

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 2008-5**

Issued August 15, 2008

*[Modified-by Opinion 2008-6 on Dec. 5, 2008. Also, note the errata in Opinion 2008-5 where the references on pages 5 and 6 to Rule 1.11(c) should be to Rule 1.11(d).]*

**SYLLABUS:** A city director of law or an assistant city director of law is prohibited from representing criminal defendants in proceedings in which the state is a plaintiff. A lawyer associated in a law firm with a city director of law or an assistant city director of law may not represent criminal defendants in a proceeding prosecuted by the city director of law or the assistant city director of law. A lawyer associated in a law firm with a city director of law or an assistant city director of law may be privately retained to represent criminal defendants in a proceeding in which the state of Ohio is plaintiff, if the proceeding is outside the jurisdiction of the city director of law. A lawyer associated in a law firm with any city director of law or an assistant city director of law may not serve as a court appointed counsel, a public defender, or a co-counsel to a public defender.

**OPINION:** This opinion addresses a question regarding criminal defense representation by a lawyer associated in a law firm with an assistant city director of law.

Is it proper for a lawyer associated in a law firm with an assistant city law director to represent criminal defendants?

This opinion advises upon the ethical restrictions under the Ohio Rules of Professional Conduct, but begins by reviewing the legal restrictions on the representation of criminal defendants by part-time city law directors and their private law firms.

### Legal Precedent

Ohio law establishes the powers and legal duties of a city director of law. These powers and duties are set forth in Ohio Rev. Code Ann §§ 705.11, 733.51, 733.52, 733.53, 733.54, 733.55, 733.56, 733.57, 733.58, 733.62 (West 1994), § 1901.34 (West Supp. 2008), § 3313.35 (West 2005). [In charter cities which exercise powers of self-government pursuant to Section 3, Art. XVIII of the Ohio Constitution, legal duties will depend upon the charter.]

The prosecutorial duties of a city law director are pertinent to this opinion. Pursuant to R.C. 705.11, a city director of law is the prosecutor in any police or municipal court. Pursuant to R.C. 733.51 and R.C. 733.52, a city director of law is the prosecuting attorney of the mayor's court and performs the same duties, insofar as they are applicable to the city director of law, as required of the county prosecuting attorney. Pursuant to R.C. 733.53, a city director of law prosecutes or defends on behalf of the city, all complaints, suits, and controversies in which the city is a party, and other suits, matters, and controversies as directed to prosecute by resolution or ordinance. Pursuant to R.C. 1901.34(A), with exceptions set forth in divisions (B) and (D) of 1901.34, a city director of law prosecutes all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the director of law and prosecutes all criminal cases brought before the court arising in the unincorporated areas with the territory of the municipal court. Pursuant to R.C. 1901.34(C), the city director of law performs the same duties, insofar as they are applicable to the city director of law, as are required of the county prosecuting attorney. Pursuant to R.C. 309.08, the county prosecuting attorney "shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party."

Because of the prosecutorial duties imposed by law, a city director of law is prohibited from representing defendants in criminal proceedings in which the State of Ohio is the plaintiff. See *Cain v. Calhoun* (1979), 61 Ohio App. 2d 240 holding that "[c]ity solicitors may not be appointed to represent indigent defendants in criminal prosecutions." See also Ohio Attorney General Opinions: O.A.G. Op. 89-023 advising that "the positions of city director of law and assistant public defender in a joint county public defender's office are incompatible"; OAG, Op. 67-112 advising that "[a] city solicitor [now city director of law] may not represent defendants in criminal cases wherein the State of Ohio is plaintiff"; O.A.G. Op. 66-159 advising that "[a] city solicitor [now city director of law] may not represent defendants in a criminal case wherein the State of Ohio is plaintiff" [even though the initial arrest and other preliminary stages were conducted in an area outside of the territorial jurisdiction of the municipal court in which such solicitor is employed]. See also, OAG Op. 71-050 noting that the office of city solicitor [now city director of law] is almost identical to a prosecuting attorney and advising that "[a]n assistant prosecuting attorney is not permitted to represent clients in criminal proceedings either within or outside of the county in which he is appointed."

An assistant city director of law is also prohibited from representing defendants in criminal proceeding in which the State of Ohio is the plaintiff. See O.A.G. Op. 89-023, footnote 1 citing O.A.G. Op. 79-100 advising that an assistant city director of law is subject to the same limitations as a city law director and may not hold any office that the city director of law may not hold. See also, OAG Op.

71-050 noting that an assistant prosecutor is “for all practical purposes, the alter ego of the prosecuting attorney.”

A law firm partner or associate of a city director of law is prohibited from accepting court appointments to represent criminal defendants, from serving as a public defender, or from serving as co-counsel with a public defender. R.C. 120.39(A) states: “Except as provided in division (B) of this section, 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) (West 2002).

As evidenced by R.C. 120.39(A), the Ohio legislature decided to restrict counsel appointed by the court, public defenders, and co-counsel appointed to assist a public defender from being a partner or employee of *any* prosecuting attorney, city director of law, village solicitor, or similar chief legal officer. The Ohio Attorney General advised that the purpose of R.C. 120.39(A) is to prevent conflicts from occurring when an attorney represents the state and defendants in original prosecutions. See O.A.G. 89-023, O.A.G. 78-026.

Thus, under longstanding legal precedent in Ohio, the conflicts of interest arising from statutory duties to the state have prohibited part-time city law directors and their assistants from representing criminal defendants and have restricted lawyers in the private law firm of a city director of law from accepting court appointments of criminal defendants or from serving as a public defender or as co-counsel to a public defender.

