IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,945

THE STATE OF FLORIDA,

Petitioner,

vs.

JOSE CLAUSELL,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTIONS

* *

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Petitioner, THE STATE OF FLORIDA, was the Respondent in the District Court of Appeal and the prosecution in the trial court. The Respondent, JOSE CLAUSELL, was the Petitioner in the District Court of Appeal and the Defendant in the trial court. The parties will be referred to as they appeared before the trial court. The symbol "A" will be used to designate the Appendix to this brief. The symbol "EX" will be used to designate a specific Exhibit in the Appendix. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Defendant, Jose Clausell, is currently charged in Information No. 83-18020 with perjury in an official proceeding, in violation of Section 837.02, Fla. Stat. The information alleges that on November 3, 1982, the Petitioner made false statements to an Assistant State Attorney during a pre-filing conference. (A. EX. A).

In preparation for trial, the State filed its witness list, which listed two Assistant State Attorneys as witnesses for the State. These assistants were the ones who took Defendant's statement during the pre-filing conference; they are not the prosecuting attorneys. (A. EX. B).

Thereafter, Defendant filed a Motion to Disqualify the State Attorney for the Eleventh Judicial Circuit. Said motion contended that, pursuant to DR 5-101(B) and DR 5-102(A),[1] the entire State Attorney's Office was disqualified from prosecuting Defendant since non-prosecuting assistants were going to testify for the State in Defendant's trial. (A. EX. C).

On October 14, 1983, a hearing was held on Defendant's Motion to Disqualify. At said hearing, the State's position was that since the testifying Assistant State Attorney would be appearing as a witness pursuant to his duties under Section 27.04 Fla. Stat.,[2] and not as a prosecuting attorney, disqualification of the entire State Attorney's Office was inappropriate. Furthermore, the State submitted that disqualification of the entire office would not lessen any alleged prejudice

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1 Hereinafter, all further references to Ethical Considerations or Disciplinary Rules of the Florida Bar Code of Professional Responsibility will be done with the symbols "EC" and "DR", respectively.

2 Section 27.04 Fla. Stat. provides:

> The State attorney shall have summoned all witnesses required on behalf of the State; and he is allowed the process of his court to summon witnesses from throughout the State to appear before him in or out of term time at such convenient places in the state attorney's judicial circuit and at such convenient times as may be designated in the summons, to testify before him as to any violation of the criminal law upon which they may be interrogated, and he is empowered to administer oaths to all wit-

of having an Assistant State Attorney testify.[3] Finally, the State submitted that under the facts, sub judice, disqualification of the entire State Attorney's Office was not required. (A. EX. D at page 13-14). At the conclusion of the hearing, the trial court denied the motion.

The Defendant then filed a Petition for Writ of Common Law Certiorari in the Third District Court of Appeal. He contended that the trial court departed from the essential requirements of law when it denied his Motion to Disqualify the entire office of the State Attorney, pursuant to Florida Bar Code of Professional Responsibility, Disciplinary Rule 5-102(A), on the grounds that non-prosecuting assistants are witnesses for the State at Defendant's trial. (A. EX. E).

(Footnote 2 continues)

> nesses summoned to testify by the process of his court or who may voluntarily appear before him to testify as to any violation or violations of the criminal law.

See also, State ex rel. Cooper v. Coleman, 138 Fla. 520, 189 So. 691 (1939) (assistant state attorney is authorized to administer an oath to a witness summoned by the State Attorney to testify in an investigation, and prosecution for perjury could properly be based upon alleged false swearing under oath given during investigation).

[3] At no time has Defendant challenged the competency of the Assistant State Attorney to testify.

Pursuant to an Order to Show Cause the State responded that the trial court did not depart from the essential requirements of law when it denied the Motion to Disqualify the Offfice of the State Attorney since said office is not a law firm as contemplated by DR 5-101 and DR 5-102. It was also submitted that no error occurred in not disqualifying the entire State Attorney's Office merely for a possible violation of a Code of Professional Responsibility Disciplinary Rule, in the absence of a finding that the State Attorney, because of such violation, has gained an unfair advantage over Defendant which can only be eliminated by disqualifying the entire office. (A. EX. F).

