OPINIONS OF THE LEGAL ETHICS COMMITTEE

L.E.I. 85-2
(April 27, 1985)

LAWYERS SERVING TOGETHER IN A PROSECUTING ATTORNEY'S OFFICE ARE NOT MEMBERS OF A "LAW FIRM" FOR PURPOSES OF IMPUTED DISQUALIFICATION

A recent legal ethics complaint has prompted the Committee on Legal Ethics to issue this advisory opinion on whether lawyers serving together in a prosecuting attorney's office are members of a "law firm," within the meaning of the Code of Professional Responsibility, so as to disqualify the entire prosecutor's office if one attorney therein is disqualified from handling a case.

The facts were as follows in the legal ethics matter giving rise to this advisory opinion: An assistant prosecuting attorney had been representing a private client for a number of months in two civil actions unrelated to the client's employment with the county board of education. While these two civil actions were pending, the client sued the board of education over his dismissal from and subsequent reinstatement to school employment. The county prosecutor's office represented the board of education in this litigation, as required by W. Va. Code § 7-4-1 (1984 Replacement Volume). Although the private client consented to representation of the county board of education by the assistant prosecutor who had been representing him in the unrelated civil matters, the county board of education could not ethically consent to such a conflict of interest. (*See* L.E.I. 81-10 and L.E.I. 84-5, *citing* Kizer, "Legal Ethics and the Prosecuting Attorney," 79 W. Va. L. Rev. 367, 373 [1977].)

The particular assistant prosecutor who had represented the client in the unrelated matters withdrew from representing the county board of education in the lawsuit involving his long-time private client. Over the client's objection, however, the circuit court permitted another assistant prosecutor not associated with the first assistant in private practice to assume representation of the county board of education in this school employment suit.

The above fact situation and other similar circumstances can occur in West Virginia because state law permits prosecuting attorneys and their assistants in many counties to engage in private civil practice. Such scenarios are not common, however, in jurisdictions barring prosecutors from private law practice. In most states, imputed disqualification of all lawyers in a prosecuting attorney's office generally becomes an issue in two categories of cases: (1) those in which a lawyer on the prosecutor's staff, or a former law partner or associate of that lawyer in private practice, previously represented a person who is now being criminally prosecuted; and (2) those in which one member of the prosecutor's staff will be called as a witness in a case prosecuted by the office.

A split of authority exists in the United States regarding imputed disqualification of lawyers serving together in a prosecuting attorney's office. The better reasoned view is that a prosecutor's office is not a "law firm" within the meaning of the Code of Professional Responsibility, and therefore disqualifica-

tion of one lawyer in such an office does not per se require vicarious disqualification of all lawyers serving therein.

In holding that lawyers in a prosecuting attorney's office are not members of a law firm for purposes of imputed disqualification, we rely in part on Formal Opinion 342 (Nov. 24, 1975) of the American Bar Association's Committee on Ethics and Professional Responsibility. In that opinion, the ABA Committee construed DR 5-105(D), the basic imputed disqualification rule in our Code of Professional Responsibility. The Committee concluded:

> When the Disciplinary Rules of Canons 4 and 5 mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter. Clearly, if DR 5-105(D) were so construed, the government's ability to function would be unreasonably impaired. Necessity dictates that government action not be hampered by such a construction of DR 5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. This important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4-101, DR 5-105, DR 9-101(B), or similar Disciplinary Rules. Although vicarious

> disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant transaction or set of transactions is prohibited by those rules. (Emphasis added)

By determining that a lawyer in a prosecuting attorney's office is not a member of a law firm, we also follow the holding in People ex rel. Younger v. Superior Court, 86 Cal. App. 3d 180, 150 Cal. Rptr. 156 (1978). Younger involved a murder prosecution in which one deputy prosecutor in a multi-deputy prosecuting attorney's office was to testify at trial. The appeals court held that the California equivalents of DR 5-101(B) and DR 5-102(A) in our Code of Professional Responsibility, which require withdrawal of an entire law firm when a lawyer in the firm ought to testify on behalf of a client, are inapplicable to a prosecutor's office with a multi-attorney staff.

