

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 2008-4

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SYLLABUS: Pursuant to Rule 1.7(a)(1) and (a)(2), an assistant county public defender should not represent co-defendants at a preliminary hearing in a felony case due to the inherent risk of a conflict of interest that likely could not be ameliorated under Rule 1.7(b). Two different assistant public defenders in the same county public defender's office should not separately represent the co-defendants at a preliminary hearing because the conflict of interest of one assistant public defender is imputed to the other pursuant to Rule 1.10(a) and Rule 1.0(c).

Pursuant to Rule 1.7(a)(1) and (a)(2), an assistant county public defender should not represent one co-defendant in a felony case while simultaneously representing the other co-defendant in an unrelated misdemeanor case due to the inherent risk of a conflict of interest that likely could not be ameliorated under Rule 1.7(b). A different assistant public defender in the same county public defender's office should not represent the co-defendant in the unrelated misdemeanor case because the conflict of interest of one assistant public defender is imputed to the other pursuant to Rule 1.10(a) and Rule 1.0(c). If a *former* client in an unrelated matter is a witness in a defendant's criminal case, an assistant county public defender may represent the criminal defendant, but may not use or reveal information of the former client that is protected from disclosure under Rule 1.9(c).

OPINION: This opinion addresses ethical questions regarding criminal representation of co-defendants by a county public defender's office in the same proceeding and in separate unrelated proceedings. The opinion does not address legal questions regarding what constitutes ineffective assistance of counsel.

1. Is it proper for an assistant county public defender to represent co-defendants at a preliminary hearing in a felony case? If not, is it proper for two different assistant public defenders in the same county public defender's office to separately represent the co-defendants at the preliminary hearing?

2. Is it proper for an assistant county public defender to represent one co-defendant in a felony case while simultaneously representing the other co-defendant in an unrelated misdemeanor case? If not, is it proper for a different assistant public defender in the same county public defender's office to represent the other co-defendant in the unrelated misdemeanor case?

Introduction

The requester of the opinion states that as a matter of policy the county public defender's office where he serves as an assistant county public defender does not represent co-defendants in criminal cases. As reasons for not representing co-defendants in criminal cases, the requester cites the likelihood that a co-defendant will be called by the State to testify at another co-defendant's trial or be given a plea offer to testify against another co-defendant. Nevertheless, a question has arisen as to whether representation of co-defendants at a preliminary hearing is ethically permissible. Additionally, a question has been raised as to whether representation of one co-defendant in a felony proceeding and the other co-defendant in an unrelated misdemeanor proceeding is ethically permissible.

A county public defender provides legal representation to indigent adults and juveniles charged with commission of an offense or act that violates a state statute for which the penalty or adjudication includes potential loss of liberty, and also provides representation in postconviction proceedings as defined in R.C 120.16. Ohio Rev. Code Ann. § 120.16(A)(1) (West Supp 2008).

A county public defender appoints assistant county public defenders and personnel necessary to the function of the county public defender's office. Ohio Rev. Code Ann. § 120.15(B)(4). (West 2002).

A county public defender's office is considered a law firm for purposes of the Ohio Rules of Professional Conduct. Prof. Cond. Rule 1.0(c).

Applicable Rules of the Ohio Rules of Professional Conduct

Rule 1.7 of the Ohio Rules of Professional Conduct is the general rule that governs conflicts of interest of current clients. Rule 1.10 is the general rule that governs imputation of conflicts of interest.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

- (1) the representation of that client will be directly adverse to another current client;

(2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

(1) the lawyer will be able to provide competent and diligent representation to each affected client;

(2) each affected client gives *informed consent, confirmed in writing*;

(3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

(1) the representation is prohibited by law;

(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

**RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST:
GENERAL RULE**

(a) While lawyers are associated in a *firm*, none of them shall represent a client when the lawyer *knows* or *reasonably should know* that any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the *firm*.

Question One

Is it proper for an assistant county public defender to represent co-defendants at a preliminary hearing in a felony case? If not, is it proper for two different assistant public defenders in the county

public defender's office to separately represent the co-defendants at a preliminary hearing?

Rule 1.7 of the Ohio Rules of Professional Conduct does not absolutely prohibit a lawyer from representing multiple criminal co-defendants, but a comment to the rule strongly warns lawyers against such representation due to the potential for conflict of interest. Comment [15] to Rule 1.7 states "[t]he potential for conflict of interest in representing multiple defendants in a criminal matter is so grave that ordinarily a lawyer should decline to represent more than one co-defendant." And, without doubt, the potential for conflict of interest in the representation of multiple criminal defendants is grave due to the high stakes of a potential loss of a defendant's liberty.

