

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 97-4**

Issued June 13, 1997

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*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:** Under DR 9-101(B) and DR 9-101(C) of the Ohio Code of Professional Responsibility and Section 102.03(A)(1) of the Ohio Revised Code, a judicial law clerk who is permitted by a common pleas court or a common pleas court judge to engage in the outside practice of law may not privately represent a client on any matter pending before the judge he or she serves or before any other judge in the same division of the court where the judge serves. These restrictions extend to members and associates of the law firm that privately employs the clerk as an attorney in the part-time practice of law.

Under Canon 3(E)(1) of the Ohio Code of Judicial Conduct, a common pleas court judge should not preside in a case in which a litigant is represented by an attorney in the law firm that employs the judge's law clerk in the part-time practice of law.

Under Canons 3(C)(1) and 3(C)(4) of the Ohio Code of Judicial Conduct, a common pleas court judge should not continue to appoint attorneys to represent indigents in criminal cases when the attorneys are members or associates of a law firm that employs the judge's law clerk in the part-time practice of law.

**OPINION:** This opinion addresses questions regarding the outside practice of law by a judicial law clerk employed by a common pleas court in Ohio.

Is it proper for a full-time law clerk for a judge of a common pleas court to concurrently engage in the part-time private practice of law?

Is it proper for a common pleas court judge to preside in a case in which a litigant is represented by a law firm that employs the judge's law clerk in the part-time practice of law?

Is it proper for a common pleas court judge to continue to appoint attorneys to represent indigents in criminal cases when the attorneys are members or associates of a law firm that employs the judge's law clerk in the part-time practice of law?

Is it proper for a full-time law clerk for a judge of a common pleas court to concurrently engage in the part-time private practice of law?

A judicial law clerk is governed both as an attorney and as a judicial employee. As a judicial employee of a state court in Ohio, a law clerk is subject to Ohio Ethics Law and to the rules and policies of the court he or she serves. As an attorney, a law clerk is subject to the Ohio Code of Professional Responsibility. A judge who appoints a judicial law clerk is subject to these authorities, as well as to the Ohio Code of Judicial Conduct.

The outside private practice of law by a judicial law clerk is not prohibited under the Ohio Code of Professional Responsibility, Ohio Ethics Law, or the Ohio Code of Judicial Conduct. It is primarily an issue for each court to decide. [For advice regarding the outside practice of law by a non-judicial public official or employee see Ohio Ethics Commission, Op. 96-004 (1996).]

A law clerk should review and abide by a court's policies or rules regarding outside employment. Courts must operate in a manner that assures each citizen that cases will be decided fairly and impartially. The conduct of each court employee is crucial to maintaining the public's confidence in the integrity and impartiality of the judiciary.

Some courts have a clear policy prohibiting the outside practice of law by a court employee who is an attorney. For example, the Supreme Court of Ohio sets forth its policy in Section V of the Employee Code of Conduct of the Supreme Court of Ohio. "Any attorney employed by the Court should not practice law in any federal, state, or local court, except in an official capacity, and should not perform legal services for any private client for compensation." The rule permits narrow exceptions for legal work necessary to the management of personal and family affairs. *See Employee Code of Conduct of the Supreme Court of Ohio*, Section V (1989). Federal judicial employees also have restrictions. Canon 4(D) of the Code of Conduct for Judicial Employees prohibits the practice of law by judicial employees of the Judicial Branch of federal government, allowing narrow exceptions for pro se, personal, family, and pro bono activities. *See Code of Conduct for Judicial Employees*, Committee on Codes of Conduct, Judicial Conference of the United States (Nov. 1996).

Policies or rules prohibiting the outside practice of law by a court employee reflect an effort by a court to remain beyond reproach. By prohibiting a judicial law clerk from the outside practice of law, a court can avoid appearances of impropriety and conflicts of interest that will arise when a confidential assistant to a judge practices law.

Nevertheless, some courts may determine that the outside practice of law by a judicial law clerk is acceptable if conducted in an ethical manner. For example, a court might decide it is necessary for a part-time judicial law clerk to practice law outside his or her public employment in order to supplement his or her public earnings.

If a court or a judge permits a law clerk to engage in the outside practice of law, the public employment and the outside practice of law must be conducted in a manner

consistent with the Ohio Code of Professional Conduct and Ohio Ethics Law. The pertinent rule under Ohio Ethics Law is Section 102.03(A)(1) of the Ohio Revised Code (Baldwin Supp. 1997).

R.C. §102.03(A)(1) No present or former public official or employee shall, during his [her] public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which he [she] personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

The term “matter” in the above rule “includes any case, proceeding, application, determination, issue, or question. The term “represent” “includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.” *See* Ohio Rev. Code Ann. § 102.03(A)(5) (Baldwin Supp. 1997).

The pertinent rule in the Ohio Code of Professional Responsibility is DR 9-101.

#### DR 9-101 AVOIDING EVEN THE APPEARANCE

DR 9-101(A) A lawyer shall not accept private employment in a matter upon the merits of which he [she] has acted in a judicial capacity.

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.

A judicial law clerk, as a confidential assistant to a judge and as a member of a judge’s staff, must act ethically, responsibly, and with dignity appropriate to the judicial position. A law clerk should observe high standards of fidelity and diligence. Public confidence in the fairness and impartiality of judicial decisions is paramount. For these reasons, the Board interprets the above rules stringently in answering the question raised.

First, it is the Board’s view that under DR 9-101(B) and R.C. 102.03(A)(1) a judicial law clerk may not privately represent a client on any matter pending before the judge he or she serves. A judge has substantial responsibility and personal participation in every case pending in his or her court. By serving as a confidential assistant to a judge, a judicial law clerk is deemed to have substantial responsibility and personal participation in every case pending before the judge.

