

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

Opinion 2008-6

Issued December 5, 2008

SYLLABUS: Opinion 2008-5 is modified by this opinion in the following manner. First, a city director of law or assistant city director of law who has no legal duty to represent the state of Ohio may represent criminal defendants provided that: 1) no city police officers from the city are involved; 2) the criminal charges are based solely on alleged violations of state law, and 3) the city is not otherwise directly or indirectly involved or affected. Although Opinion 2008-5 did not address representation of criminal defendants by village solicitors, the Board takes this opportunity to advise that a village solicitor who has no legal duty to represent the state of Ohio may represent criminal defendants under similar conditions as set forth above. Second, whether a lawyer associated in a law firm with any city director of law or an assistant city director of law may serve as a court appointed counsel, a public defender, or a co-counsel to a public defender is subject to R.C. 120.39(A). Appointment of a partner or employee of a village solicitor is subject to R.C. 120.39(A) and (B). Advice as to the application of R.C. 120.39 is outside this Board advisory authority.

OPINION: This opinion addresses questions regarding the representation of criminal defendants by city directors of law who do not have a legal duty to prosecute violations of state law, and service as court appointed counsel. The opinion reconsiders and modifies Opinion 2008-5.

Does Opinion 2008-5 prohibit the representation of criminal defendants by city directors of law who do not have a legal duty to prosecute violations of state law?

Does Opinion 2008-5 restrict a lawyer associated in a law firm with any city director of law or an assistant director of law from serving as a court appointed counsel, a public defender, or a co-counsel to a public defender?

Question One

In Opinion 2008-5, the Board advised that: “A city director of law or an assistant city director of law is prohibited from representing criminal defendants in proceedings in which the state is a plaintiff.”

In Ohio, some city directors of law do not have a legal duty to prosecute criminal violations of state law. Therefore, the proper application of Opinion 2008-5 requires further consideration by the Board of Commissioners on Grievances and Discipline.

Pursuant to R.C. 1901.34(A), a city director of law for each municipal corporation within the territory of a municipal court shall prosecute all cases brought before the municipal court for criminal offenses occurring *within the municipal corporation* for which that person is the city director of law, *except* as provided for in R.C. 1901.34(B) and (D). Also pursuant to R.C. 1901.34(A), a city director of law shall prosecute all criminal cases brought before the court *arising in the unincorporated areas* within the territory of the municipal court, *except* as provided for in R.C. 1901.34(B).

R.C. 1901.34(B) provides that in nine Ohio counties (Auglaize, Brown, Clermont, Hocking, Holmes, Jackson, Morrow, Ottawa, and Portage), the county prosecutor is required to prosecute all violations of state law arising in the county. R.C. 1901.34(B) also provides that in six Ohio counties (Carroll, Crawford, Hamilton, Madison, Wayne, and Erie) the county prosecutor is required to prosecute all violations of state law arising within the unincorporated areas of their respective counties. R.C. 1901.34(B) further provides that the “Columbiana county prosecuting attorney shall prosecute in the Columbiana county municipal court all violations of state law arising in the county, except for violations arising in the municipal corporation of East Liverpool, Liverpool township, or St Clair township. The Darke county prosecuting attorney shall prosecute in the Darke County municipal court all violations of state law arising in the county, except for violations of state law arising in the municipal corporation of Greenville and violations of state law arising in the village of Versailles. The Greene county board of county commissioners may provide for the prosecution of all violations of state law arising within the territorial jurisdiction of any municipal court located in Greene County.” Ohio Rev. Code Ann. §1901.34(B) (West Supp. 2008).

R.C. 1901.34(D) provides that in any county other than the nine identified (Auglaize, Brown, Clermont, Hocking, Holmes, Jackson, Morrow, Ottawa, and Portage), the county prosecutor is permitted to enter into an agreement with a municipal corporation in the county to prosecute all the criminal cases brought before the municipal court that has territorial jurisdiction over the municipal corporation for the criminal offenses *occurring within the municipal corporation*.

A further provision in R.C. 1901.34(D) is that in the nine counties identified, the county prosecutor is also permitted to enter an agreement with a municipal corporation in the county to prosecute all cases brought before the county municipal court for violations of the ordinances of the municipal corporation or for criminal offenses other than violations of state law *occurring within the municipal corporation*.

