

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2009-3

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SYLLABUS: A county prosecuting attorney may represent multiple statutory clients in the *negotiation of a contract or a memorandum of understanding* except when there is a conflict of interest under Rule 1.7(a)(1) or (a)(2) that cannot be ameliorated under Rule 1.7(b) or when there is a nonconsentable conflict of interest under Rule 1.7(c)(1) or (c)(2). A conflict of interest arises under Rule 1.7(a)(1) when the clients' interests are directly adverse. A conflict of interest arises under Rule 1.7(b)(2) when there is a substantial risk that the county prosecutor's ability to represent one client will be materially limited by responsibilities to the other client.

Not every disagreement among clients constitutes a conflict of interest. A county prosecuting attorney must exercise professional judgment to decide whether a Rule 1.7(a)(1) or (a)(2) conflict of interest exists and whether it may be ameliorated by meeting the conditions set forth in Rule 1.7(b)(1) through (3). Rule 1.7(b)(1) requires a prosecutor's determination that the prosecutor's office is able to give competent and diligent representation to each affected client; Rule 1.7(b)(2) requires each affected client to give informed consent, confirmed in writing; and Rule 1.7(b)(3) requires that the representation not be precluded by Rule 1.7(c). Rule 1.7(c)(1) precludes, despite client consent, a representation prohibited by law. Rule 1.7(c)(2) precludes, despite client consent, a representation involving the assertion of a claim by one client against another client represented by the lawyer in the same proceeding which includes a negotiation or a mediation. Regardless of consent, multiple representations should not be undertaken when two clients' interests are fundamentally antagonistic or when contentious litigation or contentious negotiations between two clients are imminent or contemplated.

Whether representation of multiple statutory clients may be provided by different assistant county prosecuting attorneys employed in the office of the county prosecutor depends upon whether the conflict of interest is one that may be ameliorated under Rule 1.7(b) or one that falls under Rule 1.7(c). For conflicts of interest that may be ameliorated under Rule 1.7(b), representation by different assistant county prosecuting attorneys is appropriate if the county prosecutor determines that the conditions set forth in (b)(1) through (b)(3) are met. For

conflicts of interest that fall under Rule 1.7(c), once a county prosecuting attorney determines that a representation is prohibited by law or that a client has a claim against another client in the same proceeding, the county prosecuting attorney should not attempt to represent any of them, not even through different assistant prosecuting attorneys employed in the office of the county prosecuting attorney.

A county prosecuting attorney is prohibited by Rule 1.7(c)(2) from representing multiple statutory clients, such as two different public entities, in the *filing of a lawsuit* by one of the clients asserting a claim against the other, even through different assistant county prosecuting attorneys. When a controversy evolves into a legal dispute that must be resolved through the filing of a lawsuit by one county official or entity against the other, the county prosecutor should withdraw in that matter from the representation of either client and special counsel should be appointed.

OPINION: This opinion neither addresses nor applies to conflicts of interest involving the Office of the Attorney General of Ohio. This opinion addresses questions regarding the ethical duties of a county prosecuting attorney in representation of multiple statutory clients in the same matter.

1. Is it proper for a county prosecuting attorney to represent multiple statutory clients in the negotiation of a contract or a memorandum of understanding?
2. Is it proper for a county prosecuting attorney to represent multiple statutory clients in the filing of a lawsuit by one of the clients against the other?

Duties of a county prosecuting attorney

As a lawyer, a county prosecuting attorney is subject to the Ohio Rules of Professional Conduct, for which the Board of Commissioners on Grievances and Discipline is the appropriate advisory body. As a government official, a county prosecuting attorney is also subject to Ohio Ethics Law, for which the Ohio Ethics Commission is the appropriate advisory body. This advisory opinion is limited to the Board's application of the Ohio Rules of Professional Conduct, pursuant to its advisory authority under Gov.Bar R. V § 2 (C). A county prosecutor should also consider the application of Ohio Ethics Law.

