

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 88-002

Issued: February 12, 1988

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: A county public defender running for county prosecuting attorney is not required, under the Code of Professional Responsibility, to resign or remove himself as county public defender. However, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own personal interests unless the client consents after full disclosure. We recommend that a public defender disclose, to potential clients, the fact that he or she is running for prosecutor.

OPINION: We have before us your request for an informal advisory opinion regarding a county public defender running for county prosecuting attorney. Your questions are as follows:

(1) May a county public defender appointed to that office pursuant to Section 120.15, O.R.C., continue to serve in that office subsequent to his formal public announcement and/or the declaration of his candidacy by filing the requisite petition that he is a candidate for the office of County Prosecuting Attorney?

(2) If the county public defender may continue to serve in that office contemporaneously with his candidacy for prosecuting attorney, what duties of disclosure are necessary to his prospective clients and what waivers or documentation should be obtained from them?

You also indicate in your request letter that your county is virtually a one political party county and therefore, the position of prosecutor will in all likelihood, be determined by the primary election.

There is nothing in the Code of Professional Responsibility which prohibits public defenders from continuing in that position after declaring their intention to run or filing their petition for candidacy for county prosecuting attorney. However, DR 5-101(A) of the Code does restrict the type of employment a lawyer can accept. This Code provision states:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests. Code of Professional Responsibility DR 5-101(A).

Thus, if the public defender's judgment on behalf of a client will be or reasonably may be affected by the fact that he is running for county prosecuting attorney then the public defender should not represent that client. In addition, if the public defender's judgment regarding his responsibilities as public defender is, or may be affected by his prosecutorial aspirations then, he should not continue to serve as a public defender. However, DR 5-101(A) allows the client to consent to the potential conflict after it has been fully disclosed by the lawyer.

In regard to your second question, we recommend that the public defender disclose the fact that he is running for county prosecuting attorney to potential clients. In the ABA standards relating to the defense function Rule 3.5(a) regarding disclosure states, "at the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him." ABA Standards: The Prosecution Function and The Defense Function 211 (1971). The commentary to this rule states that,

the obligation to disclose to a potential client any relationship to other parties or the subject matter of the case that might undermine or draw into question his ability to guard his client's confidences and zealously pursue his client's interest is a general one that extends to members of the legal profession in all the aspects of their activity. *Id.* at 211-212.

Based upon this standard and DR 5-101(A), it is our opinion that a public defender should disclose to a prospective client the fact that he or she is running for

county prosecuting attorney. Such an approach will hopefully reduce the number of ineffective assistance of counsel claims relating to failure to disclose what a client might later perceive to be a conflict.

In conclusion, it is our opinion and you are so advised that, a county public defender is not automatically required to resign from that position because he or she is running for county prosecuting attorney. This is true regardless of the likelihood that the public defender will be elected prosecuting attorney. However, if a public defender's professional judgment regarding a potential client's case is, or reasonably may be affected by the fact that he or she is running for prosecuting attorney then, the public defender may not accept such employment unless, the client consents after full disclosure.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.