**Opinion 05-01**

January 14, 2005

**OPINION OF:** PATRICIA A. MADRID, Attorney General

**BY:** Arthur W. Pepin, Assistant Attorney General

**TO:** Richard D. Flores, District Attorney, Fourth Judicial District, P.O. Box 2025, 1800 New Mexico Avenue, Las Vegas, New Mexico 87701

**RE:** DEATH PENALTY PROSECUTION FOR THE MURDER OF PRISON GUARD RALPH GARCIA; CONFLICT OF INTEREST FOR DISTRICT ATTORNEY AND HIS ENTIRE STAFF

## QUESTION

Is Richard D. Flores, the newly elected District Attorney in the Fourth Judicial District, who worked in private practice with an attorney presently representing a defendant in a capital case (including representing the defendant at least once at a hearing), subject to disqualification from the prosecution of that case? If the District Attorney is disqualified, are other members of his DA office similarly disqualified?

## CONCLUSION

The incoming District Attorney, Richard D. Flores, and all members of his District Attorney's office, are clearly disqualified from prosecuting the death penalty case against the District Attorney's and his colleague's former client. Any involvement by DA Flores or his staff would jeopardize any conviction obtained in the prosecution of Robert Young for the murder of Ralph Garcia

## FACTS

On January 1, 2005, Richard D. Flores took office as the newly elected District Attorney for the Fourth Judicial District. Pending in the Fourth Judicial District is a death penalty murder prosecution against Robert Young for the murder of prison guard Ralph Garcia in August 1999 during a prison riot at Santa Rosa. The Special Prosecutions Division of the Office of the Attorney General has been closely involved in this matter since September 1999. This office has participated in fifteen cases arising from the Santa Rosa riot, and the Attorney General has been the attorney of record in the Young case since his indictment. Eleven of the Santa Rosa cases have resulted in plea dispositions in which the Attorney General was directly involved. Of the four remaining cases, three are death penalty cases, including the prosecution of Young, and the remaining case is a non-death penalty murder case.

The Attorney General has been lead counsel in all of the extensive motions and hearings in Young's case. The Santa Rosa prosecutions have included more than 300 interviews and depositions and generated 70,000 pages of documents to date. The Attorney General worked in partnership with the predecessor to District Attorney Flores, devoting extensive resources to these cases. It would be extremely difficult, if not impossible, to fully inform DA Flores or any other Special Prosecutor that he may appoint of all of the relevant information in the Young prosecution that has been developed since 1999.

In seeking an Opinion from this office, District Attorney Flores states that he worked with the defense attorney for capital murder defendant Robert Young, "in a three member legal association in Las Vegas, New Mexico" where the three lawyers "freely shared our files with one another in terms of court settings, phone calls and deadlines." Regarding Robert Young, District Attorney Flores states "I have read his file, discussed the case with Mr. Baca [Young's defense attorney] and attended one hearing on Mr. Young's case." Mr. Baca will continue to represent Young in the pending capital murder case.

## DISCUSSION

A lawyer's professional conduct precludes the lawyer from participating in a matter as a public official when the lawyer "participated personally and substantially while in private practice" unless it appears that no one else can act in the lawyer's stead. RPC 16-111(C)(1) NMRA 2004. In addition, "A lawyer who has formerly represented a client in a matter shall not thereafter" either represent a different person in that matter who has interests adverse to the former client or use information gained form the former client to the former client's disadvantage. Rule 16-109, NMRA 2004. When a District Attorney perceives a conflict of interest with a defendant, or for "other good cause," the District Attorney may appoint another member of the bar to prosecute the matter. N.M.S.A. 1978, Section 36-1-23.1 (1984).

Guidance on the question of an incoming District Attorney's ability to act personally, or through the office he or she heads, can be drawn from New Mexico precedents. After reviewing these precedents as well as cases from other jurisdictions, it is clear that the District Attorney, as the elected official responsible for the operation of the prosecutor's office, is personally disqualified from continuing in this case, and others in his office are also disqualified under these circumstances.