In representation of multiple criminal defendants both types of conflict of interest identified in Rule 1.7(a)(1) and (a)(2), "directly adverse" conflicts of interest and "material limitation" conflicts of interest, may occur.

Under Rule 1.7(a)(1), a "directly adverse" conflict of interest occurs when a lawyer's representation of a client will be directly adverse to another current client. As Comment [11] explains a "directly adverse" conflict of interest occurs in the following situations: 1) when one of a lawyer's clients asserts a claim against another client of the lawyer; 2) when a lawyer must cross examine a witness who is a client represented in a different matter; 3) when a lawyer, represents a client against a person the lawyer represents in some other matter, even if the matters are wholly unrelated.

Under Rule 1.7(a)(2), a "material limitation" conflict of interest occurs when there is a substantial risk a lawyer's ability to consider, recommend, or carry out an appropriate course of action for a client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests. As Comment [15] explains: "A 'material limitation' conflict exists when a lawyer represents co-plaintiffs or co-defendants in litigation and there is a substantial discrepancy in the clients' testimony, incompatible positions in relation to another party, potential cross-claims, or substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil."

Under Rule 1.7(b) both types of conflicts of interest may be ameliorated if the requirements of (b)(1), (b)(2), and (b)(3) are met: a lawyer must be able to provide competent and diligent representation to each affected client; each affected client must give informed consent, confirmed in writing; and the representation must not be precluded by Rule 1.7(c).

Under Rule 1.7(c)(1), it is never acceptable, not even with client consent, for a lawyer to accept representation that is prohibited by law. Under Rule 1.7(c)(2), it is never acceptable, not even with client consent, for a lawyer to represent a client asserting a claim against another client represented by the lawyer in the same proceeding.

When a lawyer represents co-defendants in a criminal proceeding, material limitation conflicts of interest will frequently occur, for example, if there is substantial discrepancy in the testimony of co-defendants, if one co-defendant's position is incompatible to the other co-defendant, if one co-defendant is offered a favorable plea bargain in exchange for testimony against the other co-defendant. And, a directly adverse conflict will occur if one co-defendant accepts a favorable plea bargain in exchange for testimony against the other co-defendant; if the testimony of one co-defendant is unfavorable to the other co-defendant; or if a lawyer must impeach on cross examination one of the co-defendants he or she represents in the proceeding.

In a criminal proceeding, a conflict of interest in representation of co-defendants would be extremely difficult for a lawyer to ameliorate under the requirements of Rule 1.7(b); particularly, it would be difficult to meet the requirement that there be diligent and competent representation to each client. And, the adequacy of informed consent, confirmed in writing would also be a challenge, particularly in light of the important constitutional rights of a criminal defendant.

"Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) (footnote omitted).

In *Columbus Bar Assn. v. Ross*, 107 Ohio St.3d 354, 2006-Ohio-5, the Supreme Court of Ohio stated: "The mere representation by one lawyer of two defendants charged with the same offenses does not of itself constitute a conflict of interest; whether a conflict exists must be determined by the facts of each case. *Attorney Grievance Comm. v. Kent* (1995) 337 Md. 361, 379, 653 A.2d 909. A conflict of interest exists, however, 'where a single attorney in a criminal case represents both the defendant and the chief witness for the State in the same case.' *Id.* at 380, 653 A.2d 909. Indeed, the availability of 'a plea by one defendant in exchange for testimony against the other in the same matter is virtually certain to place lawyers involved in representing both in an untenable position.' *People v. Mattison*, 67 N.Y.2d 462, 469-470, 503 N.Y.S.2d 709, 494 N.E.2d 1374."

A Cincinnati Bar Association ethics opinion written under the now superseded Ohio Code of Professional Responsibility advised that joint representation of co-defendants by a lawyer from the county public defender's office, even at the arraignment hearing creates a conflict of interest that is not subject to waiver. Cincinnati Bar Assn. Op. 95-96-01 (undated).

