ETHICS OPINION

RO-91-44

[redacted]

QUESTION:

"Is the District Attorney and/or Assistant District Attorney disqualified from prosecution of a case in which:

(1) The alleged victim (and main prosecuting witness) of a crime is also being prosecuted by the District Attorney's office as a defendant in another, unrelated matter?

(2) The alleged victim (and main prosecuting witness) of a crime is also being prosecuted by the District Attorney's office as a defendant in a different, but related, matter?

(3) The alleged victim (and main prosecuting witness) of a crime is also being prosecuted by the District Attorney's office as a defendant for an offense which arises out of the same incident in which the person is a victim?

PROBLEM

The [redacted] County District Attorney's office frequently encounters cases in which we are asked to prosecute a defendant on one case while having to consult with the defendant on another case in which the defendant is the purported victim of a crime.

The most frequent situation involves domestic disputes, nightclub assault cases, and the like, in which there are cross-warrants ('A' gets warrant against 'B' who, in turn, gets warrant against 'A'). We have encountered cases in which the two charges are consolidated by the trial court and our office has an assistant district attorney on each side of the case.

In another case, our office is prosecuting 'A' for Assault I (shooting a man in the back) and we are being asked to prosecute police officer 'B' for Assault III based on 'B's force used in arresting 'A' on an arrest warrant.

Rules 1.7, 1.9 and 4.2 (amongst others) of the Rules of Professional Conduct merit special focus. Bear in mind that while prosecutors technically represent the State of Alabama (not victims), practically speaking, the best way to represent the State of Alabama is by representing victims."

* * *

ANSWER:

In the situation described in questions one, two and three, neither the District Attorney nor the assistant district attorneys in his office are disqualified, without a showing of some substantial reason related to the proper administration of criminal justice.

DISCUSSION: In Formal Opinion 342, the American Bar Association Committee on Ethics and Professional Responsibility indicated it did not intend for the imputed disqualification rule to encompass government offices and explained the rationale for distinguishing between those offices and a private law firm, as follows:

> "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." 62 A.B.A.J. 517, 522 (1976)."

This limitation is carried forward in the ABA Model Rules and the Alabama Rules of Professional Conduct which became effective January 1, 1991, in that prosecutors' offices are absent from the definition of a law firm in the Comment to the imputed disqualification rule, Rule 1.10.

Similarly, Rule 1.11 permits a lawyer to move from private practice to government employment as long as he or she does not participate in a matter in which the lawyer participated personally and substantially while in private practice. The comment to this rule includes provisions for

screening and specifically does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

It is also in accord with the view of a majority of jurisdictions that an entire prosecutor's office should not be disqualified absent a showing of actual prejudice. Clausell v. State, 474 So.2d 1189, 1191 (Fla. 1983); State v. Fitzpatrick, 464 So.2d 1185, 1187 (Fla. 1985).

In People v. Lopez, a California appeals court emphasized that caution be exercised when the issue is whether an entire prosecutorial office rather than a single prosecutor should be recused.

> "Caution is necessary because when the entire prosecutorial office of the district attorney is recused and the Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their elected representative in the prosecution of crime in the county. The Attorney General is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county. Manifestly, therefore, the entire prosecutorial office of the district attorney should not be recused in the absence of some substantial reason related to the proper administration of criminal justice. (People ex rel. Younger v. Superior Court (1978) 86 Cal.App.3d 180, 204, 150 Cal.Rptr. 156)."

The court also pointed out that the mere appearance of impropriety is insufficient to disqualify an entire office. People v. Lopez, 202 Cal. Rptr. 333, 155 Cal.App.3d 813 (1984).

We adopt the above rationale and favor, rather than disqualifying an entire prosecutor's or public defender's office when one of its members is confronted with a conflict, testing for individual prejudice and the adoption of effective screening procedures to screen the conflicted member.

This, in effect, was the result in Jackson v. State, 502 So.2d 858 (Ala. Cr.App. 1986), where the Alabama Court of Criminal Appeals found that a defendant's previous court-appointed attorney's subsequent employment as a part-time Assistant District Attorney did not constitute a conflcit of interest. While the court did not specifically address the question of imputed disqualification or screening, they, in effect, approved these principles when they remanded the case to determine if a conflict actually existed. The court determined that a conflict did not exist because the

attorney did not bring any record or file pertaining to the defendant with him to the District Attorney's office nor did he consult or discuss the defendant's case with the District Attorney or any attorney who prosecuted or participated in the defendant's trial.

In the three questions posed in your request, it is our view that the District Attorney and/or Assistant District Attorney are not per se disqualified from prosecuting a case in which the alleged victim (the main prosecuting witness) of a crime is also being prosecuted by the District Attorney's office as a defendant in the same, related or unrelated matter. The question to be answered is whether there is some substantial reason for disqualification related to the proper administration of justice and whether the disqualification may be cured by effective screening procedures.

It is apparent that effective screening procedures could be more easily implemented in a large, compartmentalized District Attorney's office. However, size is not the sole determiner. What is key is the effectiveness of the screening procedures established.

In United States v. Caggiano, the court refused to disqualify an entire U.S. Attorney's Office when a defendant's former defense counsel joined the office but swore that he had not discussed the case with his new colleagues [660 F.2d 184 (6th Cir. 1981), cert. denied 454 U.S. 1149, 102 S.Ct. 1015, 71 L.Ed.2d 303 (1982)]. Professor Wolfram in his hornbook on legal ethics injects a note of caution by observing that if the rule is applied "without regard to the workability of screening arrangements, the approach probably naively assumes that prosecutors can always avoid the temptation to assist new colleagues with helpful inside information or always avoid inadvertent mention of helpful tips." Wolfram, Modern Legal Ethics, West Publishing Co. (1986) pg. 405-406.

In RO-90-91, the Disciplinary Commission held that a three person prosecutor's office would be disqualified from prosecuting a city commissioner for using equipment and personnel of the city in his private business while, at the same time, prosecuting several worthless check offenses where the commissioner was the victim. The worthless checks had been tendered to the commissioner's business and could have become an evidentiary topic at the commissioner's trial. We noted in RO-90-91 that in

some instances simultaneous representation might be deemed permissible but reserved judgment and limited the opinion strictly to the facts presented.

With this opinion we adopt the view that disqualification of one lawyer in a prosecutor's or public defender's office will not be imputed to another member of that office and expressly recognize that the disqualified member may be effectively screened from other lawyers in the office. Extreme care must be exercised to insure that the screening procedure employed are effective.

In RO-85-40 we held that it was improper for the District Attorney or an Assistant District Attorney in the District Attorney's office to prosecute a criminal defendant in circuit court while that defendant is the victim and primary prosecuting witness in an assault prosecution in the District Court. To the extent that RO-85-40 is inconsistent with this opinion, it is expressly reversed.

RWN/clr

1/21/92