

# *The Supreme Court of Ohio*

## BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105  
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

### **OPINION 93-6**

Issued August 13, 1993

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*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:** An attorney member of a Certified Grievance Committee of a bar association may not privately represent an attorney in a disciplinary matter being investigated or prosecuted by the Certified Grievance Committee on which the attorney serves, but may privately represent an attorney being investigated or prosecuted by a Certified Grievance Committee of another bar association or by Disciplinary Counsel. The attorney should not accept representation in matters being jointly investigated or prosecuted by an investigatory body and the Certified Grievance Committee on which the attorney serves, matters being appealed to the Disciplinary Counsel from dismissal by the Certified Grievance Committee on which the attorney serves, or matters referred to the Disciplinary Counsel by the Certified Grievance Committee on which the attorney serves.

Partners or associates of an attorney member of a Certified Grievance Committee of a bar association may not privately represent an attorney in a disciplinary matter being investigated or prosecuted by the Certified Grievance Committee on which their partner or associate serves, but may privately represent an attorney in a disciplinary matter being investigated or prosecuted by a Certified Grievance Committee of another bar association or by Disciplinary Counsel.

Partners or associates of an attorney member of the Board of Commissioners on Grievances and Discipline may privately represent an attorney in a disciplinary matter being investigated or prosecuted by a Certified Grievance Committee or by Disciplinary Counsel, but the Board member should refrain from participation in the matter.

**OPINION:** Three questions regarding private representation of attorneys in disciplinary matters are addressed.

1. Is it proper for an attorney member of a Certified Grievance Committee of a bar association to privately represent an attorney in a disciplinary matter being investigated or prosecuted by a Certified Grievance Committee or by Disciplinary Counsel?

2. Is it proper for the partners or associates of an attorney member of a Certified Grievance Committee of a bar association to privately represent an attorney in a disciplinary matter being investigated or prosecuted by the Certified Grievance Committee on which the partner or associate is a member, or by any other Certified Grievance Committee, or by Disciplinary Counsel?
3. Is it proper for the partners or associates of an attorney member of the Board of Commissioners on Grievances and Discipline to privately represent an attorney in a disciplinary matter being investigated or prosecuted by a Certified Grievance Committee or by Disciplinary Counsel?

### Question 1

In Ohio, the authority to investigate and prosecute allegations of misconduct by judges or attorneys has been granted to two bodies--the office of Disciplinary Counsel and Certified Grievance Committees of the state or local bar associations. This authority is found within Rule V Section 4 (C) of the Supreme Court Rules for the Government of the Bar of Ohio as set forth below.

**Power and Duty to Investigate.** The investigation of grievances involving alleged misconduct by justices, judges, and attorneys and grievances with regard to mental illness shall be conducted by the Disciplinary Counsel or a Certified Grievance Committee. The Disciplinary Counsel and a Certified Grievance Committee shall investigate any matter filed with it or that comes to its attention and may file a complaint pursuant to this rule in cases where it finds probable cause to believe that misconduct has occurred or that a condition of mental illness exists. (Emphasis added).

The Office of Disciplinary Counsel employs staff attorneys, as Assistant Disciplinary Counsel, to carry out its duties. See Gov.Bar R. V §3 (B) (2). Under the Rule, the Assistant Disciplinary Counsel may not engage in the private practice of law and therefore the opportunity to accept private representation of attorneys in disciplinary matters does not arise.

In contrast, a Certified Grievance Committee carries out its duties through its committee members who are attorneys and non-attorneys appointed by the bar association. See Gov.Bar R. V §3 (C) (3). The attorney members are usually engaged in the private practice of law while serving on the Certified Grievance Committee. As a result, the attorney members and their partners or associates may at times be approached by prospective clients seeking representation in disciplinary matters.

There is no rule within the Code that expressly proscribes simultaneous private representation in disciplinary matters by attorneys with investigative or prosecutorial responsibilities, however, there are several applicable rules.

**Canon 9** A Lawyer Should Avoid Even the Appearance of Professional Impropriety

**DR 9-101 (C)** A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

**DR 1-102 (A) (5)** A lawyer shall not [e]ngage in conduct that is prejudicial to the administration of justice.

Attorneys in Ohio are encouraged to serve on certified grievance committees. Under Canon 1 "A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession." Under Ethical Consideration 1-4 "[a] lawyer should, upon request, serve on and assist committee and boards having responsibility for the administration of the Disciplinary Rules." In serving on a Certified Grievance Committee an attorney accepts investigative and prosecutorial duties with regard to enforcement of the Code of Professional Responsibility in Ohio. See Supreme Court Rules for the Government of the Bar of Ohio Rule V §4(C).

