



# Ohio Board of Professional Conduct

## **OPINION 2019-08**

Issued August 2, 2019

Withdraws Adv. Op. 1989-09

### **Duty to Report Criminal Defense Lawyer Employed in Same Law Firm as County Prosecutor**

**SYLLABUS:** If a lawyer possesses actual, unprivileged knowledge that a criminal defense lawyer is acting contrary to state law by serving as court-appointed counsel while associated in a firm with the county prosecutor, then he or she has a duty to report the conduct to the appropriate disciplinary authority.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

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**QUESTION PRESENTED:** Does a municipal prosecutor have a duty to report a criminal defense lawyer who is employed as an associate in the same law firm as the county prosecutor<sup>1</sup>?

**APPLICABLE RULES:** Prof.Cond. R. 1.7, 1.10, 1.11, 8.3

**OPINION:** The Board has been asked to address the duty of a municipal prosecutor to report to the appropriate disciplinary authority the conduct of a criminal defense lawyer who practices in the same law firm as the county prosecutor. Much of the analysis related to a lawyer's duty to report this association will depend on whether the criminal defense lawyer is privately retained or court-appointed to represent criminal defendants.

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<sup>1</sup> For purposes of this Opinion, "the county prosecutor" means the duly elected county prosecutor pursuant to R.C. §3009.01.

*Conflict Analysis*

Adv. Op. 2014-02 thoroughly analyzes the issues related to the representation of criminal defendants by prosecutors and other lawyers practicing in a prosecutor's private law firm. When the county prosecutor holds simultaneous positions as both a public officer or employee as well as an associate or partner at a private law firm, the representation of criminal defendants by that prosecutor and other lawyers associated in the prosecutor's private law firm is governed by Prof.Cond. R. 1.7, 1.10(f), and 1.11, as well as R.C. §120.39. Adv. Op. 2014-02 holds that the county prosecutor is prohibited from representing criminal defendants against either the state of Ohio or any municipal corporation that has authorized the county prosecutor to prosecute cases on its behalf. The county prosecutor's conflict of interest in criminal representations against the state and certain municipal corporations is not imputed to the other lawyers in the prosecutor's firm. *Id.* However, a lawyer associated with a county prosecutor may be prohibited from representing criminal defendants in certain situations as discussed below. Adv. Op. 2014-02 does not address a lawyer's duty to report potential professional misconduct of a criminal defense lawyer due to his or her association in the same firm as the county prosecutor. In determining if a lawyer has a duty to report the association, the lawyer must consider if the criminal defense lawyer is court-appointed or privately retained by a client.

*Representation of Clients Pursuant to Court Appointment*

If a criminal defense lawyer associated in the same private law firm as the county prosecutor is representing a client subject to court appointment, the conflict analysis is statutory in that the representation is prohibited by law. R.C. §120.39 states, "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 \* \* \* \*" R.C. §120.39 (emphasis added). Thus, a conflict exists because the criminal defense lawyer is statutorily prohibited from accepting court appointments to represent clients in criminal cases if he or she is a partner or employee of any prosecutor.

*Representation of Retained Clients*

There is no accompanying statutory prohibition related to the retained representation of criminal defendants by lawyers associated in a private firm with the county prosecutor. Thus, the Board continues to rely on the analysis set forth in Adv. Op. 2014-02. Adv. Op. 2014-02 concludes that because the elected prosecutor is the lawyer of record on all matters involving the county prosecutor's office, lawyers in an elected part-time prosecutor's private firm may not represent retained criminal defendants in the county in which the part-time prosecutor is the elected official. *Id.* A defense lawyer in this situation is faced with a conflict under Prof.Cond. R. 1.7(a)(2). Lawyers in the elected part-time prosecutor's private firm may represent retained criminal defendants outside of the county in which the prosecutor is elected. *Id.*

*Obligation to Report*

Turning to the question posed, Prof.Cond. R. 8.3 requires a lawyer to report misconduct only when the lawyer possesses unprivileged knowledge that raises a question as to a lawyer's honesty, trustworthiness, or fitness in other respects. To invoke the reporting requirement of Prof.Cond. R. 8.3, a lawyer must have actual knowledge that another lawyer has violated a Rule of Professional Conduct. This requires more than a "mere suspicion" that misconduct has occurred. Adv. Op. 2016-02; Adv. Op. 2007-01. The term "'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Prof.Cond. R. 1.0(g); Adv. Op. 2016-02. A lawyer should carefully consider the source and basis of the information to determine if the information is unprivileged and whether he or she has actual knowledge of the fact(s) in question.

A lawyer must also consider whether the criminal defense attorney associated in private practice with the county prosecutor is court-appointed or retained. If a lawyer has actual, unprivileged knowledge that a criminal defense lawyer is associated in the same private law firm with the county prosecutor and is simultaneously appointed to represent a criminal defendant, then he or she must consider if the appointed criminal defense lawyer's conduct raises a question as to the lawyer's honesty, trustworthiness, or fitness in other respects. The Board is of the opinion that a court-appointed criminal defense lawyer's blatant disregard of a law specifically designed to avoid the problems

inherent in having attorneys switch from defense to prosecution within the same county, qualifies as conduct that raises a question as to the lawyer's fitness to practice law. *See* Ohio Att'y Gen'l Op. 78-026. As a result, a clear duty to report exists.

The Board further advises that a duty to report also exists when a lawyer with actual, unprivileged knowledge that a criminal defense lawyer associated in a private firm with the county prosecutor is representing retained clients in the same county in which the county prosecutor is the elected official. The duty to report is triggered by the defense lawyer's conflict of interest under Prof.Cond. R. 1.7(a)(2). *See also* Adv. Op. 2014-02.<sup>2</sup> However, if the lawyer only possesses information that a criminal defense lawyer associated in a private firm with the county prosecutor is representing criminal defendants outside of the county in which the prosecutor is the elected official and has no actual knowledge as to whether or not the representation is retained or court-appointed, then the duty to report is not triggered.

**CONCLUSION:** A lawyer who is aware that a criminal defense attorney is an associate or partner in the same private law firm as the county prosecutor does not, without further analysis, have a duty to report this information to a disciplinary authority. The ability of a prosecutor and other lawyers in the prosecutor's private firm to represent criminal defendants is governed by Prof.Cond. R. 1.7, 1.10, and 1.11 as well as R.C. §120.39. R.C. §120.39 prohibits criminal defense attorneys who are partners or associates of prosecutors from accepting court-appointed work. In certain limited situations, other lawyers associated in a firm with county prosecutors have the ability to represent criminal defendants so long as the client privately retains the lawyer. Adv. Op. 2014-02. Thus, if a lawyer possesses unprivileged knowledge of a criminal defense lawyer serving as court-appointed counsel, while associated in a firm with any prosecutor, in violation of state law, he or she has a duty to report the conduct to the appropriate disciplinary authority. A duty to report also arises when a lawyer has actual unprivileged knowledge of a criminal defense lawyer in an elected part-time prosecutor's firm representing criminal defendants in the county in which the prosecutor is an elected official. However, if the lawyer only possesses information that a criminal defense lawyer associated in a private firm with the county prosecutor is representing criminal defendants outside the

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<sup>2</sup> If the duty to report arises under either of the above scenarios, the Board advises that it is prudent to include the elected county prosecutor in the report so that the appropriate disciplinary authority may investigate if the prosecutor assisted the criminal defense lawyer in violation of the Rules of Professional Conduct. *See* Prof.Cond. R. 8.4(a).

county in which the prosecutor is the elected officeholder and has no actual knowledge as to whether or not the representation is retained or court-appointed, then the duty to report is not triggered.