Two decades ago the Court of Appeals was faced with a situation where the attorney who represented the defendant at his first trial later became an assistant district attorney in the office prosecuting the defendant's retrial. Although the attorney recused himself from participation in the retrial, the appellate court's extensive review of cases on the subject "all lead us to believe that from the foundation of our government to the present day, under the facts of this case, the fair and impartial administration of justice compels us to hold that the Grant County District Attorney's Office is precluded from prosecuting the defendant" and that a special prosecutor or the Attorney General could prosecute the case. State v. Chambers, 86 N.M. 383, 388, 524 P.2d 999 (Ct.App.), cert.

denied, 86 N.M. 372, 524 P.2d 988 (1974), overruled in part, State v. Pennington, 115 N.M. 372, 851 P.2d 494 (Ct.App.), cert. denied, 115 N.M. 409, 852 P.2d 182 (1993).

In Pennington, 115 N.M. at 376, the New Mexico Court of Appeals rejected the Chambers rule that automatically disqualifies an entire prosecutor's office and instead adopted a rule that would permit others in the office to prosecute a case "when the disqualified member of the staff is isolated from the prosecution of the defendant. Instead we leave to the sound discretion of the district court whether the circumstances of the specific case require disqualification of the entire staff."

The court held in Pennington, 115 N.M. at 380, that the disqualified staff member in that case, an investigator who previously worked for the defendant as a private investigator during his first trial, was properly insulated from the retrial by careful measures adopted by the District Attorney to exclude the investigator from any contact with the retrial in any fashion. This is the majority rule followed in most states.

In applying Rules 16-109 and 16-111, the New Mexico Court of Appeals has adopted "a presumption that confidential information was disclosed in cases that are substantially related" when considering disqualification of a prosecutor who was formerly the defendant's counsel. State v. Barnett, 1998-NMCA-105, ¶19, 125 N.M. 739. The court held that a prosecutor who formerly represented the defendant in cases unrelated to the present prosecution, but where the prior convictions were used at sentencing, had a conflict of interest that required her disqualification. Barnett, 1998-NMCA-105, ¶24.

Thus, under existing precedents in New Mexico, it is clear that New Mexico follows the longstanding majority view that a defendant's former attorney cannot himself have any involvement in the prosecution of the defendant on the same matter. See Ward v. State, 242 P. 575, 576 (Okla.Crim.App. 1926) ("Where one appears for an accused as his attorney, whether he be paid for his services or not, and whether he is informed by his client of the facts surrounding his defense or not, such appearance precludes him from subsequently appearing or participating on the other side of the same case"). Accord Fitzsimons v. State, 218 N.W. 83, 84 (Neb. 1928). In the facts presented here, it is clear that the newly elected District Attorney is disqualified from having any personal involvement in the prosecution. See e.g. Commonwealth v. Lux, 484 S.E.2d 145, 570 n.2 (Va.App. 1997), citing Commonwealth v. Kilgore, 426 S.E.2d 837, 842-43 (Va.App. 1993) (a prosecutor is disqualified from the present prosecution after "working as a member of a firm in which a partner represented the accused in the same matter").

While it is possible as discussed in Pennington to erect barriers that insulate an investigator or Assistant District Attorney from the prosecution of a former client, no such possibility has been recognized when the defendant being prosecuted is the former client of the elected District Attorney.

The Fourth Judicial District Attorney's Office consists of twelve assistants in three courts (Las Vegas, Mora and Santa Rosa) under the direct supervision of the District Attorney. The capital case at issue arose in Santa Rosa. The District Attorney appoints the

assistants and "[e]very such appointment may be revoked by the district attorney making it," so that the District Attorney has supreme authority over the assistants. N.M.S.A. 1978, Section 36-1-2.

It is difficult if not impossible to hypothesize how the District Attorney could be adequately insulated from the prosecution of a death penalty case in an office where he appoints and supervises all of the twelve assistants. The peculiar power of the District Attorney has been examined in this context by other courts, which have found that disqualification of the elected prosecutor demands disqualification of his staff as well.

The closest factual analogy appears to be found in State v. Stenger, 760 P.2d 357, 360-61 (Wash. 1988), where the defendant's former defense counsel in an earlier, non-death penalty case was now the Clark County Prosecuting Attorney responsible for administrative control over the office, and he then filed a notice of intent to seek the death penalty in a case in which the Prosecuting Attorney had never represented the defendant. There was no doubt that the Prosecuting Attorney himself could not be involved in the capital prosecution. Ibid. In addition, the Washington Supreme Court found that the prior attorney-client relationship required disqualification of the elected prosecutor's entire office:

> The factual information the prosecuting attorney obtained from the accused by virtue of the prosecuting attorney's previous legal representation of the accused, including information about the defendant's background and earlier criminal and antisocial conduct, is information closely interwoven with the prosecuting attorney's exercise of discretion in seeking the death penalty in the present case. In short, privileged information obtained by the prosecuting attorney when he was the defendant's counsel in the previous case could well work to the accused's disadvantage in this case where the death penalty is sought.
>
> Stenger, 760 P.2d at 360-61 (footnotes omitted).

