

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 96-6**

Issued August 9, 1996

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*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 under the Ohio Code of Professional Responsibility for a lawyer to represent clients in civil matters in a municipal court while serving as a city council person for the municipality if certain restrictions are heeded. The lawyer may not accept private employment in a matter in which he or she has or had substantial responsibility as a city council person. The lawyer may not state or imply that he or she can influence improperly or upon irrelevant grounds a tribunal. The lawyer may not use his or her public position as council person to influence a tribunal to act in favor of a client or in favor of himself or herself. The lawyer may not accept private employment in matters adverse to the municipality, the officials, or the employees of the municipality.

It is improper under the Ohio Code of Professional Responsibility for a lawyer to represent, privately or by court appointment, criminal defendants in municipal court while serving as a city council person for the municipality.

**OPINION:** This opinion addresses whether it is proper under the Ohio Code of Professional Responsibility for a city council person to practice law in a municipal court in the city in which he or she serves as council person.

1. Is it proper for a lawyer to represent clients in civil matters in a municipal court while serving as a city council person for the municipality?
2. Is it proper for a lawyer to undertake private or court appointed criminal defense representation in a municipal

court while serving as a city council person for the municipality?

### Introduction

In this opinion the Board does not address the application of Ohio Ethics Law to the questions raised since that interpretation falls within the authority of the Ohio Ethics Commission pursuant to Section 102.01(F)(3) and 102.08(A), (B) of the Ohio Revised Code. The questions are answered by determining whether the conduct is proper under the Ohio Code of Professional Responsibility. To make this determination, it is necessary to briefly examine Ohio law governing local governments and municipal courts.

Municipal courts are statutory courts established by the state legislature pursuant to constitutional authority. *See* Ohio Const. art. IV, §1. The compensation of municipal judges is set by law and is paid from the state, county, and city treasuries. *See* Ohio Const. art. IV, § 6(B); Ohio Rev. Code Ann. §§ 141.04(A)(5), 1901.11(B), (C) (Baldwin 1994). Operating costs of municipal courts are paid by cities and counties as prescribed by statute. *See* Ohio Rev. Code Ann. §§ 1901.024, 1901.026 (Baldwin 1994).

In Ohio, there are different forms of local government from which citizens may choose. There are four statutory plans of local government and a charter plan of local government. *See* Ohio Const. art. XVIII, §§ 2, 7; Ohio R.C. Chapters 705, 731, 733 (Baldwin 1994 & Supp. 1996). It is outside the scope of this opinion to advise upon the questions raised with regard to each other form of government. This opinion refers to a statutory plan of government formed pursuant to Chapter 731 of the Ohio Revised Code. Nevertheless, the advice contained within may have applicability for attorneys who serve as part of a legislative authority in other forms of local government.

A city council person is an elected member of the legislative authority of a city. *See* Ohio Rev. Code Ann. § 731.03 (Baldwin 1994). As a member of the legislative authority of a city, a council person has a role in appropriating money for the costs of operating a municipal court and for the compensation of the municipal judges. *See* Ohio Rev. Code Ann. §§ 705.18, 1901.11, 1901.026 (Baldwin 1994). In carrying out the functions of

local government, a city council person has a working relationship with police officers and the law director which may involve some perception of authority. Examples of these relationships are discussed within this opinion.

With this background, the Board sets forth several disciplinary rules and an ethical consideration from the Ohio Code of Professional Responsibility that are pertinent to the questions raised.

DR 8-101(A)(2) A lawyer who holds public office shall not: Use his [her] public position to influence, or attempt to influence, a tribunal to act in favor of himself [herself] or of a client.

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

DR 9-101(B) A lawyer shall not accept private employment in a matter in which he [she] had substantial responsibility while he [she] was a public employee.

DR 9-101(C) A lawyer shall not state or imply that he [she] is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

EC 8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his [her] personal or professional interests are or foreseeably may be in conflict with his [her] official duties.

### Question One

Is it proper for a lawyer to represent clients in civil matters in a municipal court while serving as a city council person for the municipality?

A threshold concern is that a lawyer who is a city council person has public responsibilities as to the appropriation of funds to operate a municipal court and to compensate the municipal judges. Does this serve as a bar under the Ohio Code of Professional Responsibility to the lawyer's appearance in a municipal court? The Board finds no basis within the Code for such an absolute prohibition. The judicial branch of government is independent of the legislative branch of government. Judges are bound to maintain this independence through the Code of Judicial Conduct. The act of appropriating money for the courts is not an act of destroying or influencing the independence of the judiciary. If it were, there could be no independent judiciary in our state or in a federal constitutional scheme of government. Thus, the Board rejects this concern and finding no rule within the Ohio Code of Professional Responsibility to justify an absolute bar to a lawyer's appearance in a municipal court when the lawyer is a city council person with public responsibilities as to appropriation of operating funds to a municipal court and compensation to municipal judges, the Board looks to other concerns.

There are rules within the Ohio Code of Professional Responsibility that would prohibit or limit certain representations. A lawyer who is a city council person would be prohibited under DR 9-101(B) from accepting private employment in any matter in which he or she had substantial responsibility as a city council member. A lawyer who is a city council person would be prohibited under DR 9-101(C) from stating or implying that he or she could influence improperly or upon irrelevant grounds a tribunal. A lawyer who is a city council person would be prohibited under DR 8-101(A)(2) from using the public position to influence a tribunal to act in favor of the attorney or the client. It would be particularly offensive for a lawyer through any words or conduct to suggest that a legal matter for which the attorney provides representation could be influenced by the attorney's act of appropriating operating expenses for a court or compensation for the judges. A lawyer who is city council person would be prohibited under Canon 9 from representing a client in a civil matter adverse to the municipality or the officials or employees of the municipality since it would create an appearance of impropriety. The aspirational advice within EC 8-8 supports these restrictions.

