



Ohio Board of Professional Conduct

OPINION 2022-01

Issued February 4, 2022

Withdraws Adv. Op. 1988-013

Imputation of Part-Time Assistant Prosecutor Conflict to County Prosecuting Attorney

SYLLABUS: A county prosecuting attorney is not prohibited from appearing before a part-time municipal court judge, who also employs a part-time assistant county prosecutor in a private law firm.

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OPINION 2022-1

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Withdraws Adv. Op. 1988-013

Imputation of Part-Time Assistant Prosecutor Conflict to County Prosecuting Attorney

SYLLABUS: A county prosecuting attorney is not prohibited from appearing before a part-time municipal court judge, who also employs a part-time assistant county prosecutor in a private law firm.

QUESTIONS PRESENTED:

May a county prosecuting attorney, who employs a part-time assistant prosecutor, appear before a part-time municipal court judge who also employs the same part-time assistant prosecutor in a private law firm?

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

OPINION:

Both assistant prosecutors and part-time judges are permitted to engage in the private practice of law. *See* Jud.Cond.R., App. III; R.C. 325.11(B); and 2009 Ohio Atty.Gen.Op. No. 2009-053. In rural and sparsely populated Ohio counties, there may be limited legal resources or employment opportunities requiring some judges and lawyers to take on part-time legal work. Elected prosecutors often employ part-time assistant prosecutors to handle both criminal and civil cases. The practices of these hybrid public and private sector lawyers and judges often implicate the conflict imputation provisions found in the Rules of Professional Conduct. Adv. Op. 2014-2.

Part-Time Assistant Prosecutor's Conflict of Interest

An examination of the part-time assistant prosecuting attorney's conflicts of interest must be conducted prior to addressing the imputation question posed. The Board has previously concluded that, based on statutory language, the state is the client of the prosecutor's office when the office is prosecuting violations of state law. Adv. Ops. 2014-02 and 2019-09. See R.C. 309.08. Conflicts of interest when representing the state can arise for part-time prosecutors if there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, a third person, or by the lawyer's own personal interest. Prof.Cond.R. 1.7(a)(2). A lawyer's personal interest cannot dilute the lawyer's loyalty to a client. Prof.Cond.R. 1.7, cmt. [1].

Here, the part-time assistant prosecutor is representing the state of Ohio in a matter coming before the municipal court judge who is his or her employer in a private practice. The Board concludes the employment relationship, and in particular the assistant prosecutor's financial interest in maintaining his or her employment at the private law firm, presents a substantial risk that the lawyer's duties to the state will be materially limited. For example, the assistant prosecutor's private employment may cause him or her to refrain from strongly advocating a certain position out of concern that the judge will not agree with the position or disapprove of the argument, or the assistant prosecutor may be reluctant to appeal an adverse ruling by the judge.

Once a conflict is identified, the assistant prosecutor must determine if it can be properly waived by the client under Prof.Cond.R. 1.7(b) or if the representation is prohibited by law. Prof.Cond.R. 1.7(b)(3) and 1.7(c)(1). With respect to the latter question, the Board is of the opinion that Prof. Cond. R. 8.4(e) satisfies the Prof.Cond.R. 1.7(c)(1) prohibition against undertaking representation prohibited by law. Prof.Cond.R. 8.4(e) prohibits a lawyer from stating or implying an ability to improperly influence a government officer. The relationship between an assistant prosecutor and part-time judge in private practice together could be perceived by the public as an opportunity of an assistant prosecutor to improperly influence matters pending before the judge. Thus, an assistant prosecutor's appearance before his or her employing judge is conduct that implies or may imply an ability to improperly influence a government officer. See Adv. Op. 1994-2. Because the assistant prosecutor's representation of the state

before the municipal court judge is prohibited by law, the conflict cannot be waived by the client.

Imputation of Part-Time Prosecutor's Conflict to the County Prosecuting Attorney

Prof. Cond. R. 1.11 is “intended to be the exclusive rule governing the imputation of conflicts of interest of current or former government lawyers.” ABA Ctr. for Prof'l Responsibility, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2013*, at 264 (2013). Prof.Cond.R. 1.11(d)(1) obligates a part-time assistant prosecutor to abide by the general conflict of interest provisions of Prof.Cond.R. 1.7. However, because of the special problems associated with the imputation of conflicts within a governmental entity, the conflicts of the part-time assistant prosecuting attorney are not imputed to other associated government officers or lawyers within the prosecuting attorney's government office. Prof.Cond.R. 1.11, cmt. [2]. The county prosecuting attorney or another assistant prosecuting attorney may handle matters the part-time assistant prosecuting attorney is prohibited from handling. Nonetheless, it is generally prudent for the county prosecuting attorney to screen the part-time assistant prosecutor from those matters that require an appearance before the municipal court judge. *Id.*

Prosecuting Attorney's Conflict of Interest

Although the Board concludes that a conflict of a part-time assistant prosecutor is generally not imputed to the elected prosecutor, the prosecuting attorney should nonetheless analyze his or her own individual conflict under Prof.Cond.R. 1.11(d). The prosecutor should consider whether there is a substantial risk that his or her relationship with the part-time assistant prosecutor will materially limit his or her representation of the public client before the judge. Prof.Cond.R. 1.7(a)(2). Although the county prosecutor's relationship with the part-time assistant prosecutor is fundamentally different than the assistant prosecutor's relationship with the judge, the prosecutor has a continuing and possibly even a close mentoring relationship with the assistant prosecutor. If, in the county prosecutor's professional judgment, his or her conduct in proceedings before the part-time judge will be materially limited due to the employment relationship with the assistant prosecutor, he or she should assign another assistant

prosecutor, or if none is available, retain or seek appointment of special counsel to handle the matters coming before the part-time municipal court judge.