A county prosecuting attorney's duties are prescribed by law. A county prosecuting attorney may employ assistant county prosecutors to assist in the performance of the prosecutor's duties. Ohio Rev. Code Ann. § 309.06 (West 2005).

A county prosecuting attorney inquires into the commission of crimes within the county and prosecutes on behalf of the state, all complaints, suits, and

controversies in which the state is a party, except those required by law to be prosecuted by a special prosecutor or the attorney general, and prosecutes other suits, matters, and controversies that the prosecuting attorney is required to prosecute within or outside the county. Ohio Rev. Code Ann. § 309.08(A) (West Supp. 2009). The court of common pleas or the court of appeals, when in their opinion public interest requires it, may appoint counsel to assist the prosecuting attorney in the trial of a case. Ohio Rev. Code Ann. § 2941.63 (West 2006).

A county prosecuting attorney is the legal advisor of the county commissioners, board of elections, and all other county officers and boards and they may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties. Ohio Rev. Code Ann. § 309.09(A) (West Supp. 2009).

A county prosecuting attorney prosecutes and defends all suits and actions which a county officer or board directs or to which it is a party and no county officer may employ any other counsel or attorney at the expense of the county, except as provided for in R.C. 305.14. Ohio Rev. Code Ann. § 309.09(A) (West Supp. 2009). For example, R.C. 305.14(A) provides that “[t]he court of common pleas, upon application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.” Ohio Rev. Code Ann. § 304.14 (A) (West Supp. 2005). See also Ohio Rev. Code Ann. (B), (C), (D) (West Supp. 2005). And, R.C. 309.10 provides that certain county boards may employ other counsel for legal representation. Ohio Rev. Code Ann. § 309.10 (West 2005).

A county prosecuting attorney is the legal adviser for all township officers, boards, and commissions unless the township has adopted limited home rule government and has not entered a contract to have the prosecuting attorney serve as the township law director. When the township trustees find it advisable or necessary to have additional legal counsel, they may so order. Ohio Rev. Code Ann. § 309.09(B)(1) (West Supp. 2009).

A county prosecuting attorney is required, when informed of certain circumstances, to take action to reclaim property money and property of a person found dead upon whose estate no letters of administration have been issued. Ohio Rev. Code Ann. § 309.17 (West 2005). And, a county prosecuting attorney has duties to provide notice to a victim of a criminal’s escape. Ohio Rev. Code Ann. § 309.18 (West 2005).

A county prosecuting attorney is required to make annual reports to the attorney general, the board of county commissioners, and to the state fire marshall. Ohio Rev. Code Ann. § 309.15, 309.16 (West 2005). A county prosecuting attorney

prepares the official bonds for all county officers. Ohio Rev. Code Ann. § 309.11 (West 2005).

In addition to these duties, a county prosecuting attorney may assume other duties permitted by law. For example, a prosecuting attorney and a county commissioner may contract with a board of park commissioners to provide legal services to the park district. Ohio Rev. Code Ann. § 309.09(D) (West Supp. 2009). A county prosecuting attorney may be, with the approval of the board of county commissioners, the legal adviser of a joint fire district, a joint ambulance district, a joint emergency medical services district, or a fire and ambulance district. Ohio Rev. Code Ann. § 309.09(E), (F), (G), (H) (West Supp. 2009). Further, a county prosecuting attorney may bring civil actions in the name of the state to protect public funds. Ohio Rev. Code Ann. § 309.12 (West 2005). A county prosecuting attorney prosecutes wrongdoers who cut down timber on land belonging to the state or a school district. Ohio Rev. Code Ann. § 309.14 (West 2005).

Inevitably, given these vast statutory duties to multiple county officials and entities, a county prosecuting attorney will face concerns regarding conflicts of interest. The requester of this opinion raises questions concerning representation of multiple statutory clients in the negotiation of a contract or a memorandum of understanding and representation of multiple statutory clients in the filing of a lawsuit by one client against the other.

