



# Ohio Board of Professional Conduct

**OPINION 2022-04**

Issued June 10, 2022

Withdraws Adv. Op. 1988-15

## **Imputation of County Prosecuting Attorney's Former Client and Firm Conflicts to an Assistant Prosecuting Attorney**

**SYLLABUS:** Absent informed written consent, a county prosecuting attorney must appoint an assistant prosecuting attorney to handle cases that were assigned to the public defender's office during the county prosecuting attorney's former employment with the office and implement appropriate screening measures if the county prosecuting attorney (1) personally represented the defendant in the same or substantially related matter, or (2) obtained protected information about other clients of the public defender's office.

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

65 SOUTH FRONT STREET, 5<sup>TH</sup> FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

www.bpc.ohio.gov

PATRICIA A. WISE  
CHAIR  
HON. D. CHRIS COOK  
VICE-CHAIR

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

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#### **QUESTION PRESENTED:**

May a county prosecuting attorney, who previously served as the county public defender, appoint an assistant prosecuting attorney to handle cases that were assigned to the public defender's office during the county prosecutor's former employment?

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

#### **OPINION:**

An examination of the county prosecuting attorney's conflicts of interest must be conducted prior to addressing the imputation question posed.

*Former Clients of the Prosecuting Attorney*

Prof.Cond.R. 1.11(d)(1) obligates a county prosecuting attorney to abide by the general conflict of interest provisions of Prof.Cond.R. 1.9 regarding former clients. If the county prosecuting attorney formerly represented a defendant in the same or a substantially related matter while employed at the public defender's office, then the prosecutor is prohibited from prosecuting the defendant in the same or substantially related matter unless both the defendant and the government agency give informed written consent. Prof.Cond.R. 1.9(a) and 1.11(d)(2)(i). A "substantially related matter" is defined as one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information normally obtained in that type of matter would materially advance the position of another client in a subsequent matter. Prof.Cond. R. 1.0(n). In this context, any confidential factual information obtained from a defendant that could advance the position of the prosecutor's office in other matters would serve to disqualify the county prosecutor from personally prosecuting a defendant without consent.

*Clients of the Public Defender's Office but not Former Clients of the County Prosecuting Attorney*

Prof.Cond.R. 1.11(d)(1) also requires the county prosecuting attorney to determine whether he or she is prohibited from personally prosecuting a defendant whose case was assigned to another public defender during the prosecutor's tenure as public defender. Prof.Cond.R. 1.9(b) indicates that, absent informed written consent, a lawyer who was previously associated with a firm cannot represent another client in the same or substantially related matter when the clients' interests are materially adverse and when the lawyer previously acquired information about the former firm's client that is protected by Prof.Cond.R. 1.6 or 1.9(c).<sup>1</sup> In relation to the clients of a lawyer's former firm, the comments to Prof.Cond.R. 1.9 explain that a lawyer is disqualified only when he or she acquired actual knowledge of information protected by Rules 1.6 and 1.9(c). Prof.Cond.R. 1.9, cmt. [5]. If a lawyer acquired no knowledge or information relating to a specific client of the former firm, neither the lawyer nor the lawyer's new firm is

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<sup>1</sup> Prof.Cond.R. 1.0(c) defines a public defender office as a law firm.

prohibited from representing another client in the same or substantially related matter. *Id.*

The interests of a county prosecuting attorney and his or her client, the state of Ohio, are materially adverse to clients of the public defender's office. Therefore, the prosecutor must complete an individual assessment in each case that was assigned to the public defender's office during his or her tenure as public defender to determine whether he or she obtained protected client information. A lawyer's involvement in a matter can be a question of degree and depends on the particular facts of a situation. *Id.* at cmt. [2], [6]. If lawyers in the public defender's office had access to all client files or the lawyers regularly discussed client matters, it is reasonable to assume that the county prosecuting attorney, while serving as the public defender, obtained protected information regarding clients of the public defender's office. In that circumstance, the prosecutor is prohibited from personally prosecuting a defendant whose case was assigned to the public defender's office during the prosecutor's tenure in that office, unless that defendant provides informed written consent.

If, while employed as the public defender, the county prosecuting attorney had access to only his or her own or limited client files and did not participate in discussion of other public defenders' client matters, then it is reasonable to assume that the prosecuting attorney did not obtain protected information regarding other clients of the public defender's office. In that scenario, the county prosecutor is not prohibited from prosecuting an individual who was represented by another public defender during the prosecutor's tenure as public defender.<sup>2</sup>

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<sup>2</sup> This opinion addresses only ongoing cases assigned to the public defender's office at the time of the lawyer's transition from public defender to county prosecutor. It does not address subsequent prosecutions in unrelated matters of a former client of the county prosecutor or of other individuals who were clients of the public defender's office during the county prosecutor's tenure but not personally represented by the prosecuting attorney. If a subsequent prosecution of one of the individuals referenced above is necessary, the county prosecutor must complete another conflict analysis pursuant to Prof.Cond.R. 1.11(d) and 1.9. The reader is reminded of the general prohibitions contained in Prof.Cond.R. 1.9(c) related to the use of information obtained from a prior representation to the disadvantage of a former client or a former client of a former firm.

*Imputation of Conflicts of the County Prosecuting Attorney to Assistant Prosecuting Attorneys*

As the Board has previously indicated, 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.” Adv. Op. 2022-01; ABA Ctr. for Prof’l Responsibility, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2013*, at 264 (2013). *See also* Prof. Cond. R. 1.10(f). Because of the special problems associated with the imputation of conflicts within a governmental entity, the conflicts of the county prosecuting attorney are not imputed to other associated government officers or lawyers within the prosecuting attorney’s office. Prof. Cond. R. 1.11, cmt. [2]. Thus, another assistant prosecuting attorney may handle matters the county prosecuting attorney is prohibited from handling. Nonetheless, it is generally prudent for the office to screen the county prosecuting attorney from those matters that he or she is prohibited from handling due to his or her former employment with the public defender’s office. *Id.* Although the county prosecuting attorney may not be required under the rules to assign every matter handled by the public defender’s office during his or her former employment to an assistant prosecuting attorney, the Board believes the best practice is to do so out of an abundance of caution and in the interest of preserving the confidence of defendants and the public.