



Ohio Board of Professional Conduct

OPINION 2019-9

Issued October 4, 2019

County Prosecutor's Office's Representation of Adverse Clients

SYLLABUS: The State of Ohio is a client of the county prosecuting attorney for purposes of analyzing conflicts of interest with statutory clients. A conflict of interest under Prof.Cond.R. 1.7(a) and arising from the prosecutor office's concurrent representation of the state and another public client, may be ameliorated through specific client assignment of assistant county prosecutors and meaningful and effective screening. The client assignment and screening of assistant county prosecutors is not an option when the prosecutor's office is obligated to represent directly adverse clients in the same proceeding.

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Ohio Board of Professional Conduct

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

www.bpc.ohio.gov

HON. JOHN W. WISE
CHAIR
PATRICIA A. WISE
VICE- CHAIR

RICHARD A. DOVE
DIRECTOR
D. ALLAN ASBURY
SENIOR COUNSEL
KRISTI R. MCANAU
COUNSEL

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QUESTIONS PRESENTED:

- 1). Whether the State of Ohio is a client of the prosecuting attorney for purposes of analyzing conflicts of interest under Prof.Cond.R. 1.7.
- 2). If the state is considered a client, is a conflict of interest created any time the office prosecutes a delinquency case against an alleged juvenile offender when the prosecutor also represents the county job and family services department ("JFS") in a matter involving the same juvenile?
- 3). If a conflict of interest exists, may the conflict be ameliorated?

APPLICABLE RULES: Prof.Cond.R. 1.7, 1.9, 1.10, 1.11.

OPINION: Pursuant to R.C. 309.09, the prosecuting attorney is the legal advisor for all county officers and boards, which includes the county job and family services department (“JFS”). The prosecuting attorney’s office represents JFS in all abuse, neglect, and dependency cases and prosecutes all delinquency and unruly cases on behalf of the State of Ohio. Because there is no specific person that constitutes the “State of Ohio,” the prosecuting attorney makes decisions based on his or her independent professional judgment to advance the interests of justice in criminal matters.

On occasion, the concurrent representation of JFS and the state involves the same juvenile, with each client seeking different dispositional outcomes. In one scenario the prosecutor’s office may be responsible for prosecuting the juvenile in one case while it also represents JFS in protecting the welfare of the juvenile in another case, most often involving abuse, neglect, and dependency. Another scenario involves the criminal prosecution of an adult for the alleged abuse of the defendant’s child. In that situation, it is likely that an assistant prosecuting attorney in another division would file an abuse case for the same child in juvenile court on behalf of JFS. In the latter example the prosecutor’s office would be seeking to punish the criminal defendant on behalf of the state, while it also assists JFS in the reunification of the juvenile’s family in a separate case. Inherent in both of these scenarios is the possibility of cross-examination of employees of JFS or the use of confidential information learned during the representation of JFS by assistant prosecuting attorneys who previously represented the agency.

State of Ohio as Client

The Board has previously concluded that based on statutory language the state of Ohio is the client of the prosecutor’s office when the office is prosecuting violations of state law. Adv. Op. 2014-02. See R.C. 309.08. Under the scenarios provided, the state is the client when the prosecutor’s office prosecutes a delinquent case against an alleged juvenile offender.

Conflict of Interest Analysis

In a prosecutor’s office it is imperative that each lawyer consider their individual conflicts as to all former and current clients. In a concurrent representation of government clients and after individual lawyer conflicts are identified and potentially resolved, the prosecuting attorney should also conduct a conflicts analysis on behalf of

the office to determine whether recusal of the office from the matter is warranted and outside or special counsel should be retained for one or both clients.

The factual scenarios provided involve concurrent representation and conflicts of interest. Prof.Cond.R. 1.7(a)(1) provides that “a lawyer’s acceptance of continuation of representation of a client creates a conflict of interest if * * * the representation of that client will be directly adverse to another current client.” The determination of a direct adversity conflict of interest is fact and circumstance specific and can exist during the concurrent representation of different clients in unrelated matters. “The concurrent representation of clients whose interests are directly adverse always creates a conflict of interest,” Prof.Cond.R. 1.7, cmt. [10]. Under the scenarios provided, because the state and JFS seek different dispositional outcomes in two different forums involving the same juvenile, the two clients are considered directly adverse to one another resulting in a conflict of interest prohibited by Prof.Cond.R. 1.7(a)(1).