Rules governing conflicts of interest of a current government lawyer

Rule 1.11 and Rule 1.7 of the Ohio Rules of Professional Conduct are pertinent to this opinion. Rule 1.11 is a special conflicts of interest rule for former and current government lawyers. Rule 1.7 is a rule for all lawyers governing conflicts of interest of current clients. A current government lawyer is required by Rule 1.11(d)(1) to comply with Rule 1.7, except as law may otherwise expressly permit. As explained in Comment [1] to Rule 1.11, a lawyer who has served or who is currently serving as a public officer or employee is subject to the prohibition against concurrent conflicts of interest in Rule 1.7.

Rule 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYERS

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee shall comply with both of the following:

(1) Rules 1.7 [Conflicts of Interest: Current Clients] and 1.9 [Conflicts of Interest: Former Clients];

(2) [Omitted].

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.

Special consideration given to government lawyers

The Ohio Rules of Professional Conduct give government lawyers special consideration as to conflicts of interest.

Rule 1.11(d) requires a current government lawyer to comply with Rule 1.7, **except as law may otherwise expressly permit.**

The Scope section of the Ohio Rules of Professional Conduct acknowledges there may be circumstances in which a government lawyer may undertake a representation of multiple parties where a private lawyer may not. Comment [18] in the Scope section states: “Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state’s attorney in state government, and their federal counterparts, and the same may be true of other government law officers. **Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority.**” [Emphasis added].

Rule 1.11 provides special consideration for government attorneys as to imputation of conflicts of interest. Comment [2] to Rule 1.11 explains: “**Because of the special problems raised by imputation within a government agency, division (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.**” [Emphasis added].

Application of rules

Application of Rule 1.7 requires professional judgment. Disagreements are bound to occur with a county, its officers, and its entities. But, not every disagreement creates a conflict of interest for a county prosecuting attorney.

First, a county prosecuting attorney must determine whether there is a conflict of interest under Rule 1.7. A determination of whether there is a conflict of interest begins by a county prosecuting attorney examining the duties of the office and the identity of the entities or officials to whom these duties are owed. For a discussion of the identity of a government client for conflict of interest purposes see ABA Formal Opinion 97-405 (1997).

Under Rule 1.7(a)(1) a conflict of interest exists if a county, its entities, or the county officials are directly adverse to each other. Nevertheless, direct adversity should not be equated with discussions in which there are differing opinions. A county, its entities, or its officials may express different views without being directly adverse to each other. Expression of different views while discussing an issue or topic is part of the process of county government. Determination of a direct adversity conflict of interest is fact and circumstance specific.

Under Rule 1.7(a)(2), a conflict of interest exists if there is a substantial risk that the ability of the county prosecuting attorney to consider, recommend, or carry out the representation of one client (a county, its officials, or its entities) will be materially limited by responsibilities to the other. Determination of a material limitation conflict of interest is fact and circumstance specific.

Second, if there is a conflict of interest, a county prosecuting attorney must determine whether the conflict may be ameliorated under Rule 1.7(b) such that representation of all of the affected clients by the prosecutor's office may be undertaken, or whether such representation is prohibited by Rule 1.7(c) even with client consent.

Under Rule 1.7(b), a county prosecuting attorney may ameliorate a conflict of interest three conditions are met: 1.7(b)(1) requires a determination by a county prosecuting attorney that competent and diligent representation can be provided, such as through different assistant county prosecutors appropriately screened; 1.7(b)(2) requires a county prosecuting attorney to obtain informed consent, confirmed in writing of each affected client; and 1.7(b)(3) requires that the representation is not precluded by 1.7(c).

Representation is improper, even with informed consent of the affected clients under Rule 1.7(c)(1) if the representation is prohibited by law or under Rule 1.7(c)(2) if the representation involves the assertion of a claim by one client against another client represented by the lawyer in the same proceeding. Further, as explained in Comment [38] “[d]ivision (c)(2) does not address all nonconsentable conflicts. Some conflicts are nonconsentable because a lawyer cannot represent both clients competently and diligently or both clients cannot give informed consent. **For example, a lawyer may not represent multiple parties to a negotiation whose interest are fundamentally antagonistic, regardless of their consent.**” [Emphasis added].

