VOICE for the DEFENSE

Official Journal of the Texas Criminal Defense Lawyers Association

Marvin O. Teague, Judge, Texas Court of Criminal Appeals

MARCH 1987

Ethics Notes

Attorney Conflict of Interest

by Jack Zimmermann

The subject of conflict of interest is a complex area of ethical dilemmas for the criminal defense practitioner. Because of this, the subject will be treated in two parts. The first will deal with conflicts where the defense attorney has been in that status for some period of time and will cover subjects most often encountered. The second portion will deal with conflicts of interest occasioned by a prosecutor becoming a defense lawyer or a judge, or a defense lawyer assuming the position of prosecutor or judge. The first portion appears here, and the second part will be published in a future issue.

Jack B. Zimmermann is a criminal law specialist, certified by the National Board of Trial Advocacy and the Texas Board of Legal Specialization. He is widely known for his trial and appellate successes in several high profile cases, and has been a faculty member of CLE programs in fifteen states and provinces of the United States and Canada. He practices with the Houston firm of Zimmermann & Lavine, P.C., and is the Staff Judge Advocate of the 4th Marine Aircraft Wing in the Reserves.

Representing Multiple Defendants

The constitutional right to effective assistance of counsel entitles the defendant to the undivided loyalty of his counsel. Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. *See* SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, §9 (Code of Professional Responsibility) DR 5-105 (1984); STATE BAR OF TEXAS, ETHICAL CONSIDERATIONS ON CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14–5-20 (1982).

One recurring area where the conflict of interest problem arises is when defense counsel represents co-defendants in a criminal case. The potential for conflict of interest under these circumstances is so great that many attorneys simply refuse to represent co-defendants. Although the co-defendants' interests may start identically, they may diverge at almost any point in the litigation. In the plea bargaining process, the prosecutor may offer leniency to one defendant in exchange for his testimony against the other. At trial, the potential for conflict usually increases. The co-defendants may raise conflicting defenses, with each implicating the other, or they may raise a joint defense, but give contradictory explanations of the base facts. Further, the advantages and disadvantages of taking the stand may be quite different for each co-defendant, thereby presenting conflicting interests. During closing argument, defense counsel may realize that he cannot fully argue the facts favorable to one defendant without harming the other. As these few examples illustrate, the possibilities of conflicts are nearly endless.

Recognizing the problems that often arise, the American Bar Association has given some guidelines:

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that:
>
> (i) no conflict is likely to develop;
>
> (ii) the several defendants give an informed consent to such multiple representation; and
>
> (iii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that an attorney sometimes encounters in defending multiple clients.
>
> In some instances, accepting or continuing employment by more than one defendant in the same criminal case is unprofessional conduct.

1 American Bar Association, *Standards for Criminal Justice* Standard 4-3.5(b) (2d ed. 1980).

Multiple defendant representation at trial often leads to a later ineffective assistance of counsel challenge by one or more of the defendants. The main issues in this area concern waiver of conflict-free counsel by the defendants, the duty of the trial court to investigate potential conflicts in a multiple defendant representation case, and standards for review where defense counsel represents co-defendants at trial and one or more of these defendants later raise an ineffective assistance of counsel claim.

Waiver of Conflict-Free Counsel

Some commentators have questioned whether there truly can be a knowing and intelligent waiver of the right to conflict-free counsel. *See, e.g.*, Moore, *Conflict of Interest in the Simultaneous Representation*

of Multiple Clients, 61 Tex. L. Rev. 211, 281-82 (1982). The majority rule recognized by the appellate courts, however, is that the right to conflict-free counsel can be knowingly and intelligently waived by a defendant who would be equally competent to waive his right to counsel altogether under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Several statements of the United States Supreme Court suggest a recognition of the right to waive conflict-free counsel. In *Holloway v. Arkansas*, 435 U.S. 475, 482-83, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 (1978), the Court, quoting *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), pointed out that in some cases certain advantages might accrue from joint representation. Also, Justice Brennan, in *Cuyler v. Sullivan*, 446 U.S. 335, 351, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980) (Brennan, J., concurring), noted that *Holloway* established that defendants usually have the right to share a lawyer if they so choose.

