

The Supreme Court of Ohio

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OPINION 2014-2

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Imputation of Conflicts in a Part-Time County Prosecutor's Law Firm

SYLLABUS: When a part-time county prosecutor practices in a firm, the prosecutor is prohibited from representing criminal defendants prosecuted on behalf of the state of Ohio. Such representation creates a conflict of interest under Prof.Cond.R. 1.7(a) that cannot be ameliorated through Prof.Cond.R. 1.7(b). If the part-time county prosecutor is also authorized to prosecute cases brought by a municipal corporation, the prosecutor is further prohibited from representing criminal defendants against that municipal corporation. The other lawyers in a part-time county prosecutor's firm, however, are permitted to represent criminal defendants in cases prosecuted on behalf of the state and municipal corporations represented by the prosecutor. Prof.Cond.R. 1.10(f) and 1.11 indicate that the conflicts of the part-time county prosecutor associated with government practice are not imputed to the other lawyers in the firm. To protect client interests, the part-time prosecutor should be timely screened from the firm's criminal defense matters and the prosecutor should not be apportioned fees from the firm's criminal defense work. Lawyers in an elected part-time prosecutor's firm may not represent criminal defendants in the county in which the part-time prosecutor is the elected official, but may represent criminal defendants outside of the county in which the prosecutor is elected.

Advisory Opinion 88-008 is withdrawn in part.

QUESTION PRESENTED: Are the lawyers in a part-time elected county prosecutor's or part-time assistant prosecutor's law firm permitted to represent criminal defendants in cases against the state or municipal corporations represented by the prosecutor?

APPLICABLE RULES: Rules 1.7, 1.10, and 1.11 of the Ohio Rules of Professional Conduct

OPINION:

An elected county prosecutor has asked the Board to consider the imputation of a part-time prosecutor's government practice conflicts to the other lawyers in the prosecutor's law firm. Both elected county prosecutors and assistant prosecutors are permitted to engage in the private practice of law. *See* R.C. 325.11(B); 2009 Ohio Atty.Gen.Ops. No. 2009-053. Especially in rural and sparsely-populated Ohio counties, there are limited legal resources and the elected prosecutor often employs part-time assistant prosecutors to handle both criminal and civil cases. The practices of these hybrid public and private sector lawyers present a challenge when applying the conflict imputation provisions found in the Rules of Professional Conduct (Rules). This Opinion addresses the imputation of the conflicts created by a part-time county prosecutor's government practice in criminal cases.¹ For purposes of this Opinion, "part-time county prosecutor" includes both a part-time elected county prosecutor and a part-time assistant county prosecutor.

Part-Time County Prosecutor's Ability to Represent Criminal Defendants

In Advisory Opinion 88-008, the Board was asked to determine under what circumstances a part-time county prosecutor could represent criminal defendants. At that time, the Code of Professional Responsibility (Code) was in effect, and DR 5-105 governed lawyers' conflicts of interest. DR 5-105(A) and (B) required lawyers to decline or refuse to continue a representation if "the exercise of [the lawyer's] independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment" or the "representation of another client." Under DR 5-105(C), a client could consent to a lawyer's conflict of interest after full disclosure, and DR 5-105(D) imputed a lawyer's conflict to the partners and associates of the lawyer's firm.

Applying DR 5-105, and relying on a 1971 Ohio Attorney General Opinion, the Board concluded that "[a] county prosecuting attorney, whose duty it is to prosecute,

¹ Although under R.C. 309.09 the county prosecutor is the civil legal advisor to a number of county entities, the imputation of the conflicts associated with a part-time county prosecutor's civil government practice is outside the scope of the current question posed to the Board. For guidance on the civil representation of multiple statutory clients by a county prosecutor, *see* Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2009-3 (June 12, 2009).

on behalf of the State, all complaints, suits and controversies in which that state is a party, may not represent private clients in criminal cases against the State of Ohio.” Ohio Sup. Ct., Bd. of Comm’rs on Grievances and Discipline, Op. 88-008 (June 17, 1988), at 3. *See also* 1971 Ohio Atty.Gen.Ops. No. 71-050. The Board also quoted a 1967 Ohio State Bar Association informal opinion which stated that it would be “improper for an attorney who holds the public office of County Prosecutor or Assistant County Prosecutor to accept employment adverse to his employer, the public.” Ohio State Bar Assn., Informal Op. 67-1 (March 21, 1967), at 5.

The Supreme Court of Ohio repealed the Code effective February 1, 2007 and adopted the Rules. A part-time county prosecutor’s ability to represent criminal defendants in private practice is now governed by Prof.Cond.R. 1.11, which is a special conflict rule for current government officers and employees, and Prof.Cond.R. 1.7, which addresses conflicts of interest involving current clients.²

Prof.Cond.R. 1.11 does not differentiate between part-time and full-time government officers and employees. Division (d) of that rule applies to lawyers currently engaged in public service, and states that, except as otherwise permitted by law, such lawyers shall comply with Prof.Cond.R. 1.7 regarding current-client conflicts of interest.

