ADVISORY ETHICS OPINION 81-10

SYNOPSIS:

Unless personally biased against the defendants, an assistant attorney general is not ethically barred from assisting in the prosecution of a case where, as judge at an earlier time, he presided over an inquest at which the defendant did not testify.

QUESTION PRESENTED:

Is an assistant attorney general who was formerly a district judge ethically barred from assisting in the prosecution of a case wherein he earlier presided over an inquest at which the defendant did not testify?

DISCUSSION:

This question is novel for us. Vermont law provides only once precedent of any relevance. In State v. Jurras,[1] a conviction was upheld in the face of an argument that the defendant was denied an impartial trial because the presiding judge also presided over an inquest in the case. It was held that the judge's duties did not, per se, disqualify him from further sitting on the case. It was also said,

> At most the only available question was whether the judge was prejudiced by reason of what had occurred so as to prevent an impartial trial; and it should be observed that it is personal prejudice against the respondent and not prejudice against the particular offense with which he is charged that disqualifies. A respondent is not entitle to a trial by a judge and jury who are absolutely indifferent to the commission of crime.[2]

Surely a prosecutor need not be more indifferent than a judge and jury, although he dare not fall much below that standard.[3]

Our search of other jurisdictions discloses only two relevant cases. Unlike the question here presented, both are cases where not only did the prosecutor sit earlier on the case in a judicial capacity, but as a judicial officer, he made a ruling adverse to the defendant. Keyes v. State[4] was an arson case in which the assistant state's attorney refused to disqualify himself. In a judicial capacity, he had earlier waived juvenile jurisdiction in the case. This waiver, in effect, was a ruling that the case should be prosecuted in adult criminal court. On appeal it was held that no prejudice could result from the prosecutor's failure to disqualify himself. The conviction was affirmed.

In Ross. v. State[5], the prosecutor in a murder trial had been presiding judge of the district at the time of the homicide. As such, he had denied the defendant bail despite a court commissioner's contrary recommendation. The court upheld the conviction and noted that, while the prosecutor may have formed an opinion as to the defendant's guilt on the basis of evidence he received on the bench, this did not constitute prejudice sufficient to disqualify him from prosecuting the case.

Because we are not altogether comfortable with the available precedents, we analyze the case with some care. We start from the proposition that the attorney general and his assistants are not immune from the rule that prohibits attorneys from representing conflicting interests. The question presented, however, is not controlled by that rule. The mere fact that a judge presides over a case does not imbue him with an interest in the outcome.[6] Certainly there is nothing in DR 5-105 that purports to create such an interest. A judge is a disinterested magistrate whose concern is for the impartial administration of law. That he later acquires an advocate's interest in a case over which he once presided creates no actual conflict, since he has no antecedent interest to stand in opposition.

Whether the question presented is controlled by the rule prohibiting an appearance of impropriety is somewhat more difficult. DR 9-101(A) provides:

> A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

[1] State v. Jurras, 97 Vt. 276, 122 A 589 (1923).
[2] 97 Vt. At 280.
[3] State v. Hohman, 138 Vt. 502, 420 A.2d 582 (1980); In re J.S., No. 303-81, slip op. (Sept. 10, 1981).
[4] Keyes v. State, 236 Md.74, 202 A.2d 582 (1964).
[5] Ross v. State, 8 Wyo. 351, 57 P.924 (1899).
[6] *See*, generally, Anno. What Constitutes Representation of Conflicting Interests Subjecting Attorney to Disciplinary Action. 17 ALR 3d 835.

In the question presented, however, the attorney's job is not a private employment. It is a public duty.[7] And here the attorney could have made no ruling on the merits of the case when as judge he presided over the inquest. He had no opportunity to do so. An inquest is a proceeding neither penal nor accusatory; it is investigatory.[8] Indeed, we must presume that no case was pending when the inquest was held since it would be error to hold an inquest in such circumstances.[9] Thus, the question presented falls outside the rule's text.

We next consider the purpose of the rule to insure that this is not one of those rare cases where the literal application of positive law would frustrate its purpose. The purpose of DR 9-101(A) is to maintain confidence in the integrity of the bar by removing the possibility of misunderstanding.[10] No rule, however, can eliminate all possibilities. We are satisfied that the office of prosecutor in a case and prior service as judge on an aspect of the same case not involving the merits are so unrelated that the purpose of DR 9-101(A) is not compromised.

CONCLUSION:

The precedents we have found and our own analysis lead us to conclude that the assistant attorney general may prosecute here without violating any ethical obligation provided that he is not personally biased against the defendant. We leave open the question whether, if the defendant had testified at the inquest, a proper sensitivity to the privilege against self-incrimination would require a different conclusion. Likewise, we express no opinion on the question whether the assistant attorney general suffers a statutory disability pursuant to 12 V.S.A. §61(a) as we do not regard this as an ethical question.

[7] State v. Slack, 69 Vt. 486, 38 A 311 (1897).
[8] State v. Alexander, 130 Vt. 54, 286 A.2d 262 (1971).
[9] State v. Lapham, 135 Vt. 393, 377 A.2d 249 (1977).
[10] EC 9-2.