exercise of professional judgment on behalf of the clients. DR 5-101(A). There is additional conflict when these siblings are past law partners and the prosecutor is receiving money from the former partnership because now, in addition to a personal interest there is a financial and business interest which might affect the exercise of professional judgment on behalf of a client. DR 5-101(A). These conflicts cannot be waived by a prosecutor because a prosecutor's client is the public and thus full disclosure and client consent cannot be obtained. Further, these combined personal, financial and business interests create an appearance of professional impropriety that attorneys should avoid. Canon 9.

A criminal defense attorney should not accept employment to represent defendants prosecuted by his or her sibling in jurisdictions where the prosecutor would have no assistant to appoint and thus would be compelled to routinely appoint a special prosecutor in order to resolve the conflict. Such conduct creates a financial and administrative burden and could be considered conduct prejudicial to the administration of justice. DR 1-102(A) (5). However, in those instances where a prosecutor, because of a conflict of interest, appoints an assistant prosecutor or a special prosecutor to handle the case, the prosecutor should screen him/herself from involvement in the case.

OPINION: The questions presented are (1) whether a conflict of interest exists when opposing parties are represented by a full-time county prosecutor and a criminal defense attorney who are siblings and former law partners and when the prosecutor still receives money from the former partnership; and (2) how should the prosecutor proceed in cases in which the sibling is legal counsel of record.

Question 1

The Code of Professional Responsibility (Code) does not contain a rule expressly addressing the question of whether lawyers related by blood (or marriage) may represent opposing parties. However, several general provisions of the Code do apply to the analysis of this question. Disciplinary Rule 5-101(A) states that "[e]xcept with the consent of his [her] client after full disclosure, a lawyer shall not accept employment if the exercise of his [her] professional judgment on behalf of his [her] client will be or reasonably may be affected by his [her] own financial, business, property or personal interest." Canon 9 of the Code calls upon attorneys to "avoid even the appearance of professional impropriety." Ethical Consideration 5-1 aspires that "[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his [her] client and free of compromising influences and loyalties. Neither his [her] personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his [her] loyalty to his [her] client." Ethical Consideration 5-2 advises that "[a] lawyer should not accept proffered employment if his [her] personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client."

By comparison, the ABA Model Rule 1.8(i) expressly prohibits related lawyers from representing opposing parties unless there is client consent: "A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship." According to the Comment to the Model Rule, this rule applies to related lawyers in different firms. Model Rules of Professional Conduct Rule 1.8 comment (1983) (amended 1987). Thus, this rule may not be directly applicable to situations involving government lawyers.

Authorities differ in the application of Disciplinary Rule 5-101(A) to the propriety of related lawyers representing opposing parties. The ABA Standing Committee on Ethics and Professional Responsibility did not apply a per se prohibition: "No disciplinary rule expressly requires a lawyer to decline employment if a husband, wife, son, daughter, brother, father, or other close relative represents the opposing party in negotiation or litigation." ABA, Formal Op. 340 (1975). Several state ethics committees have also declined

to apply a per se prohibition on lawyers who are relatives representing opposing parties. See Alabama State Bar General Counsel and Disciplinary Comm'n, Op. 85-74 (1985) wherein a lawyer or his law partner may represent a criminal defendant even though the lawyer's brother is assistant district attorney and may prosecute the same case; Illinois State Bar Ass'n, Op. 783 (1982) wherein the family relationship of a lawyer with a municipal prosecutor does not per se disqualify the lawyer from representing defendants prosecuted by the relative and the burden of determining disqualification falls most heavily with the relative in private practice; Idaho State Bar, Informal Op. 113 (1983) wherein a father and son may practice as prosecutor and defense counsel in the same community but the relationship must not impair either lawyer's professional judgment, the lawyers must avoid the appearance of impropriety, and, the burden lies on the defense attorney to determine whether conflict exists; and Iowa State Bar Ass'n, Op. 88-12 (1988) wherein a sister of a county attorney may accept criminal defense work in same county provided no actual conflict exists and the lawyer discloses to clients and obtains consent of all parties.

