

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 95-11

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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: It is not per se improper for different attorneys from the same prosecutor's office to simultaneously handle the prosecutions of family or household members charged with committing the offense of domestic violence against each other. The determination must be made on a case-by-case basis.

OPINION: This opinion addresses the propriety of attorneys in the same prosecutor's office prosecuting family or household members charged with committing domestic violence against each other.

Is it proper for different attorneys from the same prosecutor's office to simultaneously handle the prosecutions of family or household members charged with committing the offense of domestic violence against each other?

As background, under Section 2935.03 (B) (3) (b) of the Ohio Revised Code, when a peace officer has reasonable grounds to believe that the offense of domestic violence has been committed and reasonable cause to believe that family or household members have committed the offense against each other it is the "preferred course of action" to arrest the person whom the officer has reasonable cause to believe is the primary physical aggressor. The peace officer may also arrest the nonprimary physical aggressor, although the statute expressly states there is "no preferred course of action" as to the nonprimary physical aggressor. See Ohio Rev. Code Ann. § 2935.03 (B) (3) (b) (Baldwin Supp 1995).

When both the alleged primary and nonprimary physical aggressor are arrested, the prosecutor's office is faced with prosecutorial decisions as to both individuals. Initially, the prosecutor's office would be reviewing the facts and evaluating credibility to determine whether to prosecute one or both. Later, the prosecutor's office might be prosecuting a defendant who is also the prosecution's witness in the other case. However, in some cases there would be independent witnesses who would make it unnecessary for a defendant to serve as a prosecution witness. In other cases there would be mutual pleas.

A prosecutor, of course, must seek justice. This is eloquently stated within Ethical Consideration 7-13 of the Ohio Code of Professional Responsibility.

EC 7-13

The responsibility of a public prosecutor differs from that of the usual advocate; his [her] duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he [she] also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him [her], that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further a prosecutor should not intentionally avoid pursuit of evidence merely because he [she] believes it will damage the prosecution's case or aid the accused.

Thus, a prosecutor must select the cases to prosecute, advocate each case fairly in the public interest, give the accused the benefit of reasonable doubt, disclose evidence that tends to negate the guilt of the accused, and must not intentionally avoid pursuit of evidence even if the evidence will damage the prosecution's case. These functions must be carried out in each prosecution. The question becomes whether these functions can be carried out fairly by a prosecutor's office with different attorneys from the office simultaneously handling the prosecutions of family or household members charged with committing the offense of domestic violence against each other. It is the Board's view that it is possible to do so.

A prosecutor has an unwavering duty to seek justice. The prosecutor's loyalties are to the public, not to an individual. The simultaneous prosecutions of family or household members charged with committing the offense of domestic violence against each other cannot be considered the functional equivalent of representing opposing parties. A prosecutor may ethically challenge the credibility of a victim/witness/defendant. A victim/witness/defendant is not

the client of a prosecutor. The prosecutor represents the state and has a distinct role in seeking justice.

There is no inherent conflict of interest. There are, of course, considerations other than conflict of interest. The prosecutor must abide by DR 7-103 (A) and (B).

DR 7-103

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he [she] knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he [she] has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

The prosecutor must also abide by DR 7-104 when communicating with the victim/witness who is also a defendant. Under DR 7-104 (A) (1), if the defendant is represented by counsel, the prosecutor should receive permission from counsel or have the counsel present during communications on the subject of representation. Under DR 7-104 (A) (2), if the victim/witness/defendant is unrepresented, the prosecutor must not give advice, other than the advice to secure counsel.

Further, in the spirit of fairness, and perhaps to protect constitutional rights regarding self-incrimination, it would be prudent for the prosecutor to inform the victim/witness who is also a defendant that the information provided to the prosecuting attorney is not confidential and may be used against him or her. "Whenever a prosecutor knows or has reason to believe that the conduct of a witness to be interviewed may be the subject of a criminal prosecution, the prosecutor or the prosecutor's investigator should advise the witness concerning possible self-incrimination and the possible need for counsel." American Bar Association Standards for Criminal Justice Standard 3-3.2 (b) (1980).

Outside Ohio, ethics committees have advised that it is ethical for a prosecutor's office to handle prosecutions involving victims who are also being prosecuted. In Alabama, a district attorney may prosecute a case where the victim, who is the main witness, is also being prosecuted in another matter, no matter whether the second case is unrelated, related, or arose from the same incident. See Alabama State Bar, Op. 91-44 (1992). In Virginia, a commonwealth's attorney may prosecute all four

parties to a dispute even though three are named in cross-warrants, such that they all play multiple roles as defendants, witnesses, and victims. See Virginia State Bar, Op. 1415 (1991). In West Virginia, a prosecutor may handle cross-complaints and may consolidate the proceedings since the prosecutor represents the state, not the complaining witnesses. See West Virginia State Bar, Op. 90-2 (undated). The West Virginia ethics committee did advise that "[a] preliminary statement regarding non-confidentiality of information gained in the course of cross-complaint representation would appear to be appropriate . . . complaining witnesses in cross-complaint situations should be advised that the information which they provide the Prosecuting Attorney is not confidential and may, in fact, be used against them." Id.

Under Ohio law, family or household members may be charged with domestic violence against each other. See Ohio Rev. Code Ann. 2935.03 (B) (3) (b) (Baldwin Supp 1995). Decisions regarding prosecution are and should be within the broad discretionary powers granted to a prosecutor by law. See Ohio Rev. Code Ann. § 309.08 (Baldwin 1994). If a prosecutor determines that the charges are supported by probable cause, the prosecutor must determine on an individual basis whether different attorneys from the same prosecutor's office can ethically prosecute both cases. Each case would require a factual assessment beyond the purview of this opinion.

In conclusion, it is the Board's view that there is no inherent conflict of interest for different attorneys from the same prosecutor's office to simultaneously handle the prosecutions of family or household members charged with committing the offense of domestic violence against each other. Thus, this Board advises that it is not per se improper for different attorneys from the same prosecutor's office to simultaneously handle the prosecutions of family or household members charged with committing the offense of domestic violence against each other. The determination must be made on a case-by-case basis. Through this opinion, the Board is not advising upon legal or constitutional issues outside the scope of the Board's authority.

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.