

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 2003-7**

Issued December 5, 2003

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*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 judge may appoint an attorney to serve as a special prosecutor in the same county (and even in the same court) in which the attorney represents criminal defendants, if such appointment is only on an occasional basis and the appointee is competent to fill the special prosecutor position.

This Opinion modifies the advice in Opinion 94-6 that an attorney may not represent criminal defendants in a court on which he or she serves as special prosecutor. An attorney may represent criminal defendants in a court on which he or she serves as special prosecutor, if such appointment is only on an occasional basis and he or she is competent to fill the special prosecutor position.

**OPINION:** This opinion addresses a question regarding attorneys representing criminal defendants and serving as special prosecutors. In responding to the question, the Board advises only as to ethical issues regarding the application of the Ohio Code of Professional Responsibility. Advising as to legal issues regarding appointments of special prosecutors is outside this Board's advisory authority. See Gov.Bar R. V. §2(C).

Is it proper for a judge to appoint an attorney to serve as a special prosecutor in the *same* county in which he or she represents criminal defendants?

Special prosecutors are unique, being neither an elected prosecutor nor an assistant prosecutor. A special prosecutor stands in the place of the elected prosecutor, but only for the particular matter to which he or she is appointed.

A judge may appoint an attorney to serve as a special prosecutor for any of the following reasons:

To assist the prosecuting attorney, the board [of county commissioners] 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. §305.14(A) (West Supp 2003);

To perform the functions of the county prosecuting attorney when the office of the prosecuting attorney or the office of the attorney general is implicated in criminal activity investigated by an organized criminal task force. Ohio Rev Code Ann. §177.03 ((D)(2)(b) and (3) (West 2002);

To act in the prosecutor's place to bring and prosecute an action, when the office of prosecuting attorney is vacant, or the prosecuting attorney is absent, interested in the action in quo warranto, or disabled. Ohio Rev Code Ann. §2733.07 (West 1994);

To assist the prosecuting attorney in the trial of a case pending in court when it is the court's opinion that the public interest requires it. Ohio Rev Code Ann §2941.63 (West 1997).

Also, a Board of County Commissioners has authority to employ legal counsel, as provided in Section 309.09 of the Revised Code, to represent it in public business before such board and in prosecution or defense of any action or proceeding in which the board is a party or has an interest in its official capacity. Ohio Rev.Code Ann. §305.14(B) (West Supp. 2003).

Thus, like an elected prosecutor, the duties of a special prosecutor may involve the prosecution of criminal defendants on behalf of the State of Ohio *or*, may involve counseling, prosecuting, or defending county officers. Unlike elected and assistant prosecutors, a special prosecutor's duties are limited to a particular appointment, in a particular matter, at a particular time.

Longstanding is the view that elected county prosecutors and assistant county prosecutors must refrain from private representation of criminal defendants.

A prosecuting attorney may not, after taking office, continue to represent a client in a case in which the interests of such client and of the county are adverse. Ohio Attorney General Opinion 584 (1923).

An assistant prosecuting attorney is not permitted to represent clients in criminal proceedings either within or outside of the county in which he is appointed. Ohio Attorney General Opinion 71-050 (1971).

A part time prosecutor, whose duty it is to represent the State of Ohio in criminal cases, may not represent criminal defendants against the State of Ohio in his or her private practice. Ohio SupCt, Bd Comm'rs on Grievances and Discipline, Op. 88-8 (1988).

As to special prosecutors, this Board has expressed a different view—that the Ohio Code of Professional Responsibility is not an absolute bar to representing criminal defendants and serving as a special prosecutor. In Opinion 94-6, the Board advised:

It is proper under Ohio's Code of Professional Responsibility for an attorney who represents criminal defendants in private practice in a county to serve as a special county prosecutor in another county only under the following conditions: the attorney does not represent criminal defendants in the court in which he or she serves as special prosecutor; and the attorney accepts appointment only on an occasional or isolated basis.

Ohio SupCt, Bd Comm'rs on Grievances and Discipline, Op. 94-6 (1994).

The applicable rule within the Ohio Code of Professional Responsibility is DR 5-105. Under DR 5-105(A), "[a] lawyer shall decline proffered employment if the exercise of his [her] independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C)."

Under most circumstances, it is not likely that an attorney's occasional appointed service as a "special prosecutor" will adversely affect his or her professional judgment on behalf of the criminal defendants he or she represents. Nor, is it likely that an attorney would receive an appointment as a special prosecutor if the appointing judge thought it likely that his or her representation of criminal defendants would affect his or her professional judgment as a special prosecutor. (A judge is guided by Canon 3(C)(4) of the Ohio Code of Judicial Conduct to not make unnecessary appointments, to avoid nepotism and favoritism, and to exercise the power of appointment impartially and on the basis of merit.)

A special prosecutor is a distinct type of prosecutor. A special prosecutor represents the state for only a "moment in time" for only a "distinctive matter." A special prosecutor is an "outsider" to the prosecutor's office and that is precisely why the special prosecutor is appointed—an outsider is required. Because the appointment of an "outsider" is required, it is inevitable that most special prosecutors are attorneys in the private practice of law.

Because of the uniqueness of the role of a special prosecutor, the Board's view is that the Ohio Code of Professional Responsibility does not bar an attorney from serving as a special prosecutor in the same county (and even in the same court) in which the attorney represents criminal defendants.

Thus, the Board advises as follows. A judge may appoint an attorney to serve as a special prosecutor in the same county (and even in the same court) in which the attorney represents criminal defendants, if such appointment is only on an occasional basis and the appointee is competent to fill the special prosecutor position.

This opinion modifies the advice in Opinion 94-6 that an attorney may not represent criminal defendants in a court on which he or she serves as special prosecutor. An attorney may represent criminal defendants in a court on which he or she serves as special prosecutor, if such appointment is only on an occasional basis and he or she is competent to fill the special prosecutor position.

**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 Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.**