The Fifth Circuit, in *United States v. Garcia*, 517 F.2d 272, 276 (5th Cir. 1975), explicitly concluded that a defendant can waive his right to conflict-free counsel. The court also outlined the procedure to be followed by a district court to assure that the defendant made a knowing and intelligent waiver.

> [T]he district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. It is, of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language." Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloquy between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment "fundamental fairness" basis.

Id. at 278 (citations omitted).

The leading Texas case on the defendant's waiver of his right to conflict-free counsel is *Ex parte Prejean*, 625 S.W.2d 731 (Tex. Crim. App. 1981) (en banc). The Court of Criminal Appeals held that the right to conflict-free counsel may be waived if done so knowingly and voluntarily. *Id.* at 733 (citing *United States v. Garcia, supra*). The court went on to state that "a waiver of the right to conflict-free counsel should include a showing that the defendant is aware of the conflict of interest, realizes the consequences of continuing with such counsel, and is aware of his right to obtain other counsel." *Id.* at 733. The court also attached the waiver form used in that case as an appendix, so the practitioner only needs to go read this case for a sample form.

Trial Court's Duty to Investigate

The issue of whether a trial court has a duty to inquire into the propriety of multiple representation even though no party lodges an objection at trial was specifically left unanswered in *Holloway v. Arkansas, supra*, 435 U.S. at 483-84, 98 S.Ct. at 1178. In *Cuyler v. Sullivan, supra*, the Court resolved the issue and held that "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." 446 U.S. at 347, 100 S.Ct. at 1717. The Court explained that the Sixth Amendment does not require state courts themselves to initiate inquiries into the propriety of multiple representation in every case and pointed out that defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. 446 U.S. at 346-47, 100 S.Ct. at 1717.

The standard set forth in *Cuyler v. Sullivan, supra*, has been incorporated into Texas law by the Court of Criminal Appeals. *See, e.g., Lerma v. State*, 679 S.W.2d 488 (Tex.Crim. App. 1984) (en banc) (opinion on rehearing).

It should be noted that in federal practice, however, rule 44(c) of the Federal Rules of Criminal Procedure, which became effective December 1, 1980, added a new wrinkle. Under rule 44(c), in every instance of multiple defendant representation "the court shall promptly inquire with respect to such joint representation...." So, although not constitutionally required, Congress has seen fit to place a duty on the federal district courts to inquire into multiple defendant representation.

Standard of Review of Ineffective Assistance of Counsel Claim

The prevailing standard of review for an ineffective assistance of counsel claim due to an actual conflict of interest is set forth in *Cuyler v. Sullivan, supra*. The Court pointed out that a defendant who objects to multiple representation must have the opportunity to show that potential conflicts infringe on his right to effective assistance of counsel. 446 U.S. at 348, 100 S.Ct. at 1718. But, unless the trial court denies the defendant this opportunity, an appellate court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. *Id.*

In *Holloway v. Arkansas, supra*, the Court reversed the defendants' convictions because of the trial court's failure to respond to timely objections to the multiple representation. 435 U.S. 484, 98 S.Ct. 1178-79. The Court did not consider whether the alleged conflict actually existed, but instead held that reversal was automatic because the trial court's failure to respond deprived the defendants of their right to effective assistance of counsel. *Id.*

In *Cuyler v. Sullivan, supra*, however, the defendant did not make an objection at trial to the multiple representation. The court ruled that in this circumstance the defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance, but that he need not

demonstrate prejudice in order to obtain relief. 446 U.S. 348, 349-50, 100 S.Ct. 1718, 1719. The Court also pointed out that unconstitutional multiple representation is never harmless error. 446 U.S. 349, 100 S.Ct. 1719. The Court did not determine whether Sullivan had actually made a showing of an actual conflict of interest that adversely affected his lawyer's performance, however, but instead remanded to the court of appeals for a determination under this test.