As the Younger court noted, certain basic assumptions justifying imputed disqualification of an entire private law firm when one of their number will testify at trial simply do not hold true with respect to a prosecutor's office. These assumptions include:

> that there are available a number of competent, qualified attorneys who are unrelated to the attorney-witness and who are willing to undertake the client's case [citations omitted]; that, consequently, the interest of the client in representation by the attorney of choice implicates primarily avoidance of inconvenience and duplicative expense [citations omitted]; that the attorney's interest in continuing to represent the client is mostly or wholly finan-

> cial in nature [citations omitted]; that a trial advocate has or appears to have an interest in the outcome of the case, either financial as a result of his fee arrangement or expectation of representing the client in the future, or a partisan interest resulting from his zeal as an advocate [citations omitted]; and that an attorney-witness whose law firm represents the client at trial will or will be presumed to continue to have an interest in the outcome of the case, either financial as a result of the fee arrangements and arrangement for his compensation by the firm, or secondarily perhaps, some residual partisanship resulting from his relationship with the law firm notwithstanding he is not acting as the advocate personally [citations omitted]. However valid these assumptions may be in the case of an attorney or law firm engaged in practice for remuneration and the normal attorney-client relationship, they have virtually no validity in the case of the multi-deputy prosecutorial office of a district attorney. The prosecutorial office of an elected district attorney and the relationship between the district attorney and his sole client, the People, are fundamentally and decisively different from a law firm and the ordinary attorney-client relationship.

88 Cal. App. 3d at 202-03.

A Florida appeals court cited <u>Younger</u> in <u>Clausell v. State</u>, 455 So. 2d 1050 (Fla. App. 3d 1984), and analyzed pertinent sections of the Code of Professional Responsibility as follows:

> In our view, the State Attorney's office is not a law firm, and an Assistant State Attorney is not a lawyer in the firm for the purposes of D.R. 5-101(B) and D.R. 5-102(A). These sections, as do other sections in the Code of Professional Responsibility, clearly indicate that these expressions were intended to refer to law firms undertaking employment for remuneration and to the attorneys in such firms. For example, D.R. 2-110(A)(3) requires that a withdrawing attorney refund unearned fees; D.R. 2-102 is a regulatory provision concerning

> the use of the term 'firm' in professional settings; D.R. 3-102 regulates the sharing of legal fees and payment of the same to non-lawyers; and D.R. 9-102(A)(2) regulates the use of clients' funds. The definitional section merely states that a law firm 'includes a professional legal corporation.' We believe that had it been intended that 'law firm' should include a multi-assistant State Attorney's office, that inclusion would have been clearly expressed.

455 So. 2d at 1053.

In a case where a prosecutor or his assistant is disqualified from a criminal case because he or another lawyer in his former private law firm previously represented the accused, the more sound approach is not to require *per se* the disqualification of the entire prosecutor's office. Such disqualification should not occur unless there has been an actual breach of the attorney-client relationship through revelation of client confidences and secrets to other lawyers in the prosecutor's office. This approach, followed by the court in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975), requires application of Canon 4 on client confidences and secrets and Canon 5 on conflicts of interest independently from Canon 9. (*See Terry v. State of Alabama*, 424 So. 2d 710, 714 [Court of Criminal Appeals of Alabama, 1982].) Avoiding the appearance of impropriety, as counseled by Canon 9, must be counterbalanced against factors discussed above which militate against imputed disqualification of an entire prosecuting attorney's office.

By promulgating this advisory opinion, we do not suggest that a court may not recuse a prosecutor and his entire staff in

appropriate circumstances. As noted in Younger, "a court may make such an order when it appears reasonably necessary to insure the fairness or appearance of fairness of trial or the orderly and proper administration of justice or to preserve the integrity of the fact-finding process or public confidence in the criminal justice system." 86 Cal. App. 3d at 192. We also join the Younger court in emphasizing that we do not herein imply that the Code of Professional Responsibility is inapplicable to public prosecutors. Because they hold offices of public trust, it is imperative that prosecuting attorneys adhere to the highest ethical standards.