Prof.Cond.R. 1.7(a)(1) states that “[a] lawyer’s acceptance or continuation of representation of a client creates a conflict of interest if...the representation of that client will be directly adverse to another current client.” By statute, county prosecutors and assistant prosecutors represent the state of Ohio. Under R.C. 309.08(A), county prosecutors “may inquire into the commission of crimes within the county” and “shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party * * * and other suits, matters, and controversies that the prosecuting attorney is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals.” Further, by agreement, some county prosecutors represent municipal corporations in criminal prosecutions. *See* R.C. 1901.34(D). Because a county prosecutor’s client in criminal cases is the state of Ohio, criminal defense representation by a part-time prosecutor in cases brought on behalf of the state is a conflict of interest under Prof.Cond.R. 1.7(a)(1). Such representation

² This Opinion does not apply to city directors of law or village solicitors. For guidance on their conflicts of interest, the following Advisory Opinions should be consulted: Ohio Sup. Ct., Bd. of Comm’rs on Grievances and Discipline, Op. 2007-4 (June 8, 2007); Ohio Sup. Ct., Bd. of Comm’rs on Grievances and Discipline, Op. 2008-5 (Aug. 15, 2008); Ohio Sup. Ct., Bd. of Comm’rs on Grievances and Discipline, Op. 2008-6 (Dec. 5, 2008).

would involve the representation of one client, the criminal defendant, in a case directly adverse to another current client, the state of Ohio. If the part-time prosecutor represents a municipal corporation in criminal cases by agreement, representation of criminal defendants in cases brought on behalf of the municipal corporation would likewise create a conflict of interest under Prof.Cond.R. 1.7(a)(1). Accordingly, a part-time prosecutor would not be able to represent criminal defendants in these types of cases unless it is possible for the conflict of interest to be ameliorated.

Prof.Cond. R. 1.7(b) indicates that a conflict of interest created by the representation of two directly-adverse current clients in different matters may be ameliorated if the lawyer is able to provide competent and diligent representation to both clients, the clients provide informed consent, confirmed in writing, to the simultaneous representation, and the representation is not prohibited by law. The nature of a part-time prosecutor's government practice makes amelioration of the conflict created by criminal defense work impossible for two reasons. First, a part-time prosecutor's client is the state of Ohio, which is not able to provide informed consent, confirmed in writing. Advisory Opinion 88-008. *See also* Tenn.Sup.Ct., Bd. of Prof'l Responsibility, Op. 2002-F-146 (Mar. 8, 2002). Even though Prof.Cond.R. 1.7(b) allows clients to consent to representation by a conflicted lawyer, "[s]ome conflicts are nonconsentable because both clients cannot give informed consent." Prof.Cond.R. 1.7, Comment [38]. "Where a lawyer continuously represents the state for criminal prosecutions, only the legislature can provide client consent for the lawyer to dilute required loyalty, by representing another client against the state in a criminal case." *Melling v. Stralka*, 8th Dist. Cuyahoga No. 45622, 1983 WL 3092, 13 (June 16, 1983) (Markus, J., dissenting). Accordingly, a part-time prosecutor would not be able to obtain the client consent required to ameliorate the conflict created by representing criminal defendants in private practice.

Second, the representation of criminal defendants by a part-time prosecutor is a conflict of interest that cannot be overcome because it is prohibited by law. In an opinion addressing whether an assistant county prosecutor may simultaneously engage in the private practice of law, the Attorney General stated that a prosecutor "who engages in the private practice of law is clearly subject to divided loyalties when, as a private practitioner, he participates in matters that align him against the county prosecuting attorney." 2009 Ohio Atty.Gen.Ops. No. 2009-053, at 3. Given that the statutory legal advisor for Ohio prosecutors³ has determined that a prosecutor's private practice of law is incompatible with the prosecutor's public position when that private

³ See, R.C. 109.14.

practice involves the representation of defendants in criminal proceedings brought by the state or a municipal corporation that has entered into an agreement with the county prosecuting attorney whereby the county prosecuting attorney prosecutes criminal cases for the municipal corporation, such representation is a conflict of interest that is prohibited by law which, under Prof.Cond.R. 1.7(c)(1), cannot be ameliorated by client consent.

Revised Code 102.03 states that “[n]o present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.” R.C. 102.03 indicates that a part-time county prosecutor can not represent a criminal defendant in a matter in which the prosecutor personally participated.