The word “proceeding” is not defined in Rule 1.7(c)(2). In Op. 2007-4, the Board construed the meaning of “proceeding” as follows: “A ‘proceeding’ under Ohio Rule 1.7(c) is not limited to a proceeding before a tribunal. A ‘proceeding’ includes acts and events before a tribunal, as well as acts and events before mediators, arbitrators, or other administrative bodies.” In the opinion, the Board acknowledged that in the adoption of Rule 1.7(c) Ohio chose a different approach from ABA Model Rule 1.7(c). ABA Model Rule 1.7(c) explicitly refers to “proceedings before a tribunal.” Ohio’s Rule 1.7(c) refers only to a “proceeding” not a “proceeding before a tribunal.” In fact, the notes following Ohio’s Rule 1.7(c), in the section entitled Comparison to ABA Model Rules of Professional Conduct, indicate that a proceeding could include mediation. Further, Comment [37] to Rule 1.7 explains that “[d]ivision (c)(2) bars representation in the same proceeding, of clients who are directly adverse because of the institutional interest in vigorous development of each client’s position. A lawyer may not

represent both a claimant and the party against whom the claim is asserted whether in proceedings before a tribunal **or in negotiations or mediation of a claim pending before a tribunal.**" [Emphasis added]

Question 1: Representation of multiple statutory clients in the negotiation of a contract or a memorandum of understanding

Is it proper for a county prosecuting attorney to represent multiple statutory clients in the negotiation of a contract or a memorandum of understanding?

In negotiation of a contract or a memorandum of understanding, a county prosecuting attorney must exercise his or her professional judgment to determine whether there is a conflict of interest. A minor disagreement among statutory clients does not necessarily indicate that the clients' interests are directly adverse or that there will be a material limitation on the ability of the prosecutor to consider, recommend, or carry out a course of action for each client. But, when a minor disagreement among clients escalates to a major disagreement such as on issues that are material to a contract or a memorandum of understanding, or when an atmosphere of extreme hostility or antagonism develops among the clients, it is likely that the clients' interests are directly adverse and or that there is a material limitation on a prosecutor's ability to consider, recommend, or carry out a course of action. In those circumstances, a prosecutor must prudently consider whether the conflict of interest may be ameliorated.

The Comments to several rules provide additional guidance as to when multiple representations are improper. Comment [25] to Rule 1.7 notes that "[a] lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties is antagonistic, the possibility that the clients' interest can be adequately served by common representation is low. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties." And, as already stated, Comment [38] to Rule 1.7 explains that "a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic, regardless of their consent."

Thus, even when there is a conflict of interest under Rule 1.7(a)(1) or (a)(2) because the clients' interests are directly adverse to each other and/or there is a significant risk that the county prosecutor's independent judgment on behalf of one of the clients will be materially limited by the prosecutor's responsibility to the other client, a county prosecuting attorney is given leeway under the rules to proceed with the negotiation of the contract or the memorandum of

understanding provided the conflict of interest may be ameliorated by meeting the applicable conditions of Rule 1.7(b). As already stated, the conditions are that the county prosecuting attorney must determine whether competent or diligent representation could be provided, such as through the participation of different assistant prosecuting attorneys; informed consent of the affected clients, confirmed in writing explaining the conflict of interest and the manner in which competent and diligent representation will be provided; and ascertaining that the representation is not prohibited by law or does not involve the assertion of a claim by one client against the other in the same proceeding.