One ambiguous aspect of the test set forth in *Cuyler v. Sullivan, supra,* is the requirement that the defendant show that the conflict of interest adversely affected the lawyer's performance while at the same time not requiring the defendant to demonstrate prejudice. The Fifth Circuit initially interpreted this apparent inconsistency as meaning that the defendant need only show an actual conflict of interest. In *Baty v. Balkcom,* 661 F.2d 391, 396 (5th Cir. Unit B Nov. 1981), *cert. denied,* 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982), the court said that "we believe a close examination of the opinion as a whole indicates that the Supreme Court did not intend to establish a standard requiring proof of adverse effect on counsel in addition to proof of an actual conflict of interest."

In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court, in dicta, clarified the matter somewhat. The Court explained that the presumption of prejudice in an actual conflict of interest case is not quite the per se rule of prejudice that exists in an actual or constructive denial of assistance of counsel case. 446 U.S. at ____, 104 S.Ct. at 2067. This is the reason that the defendant must show that the actual conflict of interest had an adverse effect on his lawyer's performance, in addition to showing that the actual conflict existed, in order to avail himself of the presumption of prejudice. *Id.* The Fifth Circuit has recently relied on this language in *Strickland v. Washington, supra,* in an opinion that is contrary to the reasoning in *Baty v. Balkcom, supra. Nealy v. Cabana,* 782 F.2d 1362, 1365 (5th Cir. 1986), *cert. denied,* 40 Crim. L. Rep. 4017 (October 8, 1986) ("[W]e hold that proof of some adverse effect is required before prejudice will be presumed from a showing that the attorney had an actual conflict of interest.").

The Court of Criminal Appeals, in incorporating this test from *Cuyler v. Sullivan, supra,* into Texas jurisprudence, appears to have always required the showing of an actual conflict and an adverse effect. *See, e.g., Gonzales v. State,* 605 S.W.2d 278, 282 (Tex. Crim. App. 1980) ("[The defendant] has not established the constitutional predicate for his claim of ineffective assistance of counsel unless and until he can demonstrate that his counsel has represented actually conflicting interests which in turn adversely affected his lawyer's performance.").

In summary, prudent defense counsel would be wise never to represent co-defendants due to the myriad of problems that may arise. In the rare instance where counsel does undertake multiple defendant representation, he must be aware of his ethical duties, as well as the court's duty, to see that the defendants' right to effective assistance of counsel are preserved. Further, defense counsel should at all times be aware of the standard of review in these cases so that a former client does not later successfully assert an ineffective assistance of counsel claim. Finally, if one undertakes representation of co-defendants, defense counsel must fully disclose all foreseeable conflicts of interest to the clients. This disclosure should be made in writing, with the appropriate waiver signed by the clients and the lawyer, and copies given to the clients and placed in your file.

(Next month the discussion of conflicts of interest will continue with a special focus placed on problems faced by judges and prosecutors in leaving and entering positions as defense counsel.)

Note: Readers are encouraged to submit questions about ethical practice for discussion in future columns by forwarding to Professor Walter W. Steele, Jr., Southern Methodist School of Law, Dallas, Texas 75275. This column will be written monthly by a panel of authors consisting of Ms. Jan Hemphill, Professor Walter W. Steele, Jr. and Mr. Jack Zimmermann. ■

LAWYER'S ASSISTANCE COMMITTEE

Attorneys now have a ready source of information and assistance – through the Lawyers' Assistance Committee. When you need help, please contact any of the following members:

DISTRICT 1:
Clifford Brown
1601 Broadway
Lubbock, TX 79401
(806) 763-9493

DISTRICT 2:
Jim Bobo
409 N. Texas
Odessa, TX 79761
(915) 332-0676

DISTRICT 3:
Tim Evans
115 W. 2nd St., Suite 202
Fort Worth, TX 76102
(817) 332-3822

