

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 92-13

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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 in part-time private practice may share office space with or sublet office space from an attorney whose practice includes criminal defense representation provided the following: confidences and secrets of clients must be protected through separate filing systems and proper secretarial support; the appearance of impropriety must be diminished by office procedures that establish and support the separateness of the practices; and the prosecutor must screen the assistant prosecutor from cases represented by the attorney with whom the office space is shared.

OPINION: The question presented is whether an assistant county prosecutor in part-time private practice may share office space with or sublet office space from an attorney whose practice includes criminal defense representation.

A prosecutor represents the sovereign. Each county in Ohio elects a prosecuting attorney who by statute has authority to inquire into the commission of crimes within a county; to prosecute, on behalf of the state, complaints, suits and controversies in which the state is a party; and to serve as legal adviser to county officers and boards. See Ohio Rev. Code Ann. §§ 309.01, 309.08 and 309.09 (Baldwin 1985 and Supp. 1991). To carry out these duties, a prosecuting attorney may appoint assistant prosecutors as are necessary for the proper performance of the duties of the office. See Ohio Rev. Code Ann. § 309.06 (Baldwin 1985).

Despite the importance of the prosecutorial function, the assistant prosecutor position is a part-time position in some jurisdictions. As a consequence, it is not unusual for a part-time assistant prosecutor to also have a private part-time practice of law. It is also not unusual for a prosecutor to have a private practice of law, since by statute a prosecutor may elect to engage in the private practice of law. See Ohio Rev. Code Ann. § 325.11 (Baldwin Supp. 1991).

The prosecutor's and assistant prosecutor's duty to the sovereign requires that ethical restraints be placed upon his or her part-time practice of law. These restraints are often imputed to the attorneys with whom the part-time prosecutor or assistant prosecutor practices law. In the past, this Board advised that 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 private practice; nor, may members of a prosecuting attorney's law firm represent criminal defendants, if their colleague, as prosecutor, is precluded from accepting employment. Ohio SupCt Bd of Comm'rs on Grievances and Discipline, Op. 88-8 (1988). Such employment is adverse to the public and the conflict cannot be cured since the public cannot give consent. Id.

Disciplinary Rule 5-105 governs representation of clients with differing interests.

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).

(B) A lawyer shall not continue multiple 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 his [her] representation of another client, except to the extent permitted under DR 5-105 (C).

(C) In the situations covered by DR-5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he [she] can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his [her] independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his [her] or his [her] firm may accept or continue such employment.

It is not obvious that a part-time county prosecutor could represent the public and also privately represent criminal defendants; nor, is it possible for a part-time county prosecutor to obtain consent from the public. Therefore, such representation is prohibited under Disciplinary Rule 5-105 (A) and (C) and the disqualification is imputed to partners or associates through Disciplinary Rule 5-105 (D). See Ohio SupCt Bd of Comm'rs Op. 88-8 (1988). See also Ohio Rev. Code Ann. § 120.39 (A) (Baldwin 1987) (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 members or their offices are prohibited from being a partner or employee of any prosecuting attorney.) When a criminal defense attorney is employed as an associate in the same law firm as the county prosecutor, there is a duty to report such violation. See Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 89-9 (1989).

Across the nation, ethics committees disagree on whether or not it is proper for a part-time prosecutor to share office space with lawyers who represent criminal defendants. Some states find it proper. See Alabama State Bar, Op. RO 81-543 (1981); Virginia State Bar, Op. 574 (1984); Idaho State Bar, Op. 119 (undated) Missouri Bar Administration, Informal Op. 3 (1982). Other states find it improper. See Iowa State Bar Ass'n, Op. 81-21 (1981); New Hampshire Bar Ass'n, Op 12 (1982); State Bar of Michigan, Informal Op. CI-706 (1982); Illinois State Bar Ass'n Op. 783 (1982). An Ohio committee did not impute the disqualification to lawyers who share office space with an assistant county prosecuting attorney but suggested that under Canon 9 the lawyer decline proffered employment to represent a defendant in a criminal action where the assistant county prosecutor represents the State. See Ohio State Bar Ass'n, Op. 83-1 (1983). As to the propriety of a criminal defense lawyer renting or leasing office space to a prosecutor, ethics committees advise that certain conditions must be met. See State Bar of Michigan, Informal Op. RI-82 (1991) (proper under certain circumstances); and Virginia State Bar, Op. 1416 (1991) (improper under certain circumstances).

Disciplinary Rule 5-105(D) by its language does not impute disqualification to attorneys who share office space. In the past, this Board has not applied the rule of imputed disqualification to attorneys who share office space. Ohio SupCt Bd of Comm'rs on Grievances and Discipline, Op. 89-5 (1989). The Board advised that when two individual attorneys share office space, the facts and circumstances of their relationship will determine if they can ethically represent opposing sides in a case. Id.

In determining whether a part-time prosecutor can share office space with an attorney who does criminal defense work, consideration must be given as to whether there is an appearance of impropriety as proscribed by Canon 9. Consideration must also be given as to whether the nature of the arrangement allows both lawyers to protect the clients' confidences and secrets under Canon 4. A further consideration is that although it might not be ideal for a part-time prosecutor to share office space with an attorney who does criminal defense work, in reality, in some counties in Ohio it may be an economic necessity.

In office sharing arrangements confidences and secrets can be protected by separate filing systems and separate secretaries. If separate secretaries are not feasible, a shared secretary can be instructed on proper procedures to ensure that confidences and secrets are not violated. To diminish the appearance of impropriety, office procedures should establish and enforce the separateness of the practices. An appearance of impropriety is further diminished by the prosecutor screening the assistant prosecutor from cases represented by the attorney with whom the office space is shared. These considerations would apply regardless of whether the office space was shared or sublet.

In conclusion, it is the Board's opinion that an assistant county prosecutor in part-time private practice may share office space with or sublet office space from an attorney whose practice includes criminal defense representation, provided the following: confidences and secrets of clients must be protected through separate filing systems and proper secretarial support; the appearance of impropriety must be diminished by office procedures that establish and support the separateness of the practices; and the prosecutor must screen the assistant prosecutor from cases represented by the attorney with whom the office space is shared.

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.