Even though the elected prosecutor in Stenger had not represented the death-penalty defendant in the capital case, his representation in a different, earlier case disqualified his entire office. A number of non-death penalty cases reach the same conclusion. For example, in People v. Doyle, 406 N.W.2d 893, 899 (Mich.App. 1987), the court upheld disqualification of the entire prosecutor's office due to a conflict in a pending case by the elected Genesee County Prosecutor. The appellate court upheld the finding that "the elected prosecutor and his chief assistant [are] too intertwined in the chain of command to permit their staff to conduct these prosecutions." Ibid.

The court in Doyle relied in part on a collection of cases supporting the following proposition: "The general rule is that a conflict of interest involving the elected county prosecutor himself requires recusal of the prosecutor and the entire staff. Since assistant prosecutors act on behalf of the elected county prosecutor and are supervised by him, the policies of fairness to the defendant and the avoidance of an appearance of

impropriety require this result." Doyle, 406 N.W.2d at 899, citing 31 A.L.R.3d 953. See also State v. Burns, 322 S.W.2d 736, 740 (Mo. 1959) (where the defendant's counsel later took office as the St. Francios County Prosecutor, reversal of the defendant's conviction was required by the appearance of impropriety arising from the conflict of interest, despite absence of demonstrated prejudice).

In People v. Lepe, 211 Cal.Rptr. 432, 434 (Cal.App. 1985), the Imperial County District Attorney, Thomas W. Storey, had formerly represented a defendant in two criminal cases. The Court held that the District Attorney "must be recused" and his position required disqualification of his entire office: "As the deputies are hired by Storey, evaluated by Storey, promoted by Storey and fired by Storey, we cannot say the office can be sanitized such to assume the deputy who prosecutes the case will not be influenced by the considerations that bar Storey himself from participation in the case." Ibid.

As in Lepe, the prosecutor challenged disqualification of himself and his entire staff in State v. Tippecanoe County Court, 432 N.E.2d 1377, 1379 (Ind. 1982), where the prosecutor had represented the defendant in two prior cases, the most recent of which had been five years earlier. The Indiana Supreme Court upheld disqualification because "the prosecutor who had the administrative control over the entire staff was the one who had formerly represented the particular defendant involved and, therefore, the trial court properly disqualified the entire staff of deputies." Ibid.

The court in State v. Tate, 925 S.W.2d 548, 554 (Tenn.Crim.App. 1995), found an actual conflict of interest when a judge who heard some motions from the defendant then became the Knox County District Attorney prosecuting the defendant. In addition the court held that the usual rule permitting insulation of the former counsel and prosecution by other members of the office did not apply in these circumstances. Although a "trial judge does not have the same duties as defense counsel" and there "is a lesser degree of shared confidences", the court felt that "in these particular circumstances, the more cautious approach is to disqualify the office and appoint an entirely new prosecution team. That preserves the integrity of the criminal justice system." Tate, 925 S.W.2d at 557-58.

As these cases demonstrate, the integrity of the criminal justice system, and proper respect for a defendant's right to due process and a fair trial, demand that the elected District Attorney be disqualified from participation in a case against a defendant he represented in the same case now being prosecuted. These considerations also require the disqualification of the entire prosecutor's office given the District Attorney's role as supervisor and employer of the deputies, assistants and investigators who might otherwise proceed in the case. When in addition to all of this the nature of the pending case against Robert Young as a death penalty prosecution is added, with the attendant lengthy and complicated process that demands close, focused attention by the attorneys involved, the disqualification of the District Attorney and his office is clearly required here. The Office of the Attorney General has been deeply, actively involved in the prosecution of Robert Young since 1999. In light of the conflict of interest created by

the election of Richard D. Flores as District Attorney, the continued prosecution of the death penalty case against his former client, Robert Young, should be by the Office of the Attorney General.