### Ethical Restrictions under the Ohio Rules of Professional Conduct

Under the ethical rules, the ability of city directors of law, assistant city directors of law, and their private law firms to represent private clients in criminal defense matters and to accept court appointments of criminal defendants is also restricted, as described below, due to conflicts of interest in prosecutorial duties owed to the state and criminal defense duties owed to a defendant.

Rule 1.7 is the general rule that governs conflicts of interest of current clients.

#### **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.

Under the ethical rules, a city director of law or an assistant city director of law is prohibited from representing criminal defendants in proceedings in which the state is a plaintiff because the representation is directly adverse to the state which is a conflict of interest under Rule 1.7(a)(1) that cannot be waived under Rule 1.7(b) because, even with client consent, Rule 1.7(c)(1) does not permit a representation prohibited by law, and as already discussed, legal precedent in Ohio prohibits such representation.

### Imputation of conflict of interest

A lawyer is prohibited from representing a criminal defendant in a proceeding prosecuted by another lawyer in the same law firm because such conduct is prejudicial to the administration of justice in violation of Rule 8.4(d). No one

would have any confidence in the justice system if lawyers who are associated in the same law firm were permitted to serve as the prosecutor and the defense counsel in the same proceeding.

A more difficult issue is whether lawyers associated in a law firm with a city director of law or an assistant city director of law may represent criminal defendants in proceedings that are outside the jurisdiction of the city director of law.

To determine whether a conflict of interest of a city director of law or an assistant city director of law is imputed to law firm partners or associates, a lawyer must look at several rules.

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*.

(f) The disqualification of lawyers associated in a *firm* with former or current government lawyers is governed by Rule 1.11.

The general rule of imputation, Rule 1.10(a) imputes a prohibited conflict of interest under Rule 1.7 (or Rule 1.9) to lawyers associated in a law firm unless the conflict of interest 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.

But, the general rule of imputation, Rule 1.10(a) does not apply to lawyers associated in a law firm with former or current government lawyers. Rule 1.10(f) instructs that “[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.” The application of Rule 1.11 requires a close examination of the rule. Rule 1.11(b) applies to former government lawyers. Rule 1.11(b) explicitly imputes the disqualification of a *former* government lawyer to lawyers in a law firm. Rule 1.11(c) applies to current government lawyers. No mention is made anywhere in Rule 1.11(c) of imputing the disqualification of a *current* government lawyer to the lawyers associated in a law firm with the current government attorney.

In the absence of a directive in Rule 1.11(c) for imputing the disqualification of a current government lawyer to the lawyers associated in the law firm, it is the Board's view that the conflict of interest of a city law director or an assistant city director of law in representing criminal defendants is not directly imputed by Rule 1.11(c) to law firm partners or associates who wish to privately represent criminal defendants outside the jurisdiction of the city law director.

Thus, a lawyer is prohibited from representing a criminal defendant in a proceeding prosecuted by another lawyer associated in the same law firm, but it is not unethical for a lawyer who is associated in a law firm with a city director of law or an assistant city director of law to privately represent a criminal defendant in a proceeding outside the jurisdiction of the city director of law. Further, a lawyer must abide by R.C. 120.39 which prohibits a lawyer associated in a law firm with *any* city director of law from serving as court appointed counsel, a public defender, or a co-counsel to a public defender. And, to be consistent with the ethical duty to avoid conduct prejudicial to the administration of justice, a lawyer who is associated in a law firm with an assistant city director of law should not serve as court appointed counsel, a public defender, or as co-counsel to a public defender.

In summary, a lawyer associated in a law firm with a city director of law or an assistant city director of law may privately represent criminal defendants in a proceeding in which the state of Ohio is plaintiff, if the proceeding is outside the jurisdiction of the city director of law. A lawyer associated in a law firm with any city director of law or an assistant city director of law may not represent criminal defendants in a proceeding prosecuted by the city director of law or the assistant city director of law, and may not serve as a court appointed counsel, a public defender, or a co-counsel to a public defender.

#### Past Board Opinion 88-008

With this opinion, the Board departs in two respects from prior Op. 88-008 interpreting the former Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, effective February 1, 2007.

First, Op. 88-008 permitted narrow circumstances in which a municipal prosecutor could represent criminal defendants. Such exception was based upon several older ABA opinions, ABA Informal Op. 1045 (1968) and Informal Op. 1285 (1974). Such exception does not seem consistent with the thrust of eliminating inherent conflict of interest of lawyer that occurs when a lawyer with prosecutorial duties represents criminal defendants adverse to the state of Ohio. Such exception does not contribute to consistency or clarity for city directors of law and their assistants who practice law in association with other attorneys.

Second, Op. 88-008 interpreting DR 5-105 advised that “[m]embers of a part-time prosecuting attorney’s law office may not accept employment that the prosecutor is precluded from accepting.” As addressed above Rule 1.11(c) does not directly impute disqualification of a conflict of interest of a current government attorney to other attorneys associated in a law firm with the government attorney.

### Conclusion

The Board advises as follows. A city director of law or an assistant city director of law is prohibited from representing criminal defendants in proceedings in which the state is a plaintiff. A lawyer associated in a law firm with a city director of law or an assistant city director of law may not represent criminal defendants in a proceeding prosecuted by the city director of law or the assistant city director of law. A lawyer associated in a law firm with a city director of law or an assistant city director of law may be privately retained to represent criminal defendants in a proceeding in which the state of Ohio is plaintiff, if the proceeding is outside the jurisdiction of the city director of law. A lawyer associated in a law firm with any city director of law or an assistant city director of law may not serve as a court appointed counsel, a public defender, or a co-counsel to a public defender.

**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.**