Second, it is the Board’s view that under DR 9-101(C) a judicial law clerk may not privately represent clients through court appearance or legal work performed outside the

courtroom on any matter pending before other judges in the same division of a common pleas court as the judge he or she serves. A judicial law clerk has some level of prominence within the division of the court on which he or she serves that could be perceived by the public as an improper influence in matters pending before the judge served or before other judges in the same division of the court. An attorney's private practice of law in the same division of the court of his or her public employment as a judicial law clerk is conduct that implies or may imply an ability to influence improperly a tribunal.

Third, it is the Board's view that since a judicial law clerk should not practice law in matters pending before the judge he or she serves or before other judges in the same division of the court then no lawyer in a law firm that employs the clerk in the practice of law should undertake representation in the matter. The extension of this restriction to lawyers in the firm is a measure necessary to maintain public confidence in the fair and impartial operation of the courts. The public would not be instilled with such confidence if attorneys who are members of the law firm that employs the judicial law clerk represent clients before any of the judges in the division of the court where the judicial law clerk serves.

These restrictions are not unique or unwarranted. The Code of Judicial Conduct places similar restrictions on the practice of law by part-time judges and part-time referees/magistrates. Under Section (A)(2) of Compliance With the Code of Judicial Conduct, a part-time referee/magistrate "should not practice law in the court on which he [she] serves or in any court subject to the appellate jurisdiction of the court on which he [she] serves, or act as lawyer in a proceeding in which he [she] has served as a judge or in any other proceeding related thereto." *See* Ohio SupCt., Bd of Comm'rs on Griev & Disc, Ops. 87-014 (1987), 87-036(1987), 87-038 (1987).

In other states, ethics committees have advised that a part-time judicial clerk may not practice in the court where the judge serves. *See e.g.* State Bar of Michigan, Op. CI-951 (1983), Philadelphia Bar Ass'n, Op. 80-10 (undated). One state permitted a part-time assistant district attorney to form a partnership with a part-time judicial law clerk, but advised that the clerk could not appear before any judge of the county court or practice criminal law and the assistant district attorney could not appear before the judge for whom the partner clerks. *See* New York State Bar Ass'n, Op. 672 (1995). One state advised that a superior court judge may not allow his law clerk to prepare appellate briefs on behalf of criminal defendants sentenced to death. *See* State Bar of Georgia, Op. 38 (1984).

In conclusion, this Board advises that under DR 9-101(B) and DR 9-101(C) of the Ohio Code of Professional Responsibility and Section 102.03(A)(1) of the Ohio Revised Code, a judicial law clerk who is permitted by a common pleas court or a common pleas court judge to engage in the outside practice of law may not privately represent a client on any matter pending before the judge he or she serves or before any other judge in the same division of the court where the judge serves. These restrictions extend to members and associates of the law firm that privately employs the clerk as an attorney in the part-time practice of law.

## Question Two

Is it proper for a common pleas court judge to preside in a case in which a party is represented by an attorney in the law firm that employs the judge's law clerk in the part-time practice of law?

Canon 3(E)(1), as amended effective May 1, 1997, of the Ohio Code of Judicial Conduct requires that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." This rule was formerly numbered Canon 3(C)(1). Under the general standard of this rule "[a]ny conduct that would lead a reasonable man [person] knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification." E.W. Thode, *Reporter's Notes to Code of Judicial Conduct*, 60 (1973). In this Board's view, a reasonable person could conclude that the impartiality of a judge might reasonably be questioned when a litigant is represented by an attorney in the law firm that employs the judge's clerk.

In conclusion, this Board advises that under Canon 3(E)(1) of the Ohio Code of Judicial Conduct, a common pleas court judge should not preside in a case in which a litigant is represented by an attorney in the law firm that employs the judge's law clerk in the part-time practice of law. As a practical matter, this situation should not present itself to the judge, because as advised in Question One the restriction as to a judicial law clerk representing clients before the judge whom he or she serves and before other judges in the same division of the court is extended to members and associates of the law firm that employs the clerk as an attorney in the firm.

## Question Three

Is it proper for a common pleas court judge to continue to appoint attorneys to represent indigents in criminal cases when the attorneys are members or associates of a law firm that employs the judge's law clerk in the part-time practice of law?

Appointments are part of a judge's administrative responsibilities. Under Canon 3(C)(4), as amended effective May 1, 1997, "[a] judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered." This prohibition was formerly number Canon 3 (B)(4).

A judge's act of appointing a member of a law firm to represent an indigent defendant when the law firm employs the judge's law clerk promotes rather than avoids favoritism. In addition to possibly being perceived as an act of favoritism under Canon 3(C)(4), such appointment may not be a diligent discharge of administrative responsibilities under Canon 3(C)(1), as amended effective May 1, 1997. The appointment would result in the judge's disqualification from the case. As the Board advised in Question Two, a judge

should not preside in a case in which a litigant is represented by an attorney in the law firm that employs the judge's law clerk in the part-time practice of law. The judge would be appointing an attorney to a case knowing that the judge would need to disqualify himself or herself.

In conclusion, the Board advises that under Canons 3(C)(1) and 3(C)(4) of the Ohio Code of Judicial Conduct, it is not proper for a common pleas court judge to continue to appoint attorneys to represent indigents in criminal cases when the attorneys are members or associates of a law firm that employs the judge's law clerk in the part-time practice of law.

**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. Pursuant to Section 102.03 of the Ohio Revised Code, the requester may reasonably rely on the opinion as it applies to Ohio Ethics Law and related statutes.**