ADVISORY ETHICS OPINION 92-05

SYNOPSIS:

A Deputy State's Attorney should not prosecute a case in which he or she will be called as a witness. However, the other attorneys in that prosecutor's office are not necessarily required to recuse themselves from that case.

FACTS:

A Deputy State's Attorney rides with police officer on patrol. Police officer stops an individual for D.W.I. while the Deputy State's Attorney is present. The person was charged with D.W.I. and the same Deputy State's Attorney is assigned to prosecute the case. Defendant's attorney intends to call the Deputy State's Attorney as a witness.

ISSUE:

Does a Deputy State's Attorney and his/her office have an ethical obligation to withdraw from prosecuting cases in which that deputy may be called as a witness?

ANALYSIS:

The disciplinary rules which address the issue of an attorney being called as a witness are set forth in DR 5-101 and DR 5-102. Under DR 5-101 (B) a lawyer shall generally not accept employment in litigation if he or she knows or it is obvious that he or she or a lawyer in the firm ought to be called as a witness. The several exceptions to this rule involve uncontested testimony, testimony regarding legal services or situations which would work a substantial hardship on the client "because of the distinctive value of the lawyer or his firm as counsel in the particular case" DR 5-101 (B) (4).

Under DR 5-102 (A) an attorney shall withdraw if he or she learns or it is obvious that he or she or a lawyer in the firm ought to be called as a witness on behalf of his client, and the firm shall not continue representation in the trial, except under the same exceptions provided in DR 5-101 (B). Further, under DR 5-102 (B), if a lawyer learns or it is obvious that he or she or a lawyer in the fim1 may be called as a witness other than on behalf of the client, he or she may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.

In addition, EC 5-9 discusses the dual roles of advocate and witness:

> EC 5-9 - Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Applying these rules and considerations to the factual situation at issue, a deputy state's attorney who is to be called as a witness should not be the prosecuting attorney on that particular case. Under DR 5-101 (B) a lawyer shall not accept employment if it is obvious that he or she will be called as a witness. If a deputy is present at a D.W.I. stop and witnesses the circumstances surrounding the stop, it is likely that he or she will be called as a witness.

This position is supported by the clear language of EC 5-9.

> In addition to these general rules and considerations, prosecuting attorneys hold a unique position. " A prosecutor is not only an advocate. He or she is also an officer of the state, and must advance 'just results', even if they come at the expense of convictions. . . . Their responsibilities to the state include both zealous prosecution and scrupulous protection of individual rights. To fulfill these responsibilities a prosecutor should be dispassionate and objective." *In Re J.S.,* 140 Vt. 230, Justice Hill dissenting (1981).

A deputy state's attorney who prosecutes a case in which he or she will also be a witness imperils his or her duty to be dispassionate and objective.

If the failure to act as the prosecutor would work a substantial hardship on the State's Attorney's Office (DR 5-101 (B) (4), a prosecutor who happened to be a witness to an alleged crime could undertake initial responsibility for the case and allow him or herself to be deposed by opposing counsel.

If the deposition produces evidence unfavorable to the defendant and the defendant elects not to call the deputy, then the issue is avoided. On the other hand, if the deposition evidence is favorable to the accused but the evidence is consistent with the evidence provided by other witnesses and is not contested by the state, the deputy's testimony would be cumulative on an uncontested factual issue. DR 5-101 (B) (1), indicates that if the testimony relates solely to an uncontested matter, an attorney may under- take employment even though it is obvious that the attorney may be called as a witness.

Even if that deputy may be disqualified, the other members of the State's Attorney Office are not necessarily disqualified as well." As a general rule, an entire prosecuting attorney's office should not be recused from a case merely because one or more of its attorneys will be called as a witness for the defense."[1] The rule of imputed knowledge or imputed conflict that is applied to members of a firm in private practice has been held not to apply to a government law office.[2] Further, recusal of an entire prosecuting office would entail difficulties, such as delays and potential prejudice to the state.[3] This seems to meet the hardship test of DR 5-101 (B) (4).

Accordingly, we do not find it ethically required that all members of a prosecuting office are necessarily disqualified from a case when one of the deputies is likely to be called as a witness. However, we realize it is a matter which will ultimately be decided by the court if an appropriate motion is filed by the defendant.

Although the issue addressed in this advisory opinion was raised through an initial inquiry from an attorney who is not a prosecutor, the Committee determined the question to be of sufficient interest to the Bar to merit discussion. We do not address the propriety of having prosecutors ride with policy officers on patrol, since it is not an ethical issue.

[1] 63 Am. Jur. 2d, *Prosecuting Attorneys,* §32 (1984).
[2] *Id.*
[3] *In Re J.S.,* 140 Vt. 230, Hill dissenting (1981).