A lawyer who represents a criminal defendant should be free of conflict of interest at all stages of a criminal proceeding from initial appearance, to preliminary hearing, to arraignment, and through trial and post-conviction

proceedings. At each stage of a criminal proceeding important rights of a defendant are at stake, including the Sixth Amendment right to counsel. As examples, an accused person is to be provided with information as to the right to representation by the county public defender or assigned counsel immediately upon arrest, when brought before a magistrate (or judge) or when formally charged, whichever ever occurs first. Ohio Rev. Code Ann. § 120.16(F) (West Supp. 2008). At the initial appearance before a judge or magistrate, the defendant is informed of his or her rights, including the right to counsel and the right to have counsel assigned at no cost if unable to employ counsel, the right to a preliminary hearing in a felony case when the initial appearance is not pursuant to indictment, and the right, where appropriate, to jury trial. If the defendant has not been admitted to bail for a bailable offense, the judge or magistrate admits the defendant to bail as provided for in the rules. In misdemeanor cases, the defendant may be called to plead at the initial appearance, but in felony cases the defendant shall not be called to plead either at the initial appearance or at a preliminary hearing. Crim R. 5(A), 5(A)(2), 5(A)(4), 5(A)(5). At the arraignment, the indictment, information, or complaint is read or the substance of the charge is stated and a defendant is called upon to plead to thereto, and if the defendant is not represented by counsel, the judge or magistrate informs the defendant of his or her rights and determines the defendant understands his or her rights, including the right to retain counsel or the right to have counsel appointed without cost. Crim R. 10(A), (C).

The preliminary hearing in a felony case is an important proceeding for a defendant. At the conclusion of the prosecutor's evidence and the defendant's evidence and statement, if any, the court will either order the defendant discharged, or find probable cause to believe a felony has been committed by the defendant and bind the defendant over to the court of common pleas. Crim R. 5(B)(4).

A preliminary hearing is conducted under the rules of evidence. Crim R. 5(B)(2). During a preliminary hearing, the defendant and the judge or magistrate has full right of cross-examination and the defendant has the right of inspection of exhibits prior to their introduction. Crim R. 5(B)(2). If an unrepresented defendant offers evidence on his or her own behalf at a preliminary hearing, the court must first advise the defendant of the following: (a) that any such evidence, if unfavorable to him or her in any particular, may be used against him or her at later trial; (b) that he or she may make a statement, not under oath, regarding the charge, for the purpose of explaining the facts in evidence; (c) that he or she may refuse to make any statement, and such refusal may not be used against him or her at trial; (d) that any statement he or she makes may be used against him or her at trial. Crim R. 5(B)(3).

Standard 4-3.5(c) of the ABA Standards for Criminal Justice Prosecution Function and Defense Function states: "Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to

another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the co-defendants represented and, in either case, that: (i) the several defendants give an informed consent to such multiple representation; and (ii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients.” ABA Standards for Criminal Justice Prosecution Function and Defense Function § 4-3.5 (3rd ed. 1993).

The conflict of interest of one lawyer in a county public defender’s office is imputed to other lawyer’s in the public defender’s office. This imputation occurs because a public defender’s office is a law firm as defined in Rule 1.0(c) and the members of a law firm share a Rule 1.7 conflict of interest pursuant to Rule 1.10(a). For a similar view, see State Bar of Texas, Op. 579 (2007), noting that a public defender’s office is a law firm as defined by their rules and advising that “a conflict of interest precluding a lawyer in the public defender’s office from representation of a client precludes the representation of the client by any other lawyer in that office.”

Thus, in answer to Question 1, the Board advises that pursuant to Rule 1.7(a)(1) and (a)(2), an assistant county public defender should not represent co-defendants at a preliminary hearing in a felony case due to the inherent risk of a conflict of interest that likely could not be ameliorated under Rule 1.7(b). Two different assistant public defenders in the same county public defender’s office should not separately represent the co-defendants at a preliminary hearing because the conflict of interest of one assistant public defender is imputed to the other pursuant to Rule 1.10(a) and Rule 1.0(c).

Question 2

Is it proper for an assistant county public defender to represent one co-defendant in a felony case while simultaneously representing the other co-defendant in an unrelated misdemeanor case? If not, is it proper for a different assistant public defender in the same county public defender’s office to represent the other co-defendant in the unrelated misdemeanor case?

Simultaneous representation of one co-defendant in a felony case and the other co-defendant in an unrelated misdemeanor case is not absolutely prohibited by Rule 1.7 of the Ohio Rules of Professional Conduct; however, such representation is unwise due to the potential conflict of interest. Comment [11] to

Rule 1.7 explains that a “directly adverse” conflict of interest “may arise when effective representation of a client who is a party in a lawsuit requires a lawyer to cross-examine another client, represented in a different matter, who appears as a witness in the suit.”

In a lawyer’s simultaneous representation of one co-defendant in a felony case and the other co-defendant in an unrelated misdemeanor case, a “directly adverse” conflict of interest will occur when effective representation of the co-defendant in the felony case requires cross examination of the client represented in the misdemeanor case.

An ethics committee in Vermont advised that “[a] lawyer may not represent a criminal defendant in a criminal case where another client in an unrelated matter is a State’s witness, notwithstanding that each client may make an informed consent after full disclosure of any relevant facts concerning such dual representation, because such dual representation would involve an inherent risk of violation of one or more Disciplinary Rules. Vermont Bar Assn. Op. 98-13 [undated].