However, some opinions are more restrictive. The Ohio State Bar Association has advised that if an attorney appears as a prosecutor in a case wherein the attorney's brother is the criminal defense attorney, a question of impropriety is presented by the relationship. Ohio State Bar Ass'n. Informal Op. 87-5 (1987). The committee suggested that the relationship could be considered a "personal interest" for purposes of the rules and advised that a prosecutor as a public employee could not waive the conflict and should not participate in matters involving the prosecutor's office when the brother is opposing counsel. Id. The Ohio State Bar Association has also advised that a wife as assistant city solicitor could not represent the city in any proceeding in which her husband represented the opposing party, since the client, the public, cannot consent. Ohio State Bar Ass'n, Op. 80-10 (1980). See also Virginia State Bar, Op. 190 (1985) wherein a lawyer may not accept employment when the opposing party is represented by a member of the lawyer's nuclear family even if the client consents after full disclosure, but a lawyer who is not part of the nuclear family and who is in the same household or in a highly intimate relationship may continue representation after obtaining client consent; and Maryland State Bar Ass'n, Op.85-79 (1985) wherein a lawyer whose father is a county state's attorney may not try any criminal cases against assistants in his father's office.

Loyalty to a client must remain an uncompromised component of the attorney-client relationship. Personal, financial, business and property interests of a lawyer can erode this duty of loyalty. A prosecutor serves an important public function of prosecuting crime to protect the public and to promote justice in our society. Therefore, it is important for the public to feel confident that there is no conflict and no impropriety in the representation.

Although Ohio's Code does not contain a disciplinary rule that makes it a per se violation for related attorneys to represent opposing parties, the language of DR 5-101(A) sets forth that if the relationship of the opposing attorneys is such that the exercise of an attorney's professional judgment on behalf of a client will be or reasonably may be affected by the attorney's own financial, business, property or personal interest then employment should not be accepted unless there is client consent after full disclosure. Thus, any financial, business, property and/or personal interest which creates a conflict in fulfilling this professional duty must be acknowledged and representation must be not be undertaken unless there is full disclosure and client consent.

A sibling relationship does create a personal interest which could affect the lawyers' professional judgment on behalf of the clients. Further, a relationship wherein a prosecutor is receiving money from a past partnership with a defense attorney creates a financial and business interest which could affect the lawyers' professional judgment on behalf of the clients. Such conflicts are governed by DR 5-101(A) which would require clients' consent after full disclosure. However, a prosecutor's client is the public and thus consent cannot be obtained. See Ohio Sup.Ct, Bd. of Comm'rs on Grievances and Discipline, Ops. 88-13 (1988) and 88-8 (1988). Further, these combined personal financial and business interests create an appearance of impropriety.

Therefore, the Board's opinion is that representation of opposing parties by a prosecuting attorney and a criminal defense attorney who are siblings creates a conflict because the sibling relationship is a personal interest which could affect the lawyers' exercise of professional judgment on behalf of the clients. DR 5-101(A). There is additional conflict when these siblings are past law partners and the prosecutor is receiving money from the former partnership because now, in addition to a personal interest there is a financial and business interest which might affect the exercise of professional judgment on behalf of a client. DR 5-101(A). These conflicts cannot be waived by a prosecutor because a prosecutor's client is the public and thus full disclosure and client consent cannot be obtained. Further, these combined personal, financial and business interests create an appearance of professional impropriety that attorneys should avoid. Canon 9.

Question 2

The Board has previously advised that a former county public defender, now serving as county prosecutor, may appoint one of his or her assistants as special prosecutor to handle those cases which were pending before the public defender's office when he/she served as county public defender so long as the prosecutor screens him/herself from any participation in the cases. Ohio Sup.Ct, Bd. of Comm'rs on Grievances and Discipline, Op. 88-15 (1988). This advice could be extended to the question of how the prosecutor should proceed when a conflict of interest arises such as when the legal counsel of record is the prosecutor's sibling and former partner and the prosecutor is receiving money from the former partnership. However, the need to routinely appoint an assistant prosecutor or a special prosecutor could become a burden on the judicial system. For example, in some jurisdictions there might be no assistant prosecutors to appoint, requiring that a special prosecutor always be appointed. Thus, the Board's advice is that a criminal defense attorney should not accept employment to represent defendants prosecuted by his or her sibling in jurisdictions where the prosecutor would have no assistant to appoint and thus would be compelled to routinely appoint a special prosecutor. Such conduct creates a financial and administrative burden and could be considered conduct prejudicial to the administration of justice. DR 1-102 (A) (5). However, in those instances where a prosecutor, because of a conflict of interest, appoints an assistant prosecutor or a special prosecutor to handle the case, the prosecutor should screen him/herself from involvement in the case.

As a final note, both prosecutors and criminal defense attorneys should be aware of Division A of Section 120.39 of the Ohio Revised Code which, with an exception states, "counsel appointed by the court, co-counsel appointed to assist the state public defender or a county or joint county public defender, and any public defender, county public defender, or joint county defender, or member of their offices, shall not be a partner or employee of any prosecuting attorney, city director of law, village solicitor, or similar chief legal officer." OHIO REV. CODE ANN. §120.39 (A) (Baldwin 1987).

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