Frank Jackson
2902 Maple Avenue
Dallas, TX 75201
(214) 871-1122

DISTRICT 4:
Scrappy Holmes
P.O. Drawer 3267
Longview, TX 75606
(214) 758-2200

DISTRICT 5:
Ed Mallett
55 Waugh, Suite 900
Houston, TX 77007
(713) 526-1778

Douglas Tinker
622 S. Tancahua
Corpus Christi, TX 78403
(512) 882-4378

DISTRICT 6:
Robert Yzaguirre
821 Nolana
McAllen, TX 78501
(512) 682-4308

DISTRICT 7:
Gerald Goldstein (Chairman)
2900 Tower Life Bldg.
San Antonio, TX 78205
(512) 226-1463

DISTRICT 8:
Charles McDonald
P.O. Box 1672
Waco, TX 76703
(817) 754-7317

Ethics Notes

Attorney Conflict of Interest: Former Government Service

by Jack B. Zimmermann

Part II

A criminal defense lawyer is faced with ethical issues daily. A common problem is posed to the practitioner when he is asked to handle a matter that he had previously dealt with while in government service either as a prosecutor or as a judge. A related problem is posed when a defense attorney later works as a government attorney or judge.

Applicable Ethical Provisions

Canon 9 of the Texas Code of Professional Responsibility states in its title that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Supreme Court of Texas, Rules Governing the State Bar of Texas art. X, §9 (Code of Professional Responsibility) Canon 9 (1984) [hereinafter Texas Code of Professional Responsibility]. Disciplinary rule 9-101 reads, in part, as follows:

> DR 9-101. Avoiding Even the Appearance of Impropriety.
>
> (A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.
>
> (B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

Texas Code of Professional Responsibility, *supra*, DR 9-101(A)-(B).

Other relevant provisions of the Texas Code of Professional Responsibility are those of Canons 4 (Confidences and Secrets) and 5 (Independent Professional Judgment). The disciplinary rules of Canon 4 generally prohibit a lawyer from using or revealing a confidence or secret of a client. *See* Texas Code of Professional Responsibility, *supra*, DR 4-101(B). The disciplinary rules of Canon 5 generally require a lawyer to refuse employment or withdraw from employment when his exercise of professional judgment on behalf of a client may be affected. *See* Texas Code of Professional Responsibility, *supra*, DR 5-105. *See also* State Bar of Texas, Ethical Considerations on Code of Professional Responsibility EC 5-14—5-15 (1982) [hereinafter State Bar of Texas Ethical Considerations].

Policy Considerations Underlying the Disciplinary Rule

Despite the maxim of Canon 9, "[i]t is obvious, however, that the 'appearance of professional impropriety' is not a standard, test or element embodied in DR 9-101(B)." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) (footnote omitted) [hereinafter Op. 342]. Instead, the appearance of impropriety is only a policy consideration supporting the existence of the rule. *Id.* The appearance of impropriety is also discussed in the ethical considerations of Canon 9. *See* State Bar of Texas Ethical Considerations EC 9-2—9-3.

The appearance of impropriety policy consideration should be used as guidance for lawyers when making decisions of conscience regarding their professional responsibility, but "it is not relevant when a grievance committee or court is determining whether a violation of the standard of DR 9-101(B) has in fact occurred." Op. 342, *supra*. *See also* C. Wolfram, *Modern Legal Ethics* §7.1.4 (prac. ed. 1986). The courts have nevertheless applied the appearance of impropriety policy consideration to conflict of interest cases. *See, e.g., Bradshaw v. McCotter*, 785 F.2d 1327, *modified on rehearing*, 796 F.2d 100 (5th Cir. 1986) (applied to a prosecutor who later became a judge); *Dillard v. Berryman*, 683 S.W.2d 13 (Tex. App.—Fort Worth 1984, no writ) (applied to a prosecutor who later went into private practice).

