

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 94-14

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is proper for an assistant county prosecutor in part-time private practice to share office space with an attorney whose practice includes criminal defense representation. Further, these attorneys may co-counsel in civil cases not related to or in conflict with the prosecutor's office. However, the office sharing attorneys must comply with the ethical standards within the Ohio Code of Professional Responsibility by protecting confidences and secrets of clients through separate filing systems and proper secretarial support, by utilizing office procedures that establish and support the separateness of their practices, by using separate firm names and letterhead, and by complying with the restrictions on division of fees by lawyers not in the same firm.

OPINION: This opinion addresses the following question regarding the private practice of law by an assistant prosecutor who shares office space with an attorney whose practice includes criminal defense representation:

Is it proper for an assistant county prosecutor in part-time private practice, who shares office space with an attorney whose practice includes criminal defense representation, to co-counsel with that attorney in civil cases not related to or in conflict with the prosecutor's office?

Protection of the public is such an important function that prosecutors are held to high standards. When a prosecutor or an assistant prosecutor engages in the private practice of law, ethical restraints are imposed. The restraints are in deference to the prosecutor's duty to the sovereign.

The most extensive restraint is placed upon criminal representation. This Board has 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 his or her private practice." Ohio SupCt, Bd of Comm'rs on Grievances & Discipline, Op. 88-008 (1988). The restraint is extended to firm members. "Members of a prosecuting attorney's law firm may not represent criminal defendants if their colleague, as prosecutor, is precluded from accepting employment under DR 5-105." *Id.* These restraints are to be heeded. When a criminal defense attorney is employed as an associate in the same law firm as the county prosecutor, there is a duty under DR 1-103 to report the violation. See Ohio SupCt, Bd of Comm'rs on Grievances & Discipline, Op. 89-9 (1989).

Yet, in this Board's view it not necessary to impute the restraint on representation of criminal defendants to an attorney who shares office space with an assistant county prosecutor. "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." Ohio SupCt Bd of Comm'rs on Grievances & Discipline, Op. 92-13 (1992).

Arising from opinion 92-13 comes the question presented in this opinion -- whether attorneys who share office space may co-counsel on a civil case when one attorney is an assistant prosecuting attorney in part-time private practice and the other attorney's practice includes criminal defense representation. The ethical concern is whether an office sharing arrangement and a collaborative professional relationship on civil cases suggest to the public that the defense attorney is in a position to influence the conduct of the assistant prosecutor. There is little authority on the issue. A Missouri ethics opinion advises that a part-time prosecutor and a part-time special assistant public defender may co-counsel for a plaintiff in a personal injury case even while the defender is representing a convicted defendant in a case on appeal. Missouri Bar Admin., Informal Op. 1 (Jan. 1, 1982).

Under Canon 9 of Ohio Code's of Professional Responsibility, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." In this Board's view the ethical concern that clients or the public might be led to believe that the lawyers have such a close personal and professional relationship as to imply special advantage or unusual influence is too remote to give the appearance of impropriety. If the concern does exist, it evaporates when the office sharing attorneys maintain their private practices in a manner that complies with the Ohio Code of Professional Responsibility. Under DR 4-101, the office sharing attorneys must protect confidences and secrets by utilizing separate filing systems and proper secretarial support. Under Canon 9, they must utilize office procedures that establish and support the separateness of their practices. Under DR 2-102, they must use separate firm names and letterhead. Under DR 2-107, they must comply with the restrictions on division of fees by lawyers who are not in the same firm. See Ohio SupCt Bd of Comm'rs on Grievances and Discipline, Op. 92-13 (1992), 91-9 (1991), 91-5 (1991), 89-36 (1989) and 88-19 (1988).

In conclusion, this Board advises that it is proper for an assistant county prosecutor in part-time private practice to share office space with an attorney whose practice includes criminal defense representation. Further, these attorneys may co-counsel in civil cases not related to or in conflict with the prosecutor's office. However, the office sharing attorneys must comply with the ethical standards within the Ohio Code of Professional Responsibility by protecting confidences and secrets of clients through separate filing systems and proper secretarial support, by utilizing office procedures that establish and support the separateness of their practices, by using separate firm names and letterhead, and by complying with the restrictions on division of fees by lawyers not in the same firm.

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.