Analyzing the same scenarios, a conflict of interest also exists if there is a substantial risk that the ability of an assistant prosecuting attorney to consider, recommend, or carry out the representation of one of the clients will be materially limited by the responsibilities of representing the other client. Prof.Cond.R. 1.7(a)(2). When the state and JFS desire different outcomes in cases involving the same juvenile, there is a substantial risk that the representation of one or both of the clients may be materially limited due to the prosecutor’s office responsibilities to the other client.

Based on the foregoing analysis, a conflict of interest exists for the prosecutor’s office any time the state and JFS seek different dispositional outcomes involving the same juvenile in different forums. This conflict requires the prosecutor’s office to (1) decline or discontinue representation and utilize outside or special counsel, (2) or consider other permissibly ethical steps to ameliorate the conflicts utilizing lawyers in the prosecutor’s office.

Amelioration of Conflict

The Rules of Professional Conduct impute conflicts of interest to all lawyers “associated in a firm” and lawyers in the same *firm* cannot represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Prof.Cond.R 1.7 (current clients) or Prof.Cond.R. 1.9 (former clients). Prof.Cond.R. 1.10(a). *Id.* However, a prosecutor’s office is not

considered a “firm” for purposes of the Rules of Professional Conduct, and the conflicts of interest that exist for one assistant prosecutor are not imputed to other assistant prosecutors in the same office. Prof.Cond.R. 1.10(c).

When a prosecuting attorney’s office is faced with a concurrent client conflict due to the opposing views of two separate clients in different matters, the Board is of the opinion that the meaningful and effective screening of the assistant prosecuting attorneys, separately assigned to either juvenile prosecution or JFS representation, is permissible and appropriate to remove a prohibited conflict of interest under Prof.Cond.R. 1.7(a)(1)-(2). Adv. Op. 2007-4. See Prof.Cond.R. 1.0(l) (definition of “[s]creened.”) This approach is supported by Comment [2] to Rule 1.11: “[the rule] does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, *although ordinarily it will be prudent to screen such lawyers.*” (Emphasis added). The effective and meaningful screening of the assistant prosecutors also avoids the inherent conflict issues that accompany the cross-examination of former or current clients and the use of confidential information obtained during a representation of a client prohibited by Prof.Cond.R. 1.8(b). The screening and assignment of lawyers in this context does not contemplate obtaining a waiver of conflict from each client, but rather is an administrative function of the prosecutor’s office to eliminate and resolve intra-governmental conflicts of interest.

Other Considerations

Even when screening is employed by the prosecutor’s office, assistant prosecutors employed in the office should always analyze their own individual conflicts under Prof.Cond.R. 1.7 and 1.9 for every matter and client. Assignment and screening are not options when the prosecutor’s office would be representing directly adverse clients in the same proceeding. In such a situation, the retention or appointment of outside or special counsel is required because the dual representation would be strictly prohibited under Prof.Cond.R. 1.7(c)(2). Adv. Op. 2007-04.

CONCLUSION: County prosecutor offices are charged with the representation of multiple governmental agency clients in addition to the representation of the state of Ohio. The concurrent representation of JFS and the state of Ohio by county prosecutors in matters involving the same juvenile can give rise to conflicts of interest. Specifically, the representation can result in situations where clients of the prosecutor’s office are

directly adverse to one another in unrelated matters or a material limitation conflict exists. However, because the imputation of conflicts of interest is not applicable to lawyers in a prosecutor's office, the assignment of different assistant prosecutors to each client coupled with effective and meaningful screening can be utilized to resolve conflicts of interest arising under Prof.Cond.R. 1.7(a)(1)-(2). Assignment of lawyers to different clients and screening is not permissible in situations that involve a claim of one client against another client in the same proceeding under Prof.Cond.R. 1.7(c)(2). In most cases, this type of conflict requires the prosecutor's office to decline or discontinue representation and utilize outside or special counsel. When analyzing potential conflicts, it is important for each lawyer in the prosecutor's office to consider their individual conflicts as to former and current clients. In a concurrent representation involving government clients, the prosecuting attorney should also conduct a conflicts analysis on behalf of the office and make a determination whether recusal of the entire office is warranted.