While avoiding the appearance of impropriety is one policy consideration of DR 9-101(B), it is only one of many and is probably not the most important. Op. 342, *supra*. The general policy considerations of DR 9-101(B) include the following: (1) the distaste for switching sides in a case; (2) the protection of confidential government information so that it is not later used against the government; (3) the need to prevent government lawyers from handling a case in such a manner so as to enhance their employability or financial rewards in later private practice; and (4) the professional benefit derived from avoiding the appearance of professional impropriety. *Id.*

At the same time, however, there are other policy considerations in support of the view that a disciplinary rule relating only to former government lawyers should not be too broad a limit on the lawyer's later private employment. Some of the considerations favoring a more liberal interpretation of the rule are the following: (1) the ability of the government to attract young, competent lawyers should not be unduly restricted by the imposition of harsh restraints on later private practice, and the government should not have to demand too great a sacrifice from those law-

yers who are willing to enter government practice; (2) the rule will serve no worthwhile public interest if it is allowed to become a mere tool that enables a litigant to improve his prospects by depriving his opponent of competent counsel; and (3) the rule should not be permitted to needlessly interfere with the right of a litigant to obtain competent counsel of his or her choosing. *Id.* This last consideration is especially important in the criminal defense situation. *See also* C. Wolfram. *supra*, §§8.10.1–8.10.2.

As a result of these competing interests, DR 9-101(B) should be interpreted and applied in such a manner that the policy interests of the government, former government lawyers, the Bar in general, private litigants, and the general public are all accommodated.

The Disciplinary Rule 9-101(B) Test

The issue to be determined in a disciplinary proceeding brought under rule 9-101(B) is whether the lawyer has accepted "private employment" in a "matter" in which he had "substantial responsibility" while he was a "public employee." Each of the quoted phrases needs further explanation and should be interpreted in a manner consistent with the previously discussed policy considerations.

"Private employment" should be interpreted to refer only to employment as a private attorney. Since one consideration is to prevent government lawyers from handling assignments in such a manner as to encourage larger fees in later private practice, the policy will not be furthered by a broader application. There is no perceived danger in a lawyer moving from one salaried government position to another.

The term "matter" as used in DR 9-101(B) is more difficult to precisely define. Sometimes a "same facts" or "same transaction" test is used. Generally, "matter" seems to encompass a specific transaction or transactions between particular parties. The same "matter" would not be involved where there is lacking the discrete transaction involving a particular situation and specific parties.

"Substantial responsibility" involves a fairly close and direct relationship, thus requiring more than a mere ministerial approval or disapproval of a matter. This term does not require that the government lawyer shall have personally investigated and passed on a particular matter, however; it is enough that he had such a responsibility for the matter that it is unlikely that he did not become substantially involved.

It should also be noted that the phrase "public employee" was used instead of the word "lawyer." Thus, it is clear that the intent was for DR 9-101(B) to also be applicable to the lawyer whose former governmental employment was as a nonlawyer. *See* Op. 342, *supra;* C. Wolfram, *supra*, §8.10.3. *See also* Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957) (discussion of test under former ABA Canon 36, predecessor to Canon 9).

Case Law Resolution in Conflict Situations

Defense Lawyer Who is Contemporaneously a Prosecutor

Many criminal defense lawyers also work as part-time prosecutors for small municipalities. In *Kelly v. State*, 640 S.W.2d 605 (Tex.Crim. App. 1982), Kelly's court-appointed defense counsel was a prosecutor in the city where Kelly was arrested. The court held that the trial court abused its discretion in not holding a hearing on defense counsel's motion to withdraw and reversed the conviction. *Id.* at 611-12.