However, to allow an attorney to simultaneously serve on a certified Grievance Committee and defend attorneys being investigated or prosecuted by the same committee creates an appearance of impropriety through its implication to the public that the attorney has influence within the disciplinary process. To the extent that such representation erodes public confidence in the system, it is prejudicial to the administration of justice. Cf. Alabama State Bar, Op. RO 83-80 (1983) (A lawyer may not represent another lawyer in a disciplinary proceeding if the lawyer is a member of a panel of the county grievance committee and the grievance was investigated by another panel of the same committee.); Alabama State Bar, Op. RO 83-118 (1983) (A lawyer who is a member of a county bar association grievance committee should not represent a lawyer in pending disciplinary proceedings before the disciplinary board even though the lawyer was not a committee member when the action was investigated and the charges were filed.)

Nevertheless, the investigative and prosecutorial duties bestowed upon an attorney member of one Certified Grievance Committee, need not be a bar to private representation of attorneys being investigated or prosecuted by another Certified Grievance Committee of a different bar association or by Disciplinary Counsel. Although each Certified Grievance Committee and the Disciplinary Counsel serve the same enforcement goals in the disciplinary process as to investigation and prosecution, they generally function independently from one another.

Investigatory information is confidential and is not shared between the investigatory bodies. Overlap occurs only in matters referred to Disciplinary Counsel by a Certified Grievance Committee, matters appealed to Disciplinary Counsel after dismissal by a Certified Grievance Committee, and occasional matters that might be jointly prosecuted. Outside these exceptions, an attorney serving as a member of one Certified Grievance Committee has no participation or authority in the investigative and prosecutorial matters of another Certified Grievance Committee of a different bar association or Disciplinary Counsel. Thus, due to the separate functioning of these investigatory bodies, the official duties of an attorney member of one Certified Grievance Committee would not be tarnished by his or her representation of attorneys being investigated or prosecuted by another Certified Grievance Committee of a different bar association or by Disciplinary Counsel. But cf. Mississippi State Bar, Op. 201 (1992) ("It is improper for an attorney who is a member of the Committee on Professional Responsibility, the Ethics Committee, or the Executive Committee, or the Board of Bar Commissioners, or the Complaint Tribunal to represent an attorney, other than himself, against a disciplinary complaint.")

In conclusion, this Board's opinion is that an attorney member of a Certified Grievance Committee of a bar association may not privately represent an attorney in a disciplinary matter being investigated or prosecuted by the Certified Grievance Committee on which the attorney serves, but may privately represent an attorney in a disciplinary matter being investigated or prosecuted by another Certified Grievance Committee of a different bar association or by Disciplinary Counsel. The attorney should not accept representation in matters being jointly investigated or prosecuted by an investigatory body and the Certified Grievance Committee on which the attorney serves, matters being appealed to the Disciplinary Counsel from dismissal by the Certified Grievance Committee on which the attorney serves, or matters referred to the Disciplinary Counsel by the Certified Grievance Committee on which the attorney serves.

Question 2

At issue is whether the partners or associates of an attorney member of a Certified Grievance Committee may represent attorneys in disciplinary matters. The answer depends upon whether the representation involves a matter being investigated or prosecuted by the Certified Grievance Committee on which the partner or associate is a member, or whether it involves a matter being investigated or prosecuted by another Certified Grievance Committee of a different bar association or by Disciplinary Counsel.

Representation in a matter being investigated or prosecuted by the Certified Grievance Committee on which the partner or associate is a member would most certainly create an appearance of impropriety and a presumption of shared confidences due to the employment relationship between the attorney with responsibilities for defending and the attorney with responsibilities for investigating and prosecuting. In contrast, representation before another Certified Grievance Committee of a different bar association or before Disciplinary Counsel is not likely to create an appearance of impropriety since the representing attorney would not have an employment relationship with members of the other Certified Grievance Committee or with Disciplinary Counsel, nor would there be a presumption of shared confidences, nor an opportunity for improper influence. To prohibit such representation would serve no purpose other than to discourage attorneys from serving on Certified Grievance Committees.

In conclusion, this Board advises that partners or associates of an attorney member of a Certified Grievance Committee of a bar association may not privately represent an attorney in a disciplinary matter being investigated or prosecuted by the Certified Grievance Committee on which their partner or associate serves, but may privately represent an attorney in a disciplinary matter being investigated or prosecuted by another Certified Grievance Committee of a different bar association or by Disciplinary Counsel.

Question 3

At issue is whether the partners or associates of an attorney member of the Board of Commissioners on Grievances and Discipline may privately represent an attorney in a disciplinary matter being investigated or prosecuted by a Certified Grievance Committee or by Disciplinary Counsel. The Board's view is that so long as the Board member does not participate in the matter there is no appearance of impropriety or improper influence. Unlike lawyers who serve on Certified Grievance Committees, the lawyers on the Board have only adjudicative functions. Therefore, to prevent such representation would serve no societal purpose and would deter attorneys from serving on the Board.

In conclusion, this Board advises that partners or associates of an attorney member of the Board of Commissioners on Grievances and Discipline may privately represent an attorney in a disciplinary matter being investigated or prosecuted by a Certified Grievance Committee or by a Disciplinary Counsel, but the Board member should refrain from participation in the case.

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.**