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Summary of State of Nevada v. Eight Jud. Dist. Ct. (Zogheib), 130 Nev. Adv. Op. 18

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LEGAL ETHICS: CONFLICTS OF INTEREST

Summary

The Court was asked to decide the appropriate standard for determining when the entire Clark County District Attorney's office should be disqualified for an individual prosecutor's conflict – an appearance-of-impropriety standard or if a more appropriate standard exists.

Disposition

To determine whether the entire district attorney's office may be disqualified from prosecuting a case, the court must determine whether an individual prosecutor's conflict would render it unlikely that the defendant would receive a fair trial. The conflict may be imputed to the entire office in extreme cases and is not determined based on an appearance of impropriety.

Factual and Procedural History

Zogheib, the real party in interest, moved to disqualify the Clark County District Attorney's Office because an attorney in the District Attorney's former law firm represented Zogheib in the present case. The district court granted Zogheib's motion to disqualify after several evidentiary hearings showed that the District Attorney was involved in discussions regarding the case before his appointment. The District Attorney testified that while he probably talked with Zogheib's attorney or Zogheib before his appointment, he never made an appearance on the case, never obtained or reviewed discovery on the case, and never discussed the case with the deputy appointed to prosecute the case. Nonetheless, the district court concluded that there was a conflict and that the conflict should be imputed to the entire district attorney's office because there was such a great appearance of impropriety that it made it an extreme case warranting vicarious disqualification even though the District Attorney had been effectively screened from participating in the case. A petition for a writ of mandamus was then filed.

Discussion

First, the State acknowledged that the DA had a conflict of interest that disqualified him from prosecuting Zogheib under Nevada Rule of Professional Conduct ("NRPC") 1.9 which normally imputes all other attorneys in the disqualified attorney's law firm under NRPC 1.10. However, this rule does not apply to lawyers working in government offices. Instead, NRPC 1.11 governs lawyers who are current government officers and employees and "does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers."²

The Courts primary decision addressing the disqualification of government lawyers was issued in 1982 before Nevada adopted the NRPC. In that case³, it was held that vicarious

¹ By Brian Vasek.

² MOD. R. OF PROF'L CONDUCT, R. 1.11 cmt. 2 (2012).

disqualification of a prosecutor's office may be required "in extreme cases where the appearance of unfairness or impropriety is so great that the public trust and confidence in our criminal justice system could not be maintained without such action." (appearance-of-impropriety standard).

The Court rejected this standard for two reasons. First, it is not implicit in the current NRPC. Second, policy arguments favor a test that more narrowly limits the disqualification of the DA's Office: there is a large cost to the county in paying for a special prosecutor; an attorney is presumed to perform his ethical duties; and the courts should not unnecessarily interfere with the performance of a prosecutor's duties. The broad appearance-of-impropriety standard could lead to "unnecessary disqualifications, limit mobility from private to government practice, and restrict the assignment of counsel when no breach of confidences has occurred." Consequently, the Court overruled *Collier's* appearance of impropriety standard as it applies to vicarious disqualification of a prosecutor's office.

Instead, this the district court should ask "whether the conflict would render it unlikely that the defendant would receive a fair trial unless the entire prosecutor's office is disqualified from prosecuting the case.

In this case, the district court reasoned that since the District Attorney was conflicted, as head of the office, the entire office must be also. This ignored that fact that it is the deputies who handle the day-to-day operations of the office and make decisions regarding specific cases – even though the District Attorney's name is on every court document. Furthermore, there were effective screening measures in place at the district attorney's office.

Thus, under either standard, the district court was in error. Applying the *Collier* standard, "no appearance of impropriety existed to such an extent that it would undermine the public trust and confidence in the criminal justice system." Applying the standard adopted in this opinion, "there has been no demonstration that the Clark County District Attorney's Office's continued participation in the prosecution of Zogheib would render it unlikely that Zogheib would receive a fair trial."

Conclusion

Under the appearance of impropriety standard, rejected by the Court, and even the more appropriate standard focusing on whether the defendant would receive a fair trial, the Court determined that the district court acted arbitrarily or capriciously by granting the defendant's motion to disqualify the entire Clark County District Attorney's Office from prosecuting his case. The court granted the petition to vacate the defendant's motion.

³ *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982).