Ethics committees in other states advise that a lawyer who is a council person should be prohibited from representing clients in certain matters. *See* Ethics Advisory Panel, Rhode Island SupCt, Op. 93-82 (1993) (suits against a mayor, treasurer, and council); Connecticut Bar Ass'n, Op. 91-17 (1991) (personal injury suit against town) Connecticut Bar Ass'n, Op. 37 (1985) (representation against the municipality or before any municipal board, commission, authority, or agency); Advisory Comm. on Professional Ethics, SupCt New Jersey Op. 538 (1984) (representation of builder in matters involving the city); State Bar of Michigan, Op. RI-126 (1992) (suits adverse to city housing authority); State Bar Of California, Op. 1981-63 (1981) (suits against city); State Bar of Arizona, Op. 82-14 (1982) (suits in which city is defendant); New Hampshire Bar Ass'n, Op. 1988-9/12 (1989) (representation before city land use board or in actions against city).

This Board agrees that certain restrictions are required. It is this Board's view that it is proper under the Ohio Code of Professional Responsibility for a lawyer to represent clients in civil matters in a municipal court while serving as a city council person for the municipality if certain restrictions are heeded. The lawyer may not accept private employment in a matter in which he or she has or had substantial responsibility as a city council person. The lawyer may not state or imply that he or she can influence improperly or upon irrelevant grounds a tribunal. The lawyer may not use his or her public position as council person to influence a tribunal to act in favor of a client or in favor of himself or herself. The lawyer may not accept private employment in matters adverse to the municipality, the officials, or the employees of the municipality.

### Question Two

Is it proper for a lawyer to undertake private or court appointed criminal defense representation in a municipal court while serving as a city council person for the municipality?

Ethics committees in other states prohibit or limit the representation of criminal defendants by lawyers who serve on city council. *See e.g.*, State Bar of Texas, Op. 497 (1994); State Bar of Arizona, Op. 93-07 (1993); Bar Ass'n of Nassau County, Op. 93-20 (1993); Alabama State Bar, Op. RO 90-54 (1990); Bd of Overseers of the Bar of Maine, Op. 45 (1983); South

Carolina Bar, Op. 82-11 (1982); *But cf*, New Hampshire Bar Ass'n, Op. 1992-93/2 1992 (attorney on city council may represent criminal defendants prosecuted by the city and in which city police are officers). Canon 9 impropriety is often cited as a basis for the restrictions. Other rules such as DR 5-101(interests of lawyer impairing independent judgment), DR 5-105 (interests of client impairing independent judgment), and EC 8-8 (personal or professional interests in conflict with official duties) are sometimes cited.

In this Board's view, a lawyer should not undertake private or court appointed criminal defense representation in a municipal court while serving as a city council person for the municipality because it creates an appearance of impropriety and may appear to place personal or professional interests in conflict with official duties. Such representation is particularly inappropriate when the criminal defendant has been investigated or arrested by a police officer of the city where the attorney serves as council person and when the criminal defendant is being prosecuted by the city's law director.

Albeit, in a statutory form of government under Chapter 731 of the Ohio Revised Code the legislative authority has legislative power only, does not perform administrative duties, and does not appoint or confirm any officer or employee of city government except of its own body. *See* Ohio Rev. Code Ann. § 731.05 (Baldwin 1994). City council does not have management or control over the police department. The mayor appoints a director of public safety to serve as executive head of the police department. *See* Ohio Rev. Code Ann. §§ 737.01, 737.02, 737.05 and 737.06, 737.12 (Baldwin 1994). Nevertheless, city council does work collaboratively with the mayor and the police department in administering local government. City council does by ordinance or resolution determine the number of officers, clerks and employees in each department of the city government including the police department and fixes by ordinance or resolution their salaries and compensation. *See* Ohio Rev. Code Ann. §§ 731.08, 737.05 (Baldwin 1994).

City council also has a relationship with the city law director. The city law director is an elected position. *See* Ohio Rev. Code Ann. § 733.49 (Baldwin 1994). The city law director serves as legal counsel and attorney to the directors and officers of the municipal corporation. *See* Ohio Rev. Code

Ann. § 733.51 (Baldwin 1994). The city law director is prosecuting attorney of the mayor's court and when required to do so by resolution of the legislative authority of the city prosecutes or defends on behalf of the city, all complaints, suits, and controversies in which the city is a party, and such other suits, matters, and controversies as he or she is, by resolution or ordinance, directed to prosecute. *See* Ohio Rev. Code Ann. § 733.52, 733.53 (Baldwin 1994). When an officer of a city or the legislative authority of the city has doubts concerning the law in any matter in an official capacity, and desires the opinion of the law director, the director replies to such an inquiry. *See* Ohio Rev. Code Ann. § 733.54 (Baldwin 1994).

It is this Board's view that when a council person is part of the legislative authority of a municipality and the police officers and law director are employees of the municipality, there exists at least some perceived or actual authority and oversight giving rise to an appearance of impropriety. This appearance of impropriety exists regardless of whether a council person has any actual authority or supervision as to the employment or performance of the police officers or the law director of the city. Thus, the Board advises that it is improper under the Ohio Code of Professional Responsibility for a lawyer to represent, privately or by court appointment, criminal defendants in municipal court while serving as a city council person for the municipality.

**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.**