

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 89-23

Issued August 18, 1989

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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: An assistant county prosecutor, who serves as a city police officer within the same county, must choose between the two positions only if one position is subordinate to the other. The assistant county prosecutor may not prosecute any case in which he may be called to testify as a witness. The assistant county prosecutor should avoid any appearance of impropriety and act in a manner which promotes public confidence in the legal profession.

OPINION: We have before us your request for an advisory opinion on whether the Code of Professional Responsibility prohibits an attorney from simultaneously holding the positions of assistant county prosecutor and city police officer within the same county.

The ABA Standards relating to the prosecution function state that an important step in achieving the goal of professionalism is to make the position of prosecutor a full-time occupation for its holder. ABA Standards Relating to the Prosecution Function 58 (1971). However, the majority of prosecutors in the United States are not full-time positions. Wolfram, Modern Legal Ethics 454-455 (1986).

Dual employment of any kind must be evaluated on a case by case basis. In this instance, if the positions of assistant county prosecutor and city police officer are subordinate to, or in any way a check upon each other, then the lawyer involved must choose between the two positions. See, e.g., State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274 (C.C. Franklin Co., 1909). Furthermore, if it is physically impossible for one person to carry out the duties of both positions, that person must choose one position to pursue.

An attorney general opinion suggests several other variables which should also be considered when determining the

compatibility of two positions. These include:

- (1) the degree of remoteness of a potential conflict,
- (2) the ability or inability of the individual to remove himself from the conflict,
- (3) whether the individual exercises decision making authority in both positions,
- (4) whether the potential conflict involves primary functions of each position.

Ohio Atty. Gen. Op. 79-111 (1979).

Although county prosecutor and city policeman are not per se incompatible positions, considering these variables in any particular instance may require a different result. There are also situations where the prosecutor may have to decline a particular case. For example, under DR 5-101(B) and DR 5-102 (A), lawyers are required to withdraw from representation when they are aware of the possibility of being called as a witness in the same case. Therefore, it would be a conflict for an assistant prosecuting attorney to be called as a police witness in a case he is prosecuting. The rules of an advocate and witness are inconsistent because the advocate's function is to argue the cause of another while the witness' function is to state the facts objectively. Code of Professional Responsibility, EC 5-9.

We agree, however, that DR 5-101 does not require a person holding both positions to be excused from a case simply because an officer from the city police force of which he or she is a member may be called to testify.

Canon 9 recommends that lawyers avoid even the appearance of professional impropriety. When ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity of the legal profession. Code of Professional Responsibility, EC 9-2.

In conclusion, it is our opinion and you are so advised that the positions of county prosecutor and city police officer are not per se incompatible. Each case must, however, be evaluated individually. If one position is a check on, or subordinate to the other, for example, a conflict exists. Further, a conflict could exist in a particular case even if the positions are not inherently incompatible. Any time a case presents a conflict or the appearance of impropriety, the prosecutor should remove him or herself from the case.

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