Defense Lawyer Who Becomes a Prosecutor

Problems can also arise where defense counsel later become prosecutors and have dealings with former clients. For example, in *Munguia v. State*, 603 S.W.2d 876 (Tex.Crim.App. 1980), the defendant was charged with aggravated rape. The county attorney, who had previously represented Munguia as defense counsel on a prior rape charge, which was dismissed, assisted in the prosecution. The court held that the county attorney was not disqualified since, in the prior representation, there had been absolutely no discussion of the facts of the present prosecution. *Id.* at 878 (citing *Reed v. State*, 503 S.W.2d 775 (Tex.Crim.App. 1974); *Kizzee v. State*, 312 S.W.2d 661 (Tex.Crim.App. 1958). This will not always be the outcome, however. In *Ex parte Spain*, 589 S.W.2d 132 (Tex.Crim. App. 1979), the prosecutor who filed the State's motion to revoke probation and represented the State at the revocation hearing had orignally represented Spain on the underlying offense. The court, relying on Article 2.01 of the Code of Criminal Procedure and constitutional provisions, held that the prosecutor should not have participated in the revocation proceedings. *Id.* at 134.

The writer considers the *Munguia* case to be wrongly decided. The prosecutor had established an attorney-client relationship with the defendant during the prior case, and therefore had knowledge of the defendant's every background detail. He then, as prosecutor, was in a position to use that special knowledge to cross-examine his former client, or prevent his taking the stand to avoid that. Finally, he could call witnesses to impeach the defendant that he could have discovered as defense counsel.

Prosecutor Who Becomes a Judge

Sometimes the problem will arise in a situation where the prosecutor later becomes a judge. In *Ex parte Miller*, 696 S.W.2d 908 (Tex.Crim.App. 1985), the problem again arose over probation revocation proceedings. In this case, the judge who presided over the revocation proceedings was the assistant district attorney representing the State at the hearing where Miller was originally put on probation. The court found violations of Article V, Section 11 of the Texas Constitution as well as Article 30.01 of the Code of Criminal Procedure and held that the order revoking probation was null and void. *Id.* at 910.

Lee v. State, 555 S.W.2d 121 (Tex. Crim. App. 1977), presents a slightly different situation. In this case the former assistant district attorney, who later became the trial judge in Lee's case, had not actually been the prosecutor assigned to Lee's case. Instead, the former assistant district attorney had apparently only looked at the case file one time, and this was so that he could prepare a letter to Lee's attorney. At the hearing where the trial judge overruled the motion to disqualify, he said

that he had "no independent recollection of what did occur." *Id.* at 123. The Court of Criminal Appeals considered the issue of disqualification of the judge as unassigned error. *Id.* at 122. The court concluded that the former assistant district attorney had investigated the State's file and participated in decisions made relative to Lee's case. *Id.* at 125. The court accordingly reversed the conviction. *But see Donald v. State,* 453 S.W.2d 825, 826 (Tex.Crim.App. 1969) (dictum) ("where a judge had been an assistant district attorney 'at the time of the offense, but had no recollection of working on the case,' he was not disqualified") (citing *Muro v. State,* 387 S.W.2d 674 (Tex.Crim.App. 1965)).

In *Bradshaw v. McCotter,* 785 F.2d 1327, *modified on rehearing,* 796 F.2d 100 (5th Cir. 1986), a former Texas State Prosecuting Attorney before the Court of Criminal Appeals had been appointed to the Court of Criminal Appeals as a judge after Bradshaw had filed his appeal with that court. The former State's Attorney sat on the panel that heard the appeal even though his name appeared on the State's brief as State's Attorney in Bradshaw's case. The United States Court of Appeals noted that the new judge had recused himself from all cases in which he had assumed any role as state prosecutor and that his name was placed on the prosecuting attorney's brief in Bradshaw's case only as a matter of courtesy. 785 F.2d at 1329. Disregarding this, however, the court granted Bradshaw a new appeal, without a showing of prejudice, because of the appearance of impropriety created by the situation. *Id.* On rehearing the court modified its opinion only by requiring a showing of prejudice to obtain relief. 796 F.2d at 101. The court reiterated, however, that this was not a modification of the conclusion in the original opinion that the judge should have disqualified himself in all cases in which his name appeared on the brief as a prosecutor. *Id.*