In conclusion to Question 1, the Board advises as follows. A county prosecuting attorney may represent multiple statutory clients in the *negotiation of a contract or a memorandum of understanding* except when there is a conflict of interest under Rule 1.7(a)(1) or (a)(2) that cannot be ameliorated under Rule 1.7(b) or when there is a nonconsentable conflict of interest under Rule 1.7(c)(1) or (c)(2). A conflict of interest arises under Rule 1.7(a)(1) when the clients' interests are directly adverse. A conflict of interest arises under Rule 1.7(b)(2) when there is a substantial risk that the county prosecutor's ability to represent one client will be materially limited by responsibilities to the other client. Not every disagreement among clients constitutes a conflict of interest. A county prosecuting attorney must exercise professional judgment to decide whether a Rule 1.7(a)(1) or (a)(2) conflict of interest exists and whether it may be ameliorated by meeting the conditions set forth in Rule 1.7(b)(1) through (3). Rule 1.7(b)(1) requires a prosecutor's determination that the prosecutor's office is able to give competent and diligent representation to each affected client; Rule 1.7(b)(2) requires each affected client to give informed consent confirmed in writing; and Rule 1.7(b)(3) requires that the representation not be precluded by Rule 1.7(c). Rule 1.7(c)(1) precludes, despite client consent, a representation prohibited by law. Rule 1.7(c)(2) precludes, despite client consent, a representation involving the assertion of a claim by one client against another client represented by the lawyer in the same proceeding which includes a negotiation or a mediation. Regardless of consent, multiple representations should not be undertaken when two clients' interests are fundamentally antagonistic or when contentious litigation or negotiations between two clients are imminent or contemplated. Whether representation of multiple statutory clients may be provided by different assistant county prosecuting attorneys employed in the office of the county prosecutor depends upon whether the conflict of interest is one that may be ameliorated under Rule 1.7(b) or one that falls under Rule 1.7(c). For conflicts of interest that may be ameliorated under Rule 1.7(b), representation by different assistant county prosecuting attorneys is appropriate if the county prosecutor determines that the conditions set forth in (b)(1) through (b)(3) are met. For conflicts of interest that fall under Rule 1.7(c), once a county prosecuting attorney determines that a representation is prohibited by law or that a client has a claim against another client in a proceeding, the county prosecuting attorney should not attempt to represent any of them, not even through different assistant prosecuting attorneys employed in the office of the county prosecuting attorney.

Question 2: Representation of multiple statutory clients in the filing of a lawsuit by one of the clients against the other

Is it proper for a county prosecuting attorney to represent multiple statutory clients in the filing of a lawsuit by one of the clients against the other?

Rule 1.7(c)(2) prohibits a lawyer from representation involving the assertion of a claim by one client against another client represented by the lawyer in the same proceeding, even if the affected clients give consent. Therefore, when a controversy evolves into legal dispute that must be resolved through the filing of a lawsuit by one county official or entity against another, the county prosecuting attorney is prohibited by Rule 1.7(c)(2) from representing both sides in the lawsuit, even through different assistant county prosecutors.

It is inevitable that there will be situations in which special counsel will be required. A county prosecutor has a continuing relationship with the statutory clients and cannot choose one statutory client over the other. The explanation offered in Comment [8] to Rule 1.7, as to a lawyer's ability to decide whether to withdraw from all affected clients or represent one or more affected clients, is not applicable to a county prosecutor because each statutory client will be a continuing client not a former client. [Comment [8] states "[w]hen a conflict arises from a lawyer's representation of more than one client, whether the lawyer must withdraw from representing all affected clients or may continue to represent one or more of them depends upon whether: (1) the lawyer can both satisfy the duties owed to the former client and adequately represent the remaining client or clients, given the lawyer's duties to the former client (see Rule 1.9); and (2) any necessary client consent is obtained."]

In conclusion to Question 2, the Board advises as follows. A county prosecuting attorney is prohibited by Rule 1.7(c)(2) from representing multiple statutory clients, such as two different public entities, in the *filing of a lawsuit* by one of the clients asserting a claim against the other, even through different assistant county prosecuting attorneys. When a controversy evolves into a legal dispute that must be resolved through the filing of a lawsuit by one county official or entity against the other, the county prosecutor should withdraw in that matter from the representation of either client and special counsel should be appointed.

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.