Like the Code, the Rules indicate that a part-time prosecutor’s representation of criminal defendants against the state of Ohio would be a nonconsentable conflict of interest. The Rules also dictate that a part-time prosecutor can not represent criminal defendants against a municipal corporation when the prosecutor is authorized by agreement to prosecute criminal cases for the municipal corporation. The Board drew a similar conclusion in Advisory Opinion 88-008 as to a part-time prosecutor’s ability to represent criminal defendants. Accordingly, the Board hereby reaffirms that portion of Opinion 88-008.

Representation of Criminal Defendants by Other Lawyers in Part-Time Prosecutor’s Firm

In the 1988 Opinion, the Board also determined that “[m]embers of a part-time prosecuting attorney’s law office may not accept employment that the prosecutor is precluded from accepting.” Advisory Opinion 88-008 at 3. Because the Board concluded that part-time prosecutors could not represent criminal defendants against the state of Ohio in their private practices, the practical effect of this statement was that the other lawyers in a part-time prosecutor’s law firm also could not engage in criminal defense work. The basis for the Board’s conclusion was DR 5-105(D), which stated that “[i]f a lawyer is required to decline employment or to withdraw from employment [for a conflict of interest], no partner or associate of his or his firm may accept or continue such employment.” The Supreme Court adopted this provision of the Code effective October 5, 1970.

The concept of conflict imputation that originated in DR 5-105(D) is now found in Prof.Cond.R. 1.10(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.

Reading Prof.Cond.R. 1.10(a) alone, it would appear that the conflicts of part-time county prosecutors remain imputed to the other lawyers in the prosecutor's law firm, thereby prohibiting criminal defense work by those lawyers against the state and, in some instances, municipal corporations. However, when the Supreme Court adopted the Rules in 2007, it included new language from the Model Rules of Professional Conduct that speaks directly to lawyers in practice with lawyers who also work in the public sector. This language is found in Prof.Cond.R. 1.10(f), which states that "[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." The drafters of the Model Rules added this language in 2002 to "[clarify] that Rule 1.11 is intended to be the exclusive rule governing the imputation of conflicts of interest of current or former government lawyers." ABA Ctr. for Prof'l Responsibility, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2013*, at 264 (2013).

A "firm" is defined as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization, or the legal department of a corporation or other organization." Prof.Cond.R. 1.0(c). A government office is not a "firm" for purposes of the Rules. See Prof.Cond.R. 1.0, Comment [4A]. Because Prof.Cond.R. 1.10(f) refers to lawyers associated in a "firm" with "current government lawyers," it clearly governs the lawyers in a part-time prosecutor's private law firm.

Applying Prof.Cond.R. 1.10(f) to the present inquiry, the ability of the lawyers in a part-time county prosecutor's law firm to represent criminal defendants must be analyzed under Prof.Cond.R. 1.11, the special conflict rule for current government officers and employees, not Prof.Cond.R. 1.10, the general rule on imputation of

conflicts in firms. Again, Prof.Cond.R. 1.11(d)(1) obligates a part-time prosecutor to abide by the general conflict of interest provisions of Prof.Cond.R. 1.7, including the prohibition against representing current clients who are directly adverse. As previously stated in this Opinion, Prof.Cond.R. 1.7(a) indicates that part-time county prosecutors have a conflict of interest in criminal defense cases against the state and some municipal corporations, and under Prof.Cond.R. 1.7(b) and (c) this conflict may not be ameliorated. Nevertheless, the conflict imputation principles of Prof.Cond.R. 1.10 in the firm setting are not applicable to the conflicts of government lawyers addressed in Prof.Cond.R. 1.11(d)(1). See Prof.Cond.R. 1.11, Comments [2] and [3]. Reading all of these provisions together, the Board concludes that, unlike the Code, the Rules do not impute a part-time county prosecutor's conflict of interest in criminal representations against the state and certain municipal corporations to the other lawyers in the prosecutor's firm. For this reason, Advisory Opinion 88-008 is withdrawn in part.

Court-Appointed Criminal Defense Work by Other Lawyers in Part-Time Prosecutor's Firm

Although the Board's view is that the lawyers in a part-time county prosecutor's firm may represent criminal defendants against the state and municipal corporations, this option is not available in every criminal case. Under R.C. 120.39, "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..." This statutory prohibition "does not extend to retained counsel, but relates solely to counsel appointed at state expense to provide legal services to indigents." *In re Appeal of a Juvenile*, 61 Ohio App.2d 235, 238, 401 N.E.2d 937, 939 (1978). Despite the failure of a part-time prosecutor's government practice conflicts to impute to the other lawyers in the prosecutor's firm, the other lawyers are statutorily-prohibited from accepting court-appointed criminal cases if they are partners or employees of any prosecutor.