In *Columbus Bar Assn. v. Ross*, 107 Ohio St.3d 354, 2006-Ohio-5, an Ohio attorney received a six-month stayed suspension for violating DR 5-105(B) (conflict of interest) and DR 1-104 (professional liability insurance notification). Attorney Ross represented Brown who was indicted by a federal grand jury and charged with trafficking cocaine, while representing Hollins in state court proceedings stemming from an unrelated drug charge. *Id.* at 354. The U.S. attorney inquired about the propriety of the dual representation because she had evidence that Hollins was Brown’s drug supplier in the federal case. *Id.* at 354-55. Attorney Ross discussed the allegation with the clients and the potential for a conflict of interest, but they denied any drug deals. *Id.* at 355. Respondent did not consider the prosecutor’s evidence reliable enough to warrant his withdrawal from either case. *Id.* at 355. Attorney Ross requested the prosecutor move the federal court to reduce Brown’s sentence based on his substantial assistance to the government, but the prosecutor refused unless Brown named Hollins as his supplier. *Id.* The U.S. attorney asked the court to inquire whether Brown and Hollins fully understood and consented to the dual representation, but upon assurances by Brown that Hollins was not his supplier and he wanted Ross as his attorney, the court allowed Ross to remain as Brown’s counsel. Shortly before Brown’s trial date, Ross moved to withdraw as counsel because he could not get Brown a reduced sentence. Brown through new counsel pleaded guilty and agreed to offer incriminating testimony, including that Hollins was his supplier. Later, Hollins was indicted as a conspirator, and respondent continued to represent him until removed by another federal district judge. *Id.* at 355. In respondent’s disciplinary case, the Supreme Court of Ohio found that respondent violated DR 5-105 by continuing to represent Hollins and Brown after the government identified Hollins as Brown’s supplier of drugs. *Id.* at 357. The court stated that Ross “disregarded all cautionary guidance in continuing to represent Brown and Hollins.” *Id.* at 358. “When the prosecution asked Brown to

incriminate Hollins, a trial or plea negotiations in which their interests were irreconcilable became practically inevitable.” *Id.* at 359.

When a conflict of interest occurs in the simultaneous representation of a co-defendant in a criminal case and the other co-defendant in an unrelated misdemeanor case, it would be extremely difficult for a lawyer to ameliorate the conflict of interest under the requirements of Rule 1.7(b), particularly the requirement that there be diligent and competent representation to each client. The adequacy of the informed consent, confirmed in writing would also be a challenge, especially in light of the important constitutional rights of a criminal defendant. Thus, the Board’s view is that an assistant county public defender should not represent one co-defendant in a felony case while simultaneously representing the other co-defendant in an unrelated misdemeanor case due to the inherent risk of a conflict of interest that likely could not be ameliorated under Rule 1.7(b).

As already stated, the conflict of interest of one lawyer in a county public defender’s office is imputed to other lawyers in the public defender’s office. This imputation occurs because a public defender’s office is a law firm as defined in Rule 1.0(c) and the members of a law firm share a Rule 1.7 conflict of interest pursuant to Rule 1.10(a).

Although the Board was not asked to address whether an assistant county public defender may represent a criminal defendant when a *former* client he or she represented in an unrelated matter is a witness in the criminal case, this related question begs answer. Such representation is not prohibited under the Ohio Rules of Professional Conduct, as long as the assistant county public defender does not use or reveal information of the former client that is protected from disclosure under Rule 1.9(c).

Rule 1.9 Duties to Former Clients

(c) A lawyer who has formerly represented a client in a matter or whose present or former *firm* has formerly represented a client in a matter shall not thereafter do either of the following:

- (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally *known*;
- (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Thus, in answer to Question 2, the Board advises that pursuant to Rule 1.7(a)(1) and (a)(2), an assistant county public defender should not represent one co-defendant in a felony case while simultaneously representing the other co-

defendant in an unrelated misdemeanor case due to the inherent risk of a conflict of interest that likely could not be ameliorated under Rule 1.7(b). A different assistant public defender in the same county public defender's office should not represent the co-defendant in the unrelated misdemeanor case because the conflict of interest of one assistant public defender is imputed to the other pursuant to Rule 1.10(a) and Rule 1.0(c). If a *former* client in an unrelated matter is a witness in a defendant's criminal case, an assistant county public defender may represent the criminal defendant, but may not use or reveal information of the former client that is protected from disclosure under Rule 1.9(c).

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 Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.