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TEXAS PROFESSIONAL ETHICS OPINIONS

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OPINION 454

November 1987

Tex. Comm. on Professional Ethics, Op. 454, V. 51 Tex. B.J. 1060 (1988)

FACTS

An individual was indicted for breach of computer security when he obtained credit information from a credit bureau's computerized files without the permission of the persons about whom the information was compiled. The complainants in the indictment are members of the District Attorney's Office in the county of prosecution.

QUESTION PRESENTED

May a lawyer member of the District Attorney's Office prosecute a criminal complaint where the complainants are also lawyer members of the District Attorney's Office in the county of prosecution?

DISCUSSION

DR 5101(B) and DR 5102(A) state that a lawyer shall not accept employment when he learns or it becomes obvious that a lawyer in his firm will, or ought to, be called as a witness. Opinion 399 (Feb. 1981) held that these restrictions should also apply to a District Attorney's Office and to all those who practice in the same office.

Given the situation described above, it is clear that DR 5101(B) does indeed apply and it then becomes necessary to examine the exceptions listed under DR 5101(B) to see if any are applicable. This was well demonstrated in Opinion 430 (June 1986) where it was held that another attorney in the District Attorney's Office would be allowed to testify if the testimony given would fall under one of the four enumerated exceptions. In the letter requesting this opinion it is suggested that the complainant's testimony will be uncontested and/or simply a matter of formality falling under exceptions (1) or (2) of DR 5101(B). The testimony of the complainants would simply be that they did not give the accused permission as required by law to check their credit files. As simple as this testimony may seem, it is still difficult to tell prior to trial whether or not this testimony would remain uncontested. In fact, it may be at the very heart of the matter at issue making the testimony certainly not a formality and most likely not uncontested.

It was also suggested that to bring in outside counsel to prosecute this case would work a great hardship on the client and the people of Texas. DR 5101(B)(4). While the hardship should not be disregarded, it cannot be held to override the defendant's right to a fair trial. In *State v. Whitworth*, No. 47978 (Mo. Ct. App. Eastern Dist. Dec. 11, 1984), the court held that a criminal defendant's right to a fair trial was prejudiced when one member of the state of a county prosecutor's office argued the case against him and another provided critical testimony in that case. The result, said the court, was unfair not only to the defendant but also to the jury. The prosecutor's office should have sought a special prosecutor to try the case.

A prosecutor, as any other attorney, should avoid participating in any case where an implication of partiality might cast a shadow on the integrity of the office. If, in the case at hand, prosecution is pursued by counsel within the District Attorney's Office, such a shadow would most certainly exist.

CONCLUSION

The prosecuting attorney in this case, in order to abide by DR 5101(B) and DR 5102(A) should request the court to appoint a new counsel for the state. This would be in complete compliance with DR 5101(B) and also insure the defendant a fair trial while protecting the integrity of the District Attorney's Office from the shadow of partiality.

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