The Defendant's reply contended that a multi-Assistant State Attorney's Office is a law firm as contemplated by DR 5-101(B), DR 5-102(A) and DR 5-105(D) and therefore he was entitled to relief. In support thereof he relied upon Fitzpatrick v. Smith, 432 So.2d 89 (Fla. 5th DCA 1983) cert. pending Case No. 63,752 and Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983). (A. EX. G).

The panel then issued its decision denying the petition for writ of certiorari on the grounds that the State Attorney's Office is not a law firm and the trial court was correct in denying the motion for disqualification since Defendant did not show prejudice. (A. EX. H).

The Defendant then filed a Motion for Rehearing and Rehearing En Banc alleging that the panel's opinion created intra district conflict with Rodriguez v. State. (A. EX. I). Thereafter rehearing en banc was granted and the parties were permitted to file supplemental briefs. (A. EX. J.).

Thereafter, the en banc panel disapproved the Clausell panel opinion and approved Rodriguez. Three members of the court voted to approve the panel decision; four members voted to disapprove the panel's decision and approved Rodriquez; and Judge Hubbart, although disagreeing with the rule announced in Rodriguez, voted to disapprove the panel's decision in Clausell solely because of his view that Rodriguez must be adhered to on the ground of stare decisis. The court then certified the instant questions. (EX. A; EX. K).

Judge Hubbart, in his concurring opinion agreed with Judge Pearson's analysis and specifically urged that this Court upon its review to adopt Judge Pearson's analysis of this case as contained in the panel's opinion.

This appeal ensued.

POINTS INVOLVED ON APPEAL

I

Is it a breach of the Code of Professional Responsibility of The Florida Bar for a State Attorney or any Assistant State Attorney in the office to continue to act as the prosecutor in a criminal case when it is his or her intention to call another Assistant State Attorney in the same office to testify at the trial of the case as to a material matter?

II

If it is a breach of the Code of Professional Responsibility of The Florida Bar for a State Attorney or any Assistant State Attorney in the office to continue to act as the prosecutor in a criminal case when it is his or her intention to call another Assistant State Attorney in the same office to testify at the trial of the case as to a material matter, is disqualification of the State Attorney and any Assistant State Attorney in the same office from prosecuting the case required whether or not prejudice to the defendant can be domonstrated?

ARGUMENT

I

Is it a breach of the Code of Professional Responsibility of The Florida Bar for a State Attorney or any Assistant State Attorney in the office to continue to act as the prosecutor in a criminal case when it is his or her intention to call another Assistant State Attorney in the same office to testify at the trial of the case as to a material matter?

The State joins with Judge Hubbart in urging this Court to adopt Judge Pearson's analysis of this case as contained in the panel opinion, the contents of which states:

> By this petition for writ of certiorari, Jose Clausell asks us to quash an order of the trial court which refused to disqualify the office of the State Attorney from further participation in the prosecution of Clausell for perjury. Clausell contends that because two Assistant State Attorneys will be witnesses for the prosecution, all other members of the State Attorney's Office are disqualified from prosecuting him, and such task must necessarily be assigned to a special prosecutor who has no affiliation with the State Attorney's office for the Eleventh Judicial Circuit.

Clausell is being prosecuted for perjury in violation of Section 837.02, Florida Statutes (1981). The information alleges that Clausell made material false statements under oath during an official proceeding to one Jonathan Blecher, an Assistant State Attorney. The names of Blecher and Anne Marie Farrar, another Assistant State Attorney before whom Clausell apparently retracted the earlier statements given to Blecher, appear on the State's list of prospective witnesses. The Assistant State Attorney now assigned to prosecute the case is, of course, neither Blecher nor Farrar.

It is clear, and Clausell does not contend otherwise, that there is nothing condemnable about a member of the prosecutor's office who is not prosecuting the case testifying as a prosecution witness. Without exception, courts have, explicitly and implicitly, rejected the contention that because of the prestige which attaches to the prosecutor's office, to permit a prosecutor to testify would unfairly prejudice the defendant. United States v. Cerone, 452 F.2d 274 (7th Cir. 1971), cert. denied, 405 U.S. 964, 92 S.Ct. 1168, 31 L.Ed.2d 240 (1972) (explicitly rejecting contention that United States Attorney, who was not prosecuting the case, should not have been allowed to testify because it was prejudicial to the defendants