Additional Considerations when Lawyers and Part-Time Prosecutors Practice in the Same Firm

Prof.Cond.R. 1.11(c) addresses situations in which a former government lawyer acquires confidential government information, subsequently enters private practice, and considers the representation of a private client who is adverse to the person to whom the information pertains. The former government lawyer is prohibited from representing the private client if the confidential government information could be used to the person's disadvantage. The former government lawyer's firm is only permitted

to undertake or continue the representation if a timely screen is implemented and the lawyer does not receive any portion of the fee associated with the matter.

While Prof.Cond.R. 1.11(c) only appears to apply to former government lawyers, rather than current, part-time government lawyers, the Board believes that the approach to screening and fees set forth in Prof.Cond.R. 1.11(c) is an appropriate method for protecting the interests of the criminal defense clients of a part-time county prosecutor's law firm. To preserve information required to be kept confidential by Prof.Cond.R. 1.6, the part-time prosecutor should be screened from the firm's criminal defense matters. "Screened" means "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law." Prof.Cond.R. 1.0(l). Also, because the part-time prosecutor is disqualified under Prof.Cond.R. 1.7 from representing criminal defendants in cases brought by the state and possibly certain municipal corporations, the prosecutor should not be apportioned any part of the fee associated with the criminal defense representations of his or her colleagues. A screened lawyer may be able to receive compensation "established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified." Prof.Cond.R. 1.10, Comment [5C].

Within the county prosecutor's office, the part-time prosecutor should be screened from any criminal defense cases involving the lawyers in the part-time prosecutor's firm. *See* Prof.Cond.R. 1.11, Comment [2]. "Because of the special problems raised by imputation within a government agency, [Prof.Cond.R. 1.11(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." *Id.* Further, the part-time prosecutor should not handle criminal prosecutions in which the lawyers in the prosecutor's firm would be opposing counsel. In the opinion of the Board, this would be a material limitation conflict under Prof.Cond.R. 1.7 that cannot be ameliorated though consent due to the inability of the state to provide informed consent to the representation.

Additionally, a distinction must be drawn for conflicts of interest for lawyers in a firm with the elected part-time prosecutor and those in a firm with part-time assistant prosecutors, who are not elected officials. Revised Code Section 309.08 governs the powers and duties of the elected county prosecuting attorney. The powers and duties of the elected county prosecuting attorney include prosecuting all complaints, suits, and

controversies on behalf of the state of Ohio within the county where that prosecutor is elected. R.C. 309.08. As a result, the elected prosecutor is the lawyer of record on all matters involving the county prosecutor's office. Therefore, lawyers in an elected part-time prosecutor's firm may not represent criminal defendants in the county in which the part-time prosecutor is the elected official. However, lawyers in an elected part-time prosecutor's firm may represent criminal defendants in matters outside of the county in which the prosecutor is elected. This restriction does not apply to lawyers in a part-time assistant prosecutor's firm.

CONCLUSION:

In this Advisory Opinion, the Board revisits Opinion 88-008, which is hereby affirmed in part and withdrawn in part. The Rules of Professional Conduct prohibit part-time county prosecutors from representing criminal defendants against the state of Ohio, and if the part-time prosecutor is authorized by agreement to prosecute cases on behalf of a municipal corporation, he or she is also prohibited from representing criminal defendants against that municipal corporation. Such criminal defense representation is a conflict of interest under Prof.Cond.R. 1.7(a) that cannot be ameliorated through Prof.Cond.R. 1.7(b).

The imputation of a part-time county prosecutor's conflict of interest regarding criminal defense representations is governed by Prof.Cond.R. 1.10(f) and 1.11. These rules indicate that the prosecutor's conflict does not impute to the other lawyers who practice with the prosecutor in a firm. Accordingly, these lawyers are permitted to represent criminal defendants in cases against the state of Ohio and any municipal corporations for which the prosecutor is authorized to act. The lawyers may be prohibited from representing indigent defendants in court-appointed cases, however, as the partners and employees of county prosecutors are statutorily-prohibited from accepting such appointments.

To protect the interests of the criminal defense clients of a part-time county prosecutor's law firm, the Board recommends the approach set forth in Prof.Cond.R. 1.11(c) regarding former government lawyers in possession of confidential government information. A part-time county prosecutor also engaged in private practice should be timely screened from the firm's criminal defense matters and the prosecutor should not be apportioned any fee from these matters. Additionally, within the county prosecutor's office, the part-time prosecutor should be timely screened from criminal cases involving the other lawyers in the prosecutor's firm. Finally, the part-time prosecutor should not oppose lawyers from the prosecutor's firm. This scenario creates

a material limitation conflict under Prof.Cond.R. 1.7(a) that cannot be ameliorated pursuant to Prof.Cond.R. 1.7(b).

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.