

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

**ADVISORY ETHICS OPINION NO. 2010-A-853
(NOT FOR PUBLICATION)**

**Inquiry is made regarding whether a
District Attorney General may sit on the
Post-Conviction Defender Commission.**

FACTS

An individual who is a District Attorney General and member of the Tennessee District Attorney General Conference was appointed to the Post-Conviction Defender Commission.

DISCUSSION

With respect to the Post-Conviction Defender Commission, T.C.A. §40-30-202, Legislative Intent, provides, in part:

It is the intent of the general assembly to create the post-conviction defender commission and the office of post-conviction defender to provide for the representation of any person convicted and sentenced to death in this state... It is the further intent that the operation of the post-conviction defender commission and office of post-conviction defender shall be consistent with professional standards and shall not compromise independent professional judgment or create a professional or institutional conflict of interest, appearance of impropriety, breach of attorney-client confidence or secret or other violation of the Tennessee Rules of Professional Conduct or the Tennessee Code of Judicial Conduct.

(emphasis added)

T.C.A. §40-30-203, Establishment-Composition, provides, in part:

- (a) There is hereby established a Tennessee post-conviction defender commission...

T.C.A. §40-30-206, Duties, provides, in part:

- (a) It is the primary responsibility of the post-conviction defender to represent...any person convicted and sentenced to death in this state...

The ABA Standards for Criminal Justice 5-1.3 (3rd ed.), Providing Defense Services, Professional Independence, provides, in part:

...Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges...

(emphasis added)

Duties of a District Attorney General are set forth in T.C.A. §8-7-103, Duties, which provides, in part:

Each district attorney general:

- (1) Shall prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto...

With respect to the duties of the District Attorneys General Conference, T.C.A. §8-7-303, Consideration of more effective suppression of crime - Committees for drafting proposed legislation, provides:

It is the duty of the conference to give consideration to the enactment of such laws and rules of procedure as in its judgment may be necessary to suppress crime more effectively, and thus promote peace and good order in the state. To this end, a committee of its members shall be appointed to draft suitable legislation and submit its recommendations to the general assembly.

Rule of Professional Conduct (RPC) 1.7, Conflict of Interest: General Rule, provides, in part:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents in writing after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents in writing after consultation...

Comment [4] to RPC 1.7, Loyalty to a Client, provides, in part:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests...The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or otherwise foreclose courses of action that reasonably should be pursued on behalf of the client...

(emphasis added)

Comment [13] to RPC 1.7, Conflicts in Litigation, provides, in part:

...A conflict of interest exists, however, if there is a significant risk that a lawyer's action in behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken by the lawyer on behalf of the other client... If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

(emphasis added)

In State v. White, 114 S.W. 3d 469 (Tenn. 2003), the Supreme Court held that there was an actual conflict of interest which barred an attorney who was appointed to prosecute cases in municipal court from serving as defense counsel in criminal court in the same county. The Court noted that "[t]empered only by the impartial search for justice, prosecutors are to keep the interests of the State as their preeminent concern." Id. at 477. The Court stated, on the other hand, that, "the basic duty defense counsel owes to the administration for justice and an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation..." Id. The Court stated:

...an actual conflict of interest includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of 'compromising interests and loyalties.' See Culbreath, 30 S.W.3d at 312-13, see also Tenn. R. Sup. Ct. 8, EC 5-1. In the context of multiple employment, for example, an actual conflict arises where an attorney's continuance of such employment 'would be likely to involve the lawyer in representing differing interests...' Tenn. Sup. Ct. R. 8, DR 5-105(b).

(emphasis added) Id. at 476. The Court concluded that "...the dual roles of assistant district attorney general and defense counsel in the same county were inherently antagonistic and thus create a conflict of interest." (emphasis added) Id. at 478. The Court noted that the conclusion is consistent with the current Code of Professional Responsibility 1.7. Id. at 480, fnt. 5.

In State v. Culbreath, 30 S.W. 3d 309 (Tenn. 2009), a private attorney was compensated by a special interest group to assist the District Attorney in the investigation and prosecution of a criminal matter. The Supreme Court stated:

A District Attorney General is an elected constitutional officer whose function is to prosecute criminal offenses in his or her circuit or district. (citation omitted) The District Attorney General 'shall prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto...' T.C.A. §8-7-103(1).

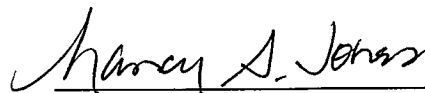
Id. at 313. The Court stated that inspite of the duty to be impartial, District Attorneys "...are expected to prosecute criminal offenses with zeal and vigor within the bounds of the law and professional conduct." Id. at 314; see also, State v. White, 114 S.W. 3d. at 477. The Court held that a conflict existed because the attorney owed a duty of loyalty to the special interest group and a duty of loyalty to the office of the District Attorney. Id. at 316. The Court stated that "[i]n short, the dual role was such that Parrish could not exercise his independent professional judgment free of 'compromising influences and loyalties'." (emphasis added) Id.

CONCLUSION

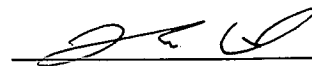
Given the duties of the Post-Conviction Defender Commission versus the duties of the District Attorney General and a member of the District Attorneys General Conference, as set forth in the cited statutes and cases, it appears that the roles are inherently antagonistic. It further appears that an attorney serving in such a dual capacity would, at a minimum, present a significant risk of materially interfering with the attorney's independent professional judgment. Under such circumstances, RPC 1.7 would require that the attorney to refuse the representation or withdraw from one or the other. Cmt. [13]

Pursuant to Rule 9, Section 26.5, this opinion in not binding on the Court, the Board, or the Ethics Committee and offers no security.

This 2nd day of September, 2010.



Nancy S. Jones
Chief Disciplinary Counsel



James A. Vick
Ethics Counsel

JAV:cf