In Op. 88-008, the Board advised: “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. There are very limited circumstances, which are set forth in this opinion, when a part time city or municipal prosecutor may represent criminal defendants in his or her private practice.” In that opinion, the Board concurred with ABA Informal Op. 1045 (1968) allowing a city attorney to represent a criminal defendant in cases not involving the city or its ordinances in limited circumstances: “(1) the ordinance violations as to which the city attorney acts as prosecutor are of an entirely different character from the criminal charges as to which he acts as defense counsel, (2) the criminal charges as to which he acts as defense counsel do not involve the city or its ordinances or officials, (3) the types of investigating officers (city officials, law enforcement officers) involved in the prosecution and defense matter are entirely different, (4) the city attorney does not represent city residents as defense counsel in criminal matters, and (5) the city attorney's conduct in that capacity has no impact outside of the city's own limited jurisdiction.” In Op. 88-008, the Board also concurred with ABA Informal Op. 1285 (1974) allowing “municipal attorneys who only prosecute violations of municipal ordinances to represent criminal defendants in situations where no municipal police officers from the municipality are involved, the criminal charges are based solely on alleged violations of state law, and the municipality is not otherwise directly or indirectly involved or affected.”

Accordingly, a modification of Opinion 2008-5 is necessary, consistent with the Board's advice in Opinion 88-008 that concurred in the advice offered by the ABA, Committee on Ethics and Professional Responsibility in Informal Op. 1045 (1968) and Informal Op. 1285 (1974).

The Board's advice is modified as follows. A city director of law or assistant city director of law who has no legal duty to represent the state of Ohio may represent criminal defendants provided that: 1) no city police officers from the city are involved; 2) the criminal charges are based solely on alleged violations of state law, and 3) the city is not otherwise directly or indirectly involved or affected. Although Opinion 2008-5 did not address representation of criminal defendants by village solicitors, the Board takes this opportunity to advise that a village solicitor who has no legal duty to represent the state of Ohio may represent criminal defendants under similar conditions as set forth above.

Question Two

In Opinion 2008-5, the Board stated: “A lawyer associated in a law firm with any city director of law or an assistant city director of law may not serve as a court appointed counsel, a public defender, or a co-counsel to a public defender.” The statement was a reference to the requirement of R.C. 120.39(A). R.C. 120.39(A) states: “Except as provided in division (B) of this section [a narrow exception applicable to village solicitors], counsel appointed by the court, co-counsel appointed to assist the state public defender or a county or joint county public defender, and any public defender, county public defender, or joint county defender, or member of their offices, shall not be a partner or employee of any prosecuting attorney, city director of law, village solicitor, or similar chief legal officer.” Ohio Rev. Code Ann. §120.39(A) (West 2002). R.C. 120.39(B) states: “A partner or employee of a village solicitor or of a law firm, legal professional association, or legal clinic with which the village solicitor is affiliated may be appointed by the court, assist a public defender, or serve as public defender in any criminal proceedings in which the village solicitor is not acting as prosecuting attorney.” Ohio Rev. Code Ann. §120.39(B) (West 2002).

Whether a lawyer associated in a law firm with any city director of law or an assistant city director of law may serve as a court appointed counsel, a public defender, or a co-counsel to a public defender is subject to R.C. 120.39(A). Appointment of a partner or employee of a village solicitor is subject to R.C. 120.39(A) and (B). This Board does not have advisory authority over the application of R.C. 120.39.

Conclusion to Question One and Two

In conclusion, the Board advises accordingly. Opinion 2008-5 is modified by this opinion in the following manner. First, a city director of law or assistant city director of law who has no legal duty to represent the state of Ohio may represent criminal defendants provided that: 1) no city police officers from the city are involved; 2) the criminal charges are based solely on alleged violations of state law, and 3) the city is not otherwise directly or indirectly involved or affected. Although Opinion 2008-5 did not address representation of criminal defendants by village solicitors, the Board takes this opportunity to advise that a village solicitor who has no legal duty to represent the state of Ohio may represent criminal defendants under similar conditions as set forth above. Second, whether a lawyer associated in a law firm with any city director of law or an assistant city director of law may serve as a court appointed counsel, a public defender, or a co-counsel to a public defender is subject to R.C. 120.39(A). Appointment of a partner or employee of a village solicitor is subject to R.C. 120.39(A) and (B). Advice as to the application of R.C. 120.39 is outside this Board advisory 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 Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.