

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 94-6**

Issued April 15, 1994

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*

**[Modified- by Opinion 2003-7 on Dec. 5, 2003]**

**SYLLABUS:** 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.

**OPINION:** The question presented is whether it is proper for an attorney who represents criminal defendants in private practice in a county to serve as a special county prosecutor in another county. The Board's authority to answer this question is limited to whether such conduct is proper under the Code of Professional Responsibility.

This is not the first time this Board has been asked to address the propriety of an attorney prosecuting and defending criminal cases at the same time. In Opinion 88-008, the Board advised that a county 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. That advice was based upon Disciplinary Rule 5-105 which requires consent to eliminate conflicts of interest between clients. Such consent cannot be accomplished since the public is a party and cannot consent. See Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 88-008 (1988). See also, Ohio Att'y Gen., Op. 71-050 ("An assistant prosecuting attorney is not permitted to represent clients in criminal proceedings either within or outside of the county in which he [she] is appointed.").

In this opinion the Board must again consider the propriety of prosecuting and defending criminal cases, but this time in the context of a defense attorney who is appointed special prosecutor. This opinion addresses only judicial appointments of special prosecutors to assist county prosecutors pursuant to Sections 2941.63, 2733.07 and 305.14(A) of the Ohio Revised Code.

Pertinent to this opinion are Disciplinary Rules 5-105 (A) and (C) and Canon 9 of the Ohio Code of Professional Responsibility.

**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).

**DR 5-105(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.

**Canon 9** A Lawyer Should Avoid Even the Appearance of Professional Impropriety

A special county prosecutor is different from a county prosecutor or an assistant county prosecutor in several ways. A special county prosecutor is appointed by a court to fulfill duties that are limited to the case to which he or she is appointed. See Ohio Rev. Code Ann. §§ 305.14(A) (Baldwin 1992), 2733.07 (Baldwin 1990), 2941.63 (Baldwin 1992). In contrast, a county prosecutor is an elected official who appoints his or her assistants. The county prosecutor and his or her assistant prosecutor have broad prosecutorial duties. See Ohio Rev. Code Ann. §§ 309.01 (Baldwin 1992), 309.06, 309.08 (Baldwin Supp. 1993).

Despite these differences, there are similarities. A prosecutor develops a continuing relationship with law enforcement authorities. A prosecutor has access to information. A prosecutor, obviously, has prosecutorial power. A special prosecutor would also develop relationships with law enforcement authorities; would also have access to information; and would also have prosecutorial power, albeit limited to a specific case.

The differences and similarities between special prosecutors and prosecutors or assistant prosecutors render the question presented difficult to answer. The similarities raise ethical concerns regarding the appearance of impropriety and conflict of interest. Yet, the differences suggest that the ethical concerns might be diminished through conditions that provide safeguards.

Several states have permitted attorneys engaged in criminal defense work to serve as special prosecutors with certain safeguards to eliminate ethical concerns. A Kansas ethics committee advised that a county attorney may employ a criminal defense lawyer to act as special prosecutor in a particular criminal case, even though during the case the special prosecutor and the county attorney would be adverse counsel in other criminal matters. The Kansas view was that the representation would not influence or reflect on the lawyer's ability to represent criminal defendants in other matters and it did not give rise to the appearance of impropriety under Canon 9 since the court could explain to the jurors or jury panel that the lawyer was appointed to act as a special prosecutor in that case only. Kansas Bar Ass'n, Op. 85-7 (1985). A New York committee advised that a special district attorney should be considered *sui generis* and not as a part-time prosecutor in determining the extent to which a special district attorney may engage in private practice of criminal law. Under the New York view, a special district attorney may engage in criminal defense work under certain circumstances without violating DR 5-105 and DR 9-101. The reasons for this view include the following: a conflict of interest does not arise because an appointed special district attorney does not present the same potential for public distrust and suspicion as would a regularly employed prosecutor representing criminal defendants; an appointed special district attorney is subject to careful scrutiny by the court; and a special prosecutor is appointed for the purpose of a single case. New York State Bar Ass'n, Op. 564 (1984).

A West Virginia ethics opinion, citing DR 5-101, 5-105, and 7-103, described limited circumstances in which an attorney maintaining a private criminal defense practice may be appointed as special prosecutor. The limited circumstances included a geographic location that precluded special appointment of an attorney from another circuit, a determination by the appointing judge that it is unfair to require appointees to give up their defense work for low pay, and the special prosecutor's private client's right to a speedy trial. However, even under the limited circumstances where appointment is proper, the West Virginia committee required the following safeguards: the arrangements regarding the special prosecutor's retention of private clients should be closely monitored by the court; the special prosecutor must not defend criminal cases before the same venire before which they acted as prosecutor; each client of the special prosecutor must be made aware of any possible divergent interests and that no special benefit or harm will result to the client so that each client may freely evaluate the original decision to retain the special prosecutor as defense counsel; and notice must be given to the regular prosecutors and assistants identifying the special prosecutor's clients and advising them that the special

prosecutor is entitled to no more consideration or information than any other defense counsel. West Virginia State Bar Op. 81-9 (1982).

Nevertheless, the view that it is proper under certain circumstances for a special prosecutor to privately represent criminal defendants is not unanimous. For example, an Alabama committee advised against such conduct in response to an inquiry as to whether an attorney engaged in the private practice of law including criminal defense work could be hired as a special prosecutor on a case-by-case basis. The Alabama committee referred to Disciplinary Rule 5-105 (D), Section 7 of the definitions section of their Code of Professional Responsibility, and to Alabama statutes. Alabama State Bar, Op. 85-01 (1985). An Arizona committee answered in the negative an inquiry regarding whether an attorney in private practice who represented criminal defendants may serve as a special prosecutor in a criminal case. The ethical grounds for the committee's view were summarized as the potential for conflict of interests for the attorney as to the private clients and the public client, the possibility of disclosure of client confidences, and the likelihood of adverse public reaction. The Arizona committee cited DR 4-101, 5-101, 5-105 and Canon 9. State Bar of Arizona, Op. 74-31 (1974).

In conclusion, it is this Board's advice that 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. The Board reaches this conclusion on the basis that neither DR 5-105 nor Canon 9 would be violated. Disciplinary Rule 5-105 would not be violated since the appointment of a special county prosecutor by a judge in effect gives public consent to the potential conflict of interest as required by the rule. Canon 9 would not be violated since the limited scope of a special prosecutor's duties on an occasional or isolated basis does not create an appearance of impropriety that would outweigh the public's interest in ensuring that offenses are prosecuted swiftly.

**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.**