

L.E.I. 92-01

**Imputed Disqualification of Prosecuting Attorneys
And Their Assistants**

Because many prosecuting attorneys and their assistants engage in the private practice of law, they not infrequently find themselves disqualified from acting on behalf of the State or its subdivisions. The question thus arises whether the entire staff of a prosecuting attorney's office is prohibited from representing the State or county in matters when one of the staff is personally disqualified.

The Committee on Legal Ethics considered this matter under the Code of Professional Responsibility in L.E.I. 85-2. Although the Code did not exempt public lawyers from imputed disqualification, the Committee expressed its opinion that a lawyer in a prosecuting attorney's office is not a member of a law firm for purposes of imputed disqualification, in criminal or civil matters. The Committee relied, in part, upon Formal Opinion 342 (1975) of the American Bar Association's Committee on Ethics and Professional Responsibility, which found that there should be no imputed disqualification as long as the attorney with the personal disqualification is screened from participating, either directly or indirectly.

L.E.I. 85-2 noted that important differences exist between private firms and a prosecuting attorney's office which warranted different disqualification standards. Salaried government attorneys do not have a financial interest in the success of

departmental representation inherent in private practice; and there is greater hardship on the State to have a special prosecutor appointed than on a private client to obtain new counsel.

The Court adopted the Rules of Professional Conduct, effective January 1, 1989. The Committee considers it appropriate to revisit the issue of imputed disqualification of prosecuting attorneys under the Rules.

The Rules codify the gloss given to the Code by the ABA and the Committee by specifically providing for screening mechanisms for government lawyers under certain circumstances. Rule 1.11(c) (1) provides that a lawyer serving as a public officer or employee shall not "participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be authorized to act in the lawyer's stead in a matter...." The Comment to Rule 1.11 states: "Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated." The disqualified attorney must be screened from participation.

Rule 1.11(c) (1) is both more stringent and more lenient than the general conflict rules which apply to private attorneys. It is more stringent because Rule 1.9 only prohibits a lawyer from taking a position adverse to a former client on the same or a substantially similar matter; whereas Rule 1.11(c) (1) disqualifies a government attorney even when the representation does not involve

switching sides. The latter seeks to prevent government attorneys from using their public powers to benefit private individuals. The Rule is more lenient because the government attorney's disqualification is not imputed to the entire agency; whereas a private attorney's disqualification is imputed to all lawyers associated in "a firm" under Rule 1.10.¹

The differences between private firms and prosecuting attorney offices which the Committee found warranted different disqualification standards in L.E.I. 85-02 still exist. However, the Committee does not believe that the opinion or a literal reading of Rule 1.11 gives sufficient consideration to the fact that when it is the Prosecuting Attorney who is disqualified, his position as supervisor and employer of his/her assistants calls into question the practical effect of screening.

In the interests of fairness to the defendant and public confidence in the impartiality of a prosecution, the Committee believes that when a Prosecuting Attorney is disqualified for any reason, that disqualification is imputed to the entire office. When an assistant is disqualified for any reason, he/she may be

¹ The Comment to Rule 1.10 defines the term "firm" as: lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization or in a legal services organization.

screened from participation in the matter, and other assistants or the Prosecuting Attorney may represent the State.²

This matter being adopted by the full Committee on Legal Ethics on February 7, 1992.



Charles M. Love, III, Chairman
Committee on Legal Ethics
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² Technically, the screening mechanism in Rule 1.11 applies only when the disqualification comes from prior representation and not from other sources, such as relation to a witness or opposing party. The Committee does not perceive a distinction meriting a more stringent standard in the latter situation. For example, an assistant's disqualification in a prosecution for assault by a husband is no different whether he/she represents the wife in a divorce proceeding or whether the wife is the assistant's aunt.