Prosecutor Who Becomes a Civil Lawyer

Dillard v. Berryman, 683 S.W.2d 13 (Tex. App.–Fort Worth 1984, no writ), involved a former district attorney, now in private practice, who, as the district attorney, had received the complaint and had interviewed the complaining witness in an assault case. Another lawyer at the former district attorney's firm was now representing the former criminal defendant as a civil defendant in the civil case that arose from the same assault. The plaintiff sought to disqualify the former district attorney's firm. The court said that there was no question that the former district attorney himself could not represent the civil defendant, and that the only issue was whether the whole firm was disqualified. *Id.* at 15. The court held that the whole firm was disqualified, stating that "[t]he purpose of Canon 9 is to avoid even the appearance of impropriety." *Id.*

The writer considers the essence of this case to be a problem of "switching sides." It is just inherently wrong to permit a lawyer to represent one side of a civil dispute between two individuals, when that same lawyer had access to private communications and information from the now adverse party from prior prosecutorial duties. If he represented the prosecution, and thereby the complaining witness, it just does not set well that the same lawyer can then oppose that complaining witness, now plaintiff, in the civil case arising out of the same exact facts. The situation would be different, it is submitted, if the former prosecutor had not been in a position to learn information which could be used against the former complaining witness at the civil trial.

Prosecutor Who Becomes a Criminal Defense Lawyer

Much the same situation would exist where a former prosecutor joins a private firm, which is sought out to represent a defendant in a criminal case, where the prosecution was handled by the former prosecutor's office. If he had access to the witnesses for the State in preparation for trial–as prosecutor–and could use information he actually learned in that role against those witnesses at the criminal trial, then judgment should be exercised in favor of nonrepresentation. However, if only preliminary matters, or no matters, were personally handled by the former prosecutor, his new firm should not be disqualified. The writer again submits that discretion should be exercised so that the former prosecutor personally should not have any role at all in the defense of the criminal case. He should be insulated, or screened, as to that case. He should not give or receive any information about the case, and should have no participation at all, see e.g. *Armstrong v. McAlpin,* 625 F.2d 433 (2d Cir. en banc) vacated on other grounds 449 U.S. 1106 (1981).

An extremely important factor, recognized in Op. 342, *supra,* is the preexisting relationship between the client and the firm at the time the former prosecutor is hired. If a real hardship to the client would result from firm disqualification, either because substantial work on the client's case already may have been completed regarding specific litigation, or because the client may have relied in the past on representation by the firm, then an inflexible extension of firm disqualification should not occur. So long as the former prosecutor is properly screened, to apply disqualification to the whole firm would elevate form over substance. *See* Op. 342, *supra.*

This approach accommodates the need to permit former prosecutors to associate with a law firm doing criminal defense work, without disqualifying the whole firm in every criminal case on its docket. Moreover, this protects the public's interest that the prosecution not be disadvantaged by a former prosecutor using "inside information" against it. Obviously, every case will turn on its own facts, and there will be degrees, depending on the involvement of the former prosecutor. The only "bright line" rule the writer recommends is that the former prosecutor be disqualified personally. As to the whole firm, all the foregoing factors must be analyzed on a case-by-case basis to determine if the firm can ethically accept or maintain employment.

Because this situation is so rare, no Texas cases were discovered on this subject.

