

Ethics Opinion

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FACTS: A prosecutor's major focus is white collar crime cases and forfeiture actions. The prosecutor is paid a salary by the County of approximately \$55,000 a year. Of this \$55,000 about \$27,000 is generated from a Drug Forfeiture Account but paid through the county general fund.

Pursuant to Title 44, Chapter 12 of MCA, property may be seized and sold if it is used in the commission of specified crimes. After the property is sold, the proceeds go into a drug forfeiture account. The drug forfeiture account is maintained by the County and contains matching grants from the Federal Government for the purpose of drug law enforcement. The prosecutor is the only County prosecutor position budgeted from this account, however, two special drug task force officers and a secretary are also budgeted from this account.

The prosecutor is paid \$55,000 a year regardless of the existence of the drug forfeiture account or the amount of forfeitures attained by the prosecutor. The prosecutor receives one check from the County with no identification of the sources of payment; although the prosecutor is aware of the drug forfeiture account and the fact that the prosecutor position is partly budgeted from it. Equally important is that the \$27,000 saves the County Attorney funds which enables the County Commissioners to hire and maintain an additional deputy County Prosecutor. If there was no drug forfeiture account, the Commissioners may choose to eliminate one deputy's position.

QUESTIONS PRESENTED: Does the current situation create an impermissible conflict of interest?

SHORT ANSWER: No.

DISCUSSION: Rule 1.7 (b), Conflict of Interest: General Rule, applies to the question presented here. The rule states, in pertinent part:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests unless:

- 1. the lawyer reasonably believes the representation will not be adversely affected; and*
- 2. the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanations of the implications of the common representation and the advantages and risks involved.*

Comment 6 of Rule 1.7 of the ABA Model Rules is particularly applicable. Comment 6 states in part that "the lawyer's own interests should not be permitted to have an adverse effect on representation of a client." Additionally, a prosecutor is limited by Rule 3.8 and may not prosecute "a charge that the prosecutor knows is not supported by probable cause."

The Supreme Court of Colorado addressed a very similar issue in *Colorado ex rel Sandstrom v. District Court*, 884 P.2d 707 (1994). In Sandstrom the district attorney's office received approximately one-third of forfeited currency from civil forfeitures that followed criminal prosecution for narcotics dealing. The forfeited funds were placed in a special account used for the use and benefit of prosecution, including buying books, computer supplies, funding audits, and providing cash for undercover drug purchases. The district attorney personally handled the civil forfeiture actions for the district. The trial court reasoned that because the civil forfeiture action required proof of the drug crime by preponderance of the evidence, a successful criminal prosecution, which requires proof beyond a reasonable doubt, would impact the forfeiture action. The trial court found this to be an impermissible interest in the outcome of the case and disqualified the district attorney and appointed a special prosecutor. The Supreme Court of Colorado reversed and held that the district attorney should not have been disqualified from the criminal case simply because he was also involved in the civil forfeiture action. The Court held that the district attorney did not have an interest in the outcome of the case apart from his interest in fulfilling his official duties as a district attorney.

Prosecutors are biased. They are state advocates. In *Marshall v. Jericho, Inc.*, 446 U.S. 238 (1980) the Court held that although the judiciary must be impartial and neutral, the executive branch does not. Prosecutors need not be entirely "'neutral and detached'.... [I]n an adversary system they are necessarily permitted to be zealous in their enforcement of the law." *Marshall*, 446 U.S. at 448. The State "may and often should stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interests of the State and the people" *Turney v. Ohio*, 273 U.S. 510, 538 (1927).

However, a prosecutor's motives in seeking a forfeiture should still be objective. In *People v. Superior Court*, 561 P.2d 1164 (1977) the California Supreme Court noted that "a district attorney may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will be born of objective and impartial consideration of each individual case." *Id.* at 1172.

The 1992 ABA Standards Relating to The Prosecution and The Defense Function, Standard 3-1.3 addressing conflicts of interest, reads in part, "a prosecutor should avoid a conflict of interest with respect to his or her official duties." Section (f) states "a prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests." While these standards have not been adopted in Montana, they are helpful advisory council.

Before 1992, this standard's general prohibition provided, "a prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties." The revision eliminating the language as to appearance of conflict was specifically intended to reflect the ABA Model Rules of Professional Conduct's reject of appearance based conflict of interest standards. Therefore, the present question is whether the prosecutor's knowledge of or interest in maintaining the drug forfeiture account and ancillary position creates a conflict with the prosecutor's official duty. This Committee feels that given the facts presented there is no evidence of conflict of interest.

CONCLUSION: Prosecutors are state advocates in an adversarial system. They are not impartial or unbiased, but they must be fair in exercising their discretion to prosecute or seek civil forfeitures. In the interests of fairness they must not have a personal interest in the outcome of a case. A prosecutor who has a personal interest in the outcome of a case may not allow such an interest to interfere with his/her professional judgment.

In the present situation, the prosecutor may indeed have an interest in the case. However, the fact that the prosecutor's position is budgeted from this account does not create an impermissible interest. The prosecutor receives a set salary that is not dependent in any way on the result of the forfeiture action. The prosecutor's interest is to pursue forfeitures because they are a part of the official duties and revenue is produced to indirectly provide a salary for another prosecutor. This interest is in compliance with the official duties of prosecuting criminals and promoting justice and does not appear to be a personal interest.

No facts were supplied that would indicate that the prosecutor's obligations or professional judgment are affected in any way. The facts supplied do not indicate real conflict of interest. Given these facts, no impermissible conflict exists.

We wish to emphasize that this opinion is not intended to relieve in any way a prosecutor's duty to be objective in using his/her independent professional discretion while carrying out official duties.

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