Out-of-State Provisions

The lawyer who comes to Texas after practicing in another state, or the Texas lawyer who goes to another state, should also be aware that the Texas Code's imputed-disqualification rule differs from the one of the American Bar Association's Model Code of Professional Responsibility. The Texas imputed-disqualification rule states that if a lawyer in Texas is disqualified under the provision of Canon 5 because his judgment on behalf of a present client is likely to be adversely affected,

then the disqualification is imputed to the other lawyers in his firm. *Compare* Texas Code of Professional Responsibility, *supra,* DR 5-105(D) ("If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.") *with* Model Code of Professional Responsibility DR 5-105(D) (1980) ("If a lawyer is required to decline employment or to withdraw from employment under *a Disciplinary Rule,* no partner, or associate, . . .[of] hi[s] or his firm, may accept or continue such employment.") (emphasis added). The emphasized portion of the American Bar Association rule, which previously read similarly to the Texas rule, was added in February 1974. Thus, by its plain wording, the imputed-disqualification provision of the Texas Code would not be applicable to a former government lawyer disqualification that arose under *DR 9-101(B),* since the Texas provision applies only to disqualifications arising under *DR 5-105.*

In the case of former government lawyers, in addition to the restriction regarding his own personal involment as private counsel, the American Bar Association has provided a guideline that presents an additional consideration as follows:

> It is unprofessional conduct for a lawyer to defend a criminal case in which the lawyer's partner or other professional associate is or has been the prosecutor.

1 American Bar Association, *Standards for Criminal Justice* Standard 4-3.5(d) (2d ed. 1980). Pertinent to this subject is rule 1.11 of the American Bar Association's Model Rules of Professional Conduct, which states that:

> RULE 1.11 Successive Government and Private Employment
>
> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

Model Rules of Professional Conduct Rule 1.11(a) (Discussion Draft 1983).

Conclusion

The private lawyer who also serves as a public prosecutor, and the other lawyers in his firm, should not accept employment or appointment as a trial defense lawyer in the jurisdiction in which he prosecutes.

A prosecutor should not accept assignment to try a case in which the defendant is a former client of his from prior private practice.

A judge should recuse himself or herself from any case where the defendant is either a former client from prior private practice, or the judge, as a former prosecutor, had anything to do with a prior prosecution of that defendant.

A former prosecutor, and the other lawyers in his firm, should not accept private employment as a trial lawyer in defense of a civil client whom he had previously prosecuted as a criminal defendant.

A former prosecutor should not accept private employment as a trial lawyer in defense of a criminal defendant whom he had prosecuted in a criminal case. If the former prosecutor had substantial responsibility in the prosecution of the criminal defendant, and there is no preexisting relationship between the firm and the client, the other lawyers in the firm should not accept employment to represent the defendant in a criminal case. Where there has been a substantial prior relationship between the firm and the client, and the former prosecutor is carefully and properly screened and does not personally participate in any way in the defense of the criminal defendant, the other lawyers in the firm should not be disqualified.

The writer gratefully acknowledges the assistance of law clerk Warren W. Harris, a second-year student at the University of Houston Law Center. However, responsibility for all opinions and conclusions remains solely with the writer.

Note: Readers are encouraged to submit questions about ethical practice for discussion in future columns by forwarding to Professor Walter W. Steele, Jr., Southern Methodist School of Law, Dallas, Texas 75275. This column will be written monthly by a panel of authors consisting of Ms. Jan Hemphill, Professor Walter W. Steele, Jr. and Mr. Jack Zimmermann. ■

Defense Considerations

continued from page 14

sonal objection he may have to the production of the documents, produce those documents to which there are no objections, and describe those documents which are called for in the summons and not produced.

8. Any objection to questions asked must be done so to each question. A general "blanket" objection is not accepted.

XIV. Conclusion

Since the government has the burden of proof in establishing "beyond a reasonable doubt" that a taxpayer has violated a criminal tax statute, the best technique to protect your client's interests is to instruct the person from the beginning not to discuss the matter with anyone other than his tax attorney and to avoid assembling information that will assist the IRS in making its criminal or civil fraud case. Whether information should be assembled will depend upon whether the IRS has ready access to such information as through bank deposits record, and non-privileged records subject to discovery through summons enforcement proceedings.

1. All Section references herein are to the Internal Revenue Code of 1954, as amended, 26 U.S.C., unless otherwise referenced. ■