due to the prestige of witness's office); United States v. Callanan, 450 F.2d 145 (4th Cir. 1971) (same); People v. Mann, 27 I11.2d 135, 188 N.E.2d 665, cert. denied, 374 U.S. 855, 83 S.Ct. 1923, 10 L.Ed.2d 1075 (1963) (same, implicit); Lukas v. State, 194 Wis. 387, 216 N.W. 483 (1927) (same, implicit).[1/] Clausell suggests, however, that this otherwise admissible testimony cannot be elicited by any other Assistant State Attorney from the same office as the witnesses. Since, as we have said, there is not cognizable prejduice to the defendant from the fact of these Assistant State Attorneys testifying, in order to prevail on his motion to disqualify all other members of the State Attorney's office, the defendant must point to some prejudice to him which

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1/ On the other hand, but inapposite here, where the person actually prosecuting the case appears as a witness in the case, courts have uniformly condemend the practice on the theory that in such an instance, "a jury is naturally apt to give the testimony of the prosecuting attorney himself much more weight than it would accord to the ordinary witness." Shargaa v. State, 102 So.2d 809, 813 (Fla. 1958) (condemning practice, but affirming conviction where prosecutor's testimony was limited to a matter not a material dispute); Robinson v. State, 32 F.2d 505 (8th Cir. 1929) (condemning practice and reversing on other grounds); People v. Spencer, 182 Col. 189, 512 P.2d 260 (1973) (condemning practice and reversing conviction where prosecutor's testimony of sufficient consequence).

results from the officer's participation in his prosecution. See United States v. Hubbard, 493 F.Supp. 206 (D.C. 1979), affirmed sub nom. United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981), cert. denied sub nom. Hubbard v. United States, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982). The defendant has pointed to none.[2/]

We reject Clausell's argument that it is unnecessary for him to show prejudice and that he is entitled to have the State Attorney's office disqualified because its further participation in his prosecution would constitute a breach of the Florida Bar Code of Professional Responsibility. His thesis is that the office of the State Attorney is a law firm, and every assistant within the office is a lawyer in the firm, so as to require the automatic disqualification of the firm when, as here,

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[2/] In United States v. Hubbard, 493 F.Supp. 206, the court rejected the defendant's claim that the United States Attorney's Office should be disqualified where the indictment charged the defendants with burglaries and thefts from an office of an Assistant United States Attorney in that district who was not in any way involved in the prosecution of the case. The court found that none of the government attorneys had any emotional stake in the outcome that could disturb his exercise of impartial judgment and thus deprive the defendant of a fair trial. In so doing, the court distinguished People v. Superior Court, 19 Cal.3d 255, 137 Cla.Rptr. 476, 561 P.2d 1164 (1977), where the district attorney's office was held to be properly disqualified from prosecuting a homicide where the victim's mother was a clerk in the district attorney's office and stood to gain

any of its members are to be witnesses in a case being prosecuted by the firm.

First, without any showing that a prosecutor's violation of the Code of Professional Responsibility will or has prejudiced him, a defendant has no right to enforce the Code and is not intended to be an incidential beneficiary of any violation of its provisions. See State v. Murray, ___So.2d___ (Fla. 1984) (Case No. 63,364, opinion filed Janaury 12, 1984) (prosecutorial misconduct in violation of the Code of Professional Responsibility is the proper subject of bar disciplinary action and will not warrant reversal of a conviction unless the misconduct can be said to have prejudiced the defendant's right to a fair trial); State v. DelGaudio, ___So.2d___ (Fla. 3d DCA 1984) (Case Nos. 82-770 and 82-774, opinion filed January 31, 1984) (sanction of dismissal of charges for prosecutor's misconduct in failing to make discovery inappropriate in absence of irreparable prejudice to defendant). Cf. Molina v. State, ___So.2d___ (Fla. 3d DCA 1983((Case No. 82-870, opinion filed October 4, 1983) (where prose-

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(Footnote 2 continues)

custody of her deceased son's child upon the conviction of the defendant, the victim's wife. The California court held on the circumstances presented, "[T]he prosecutor might at least appear to have an emotional stake in the case of the sort that could disturb his exercise of impartial judgment. . . ." 561 P.2d at 1174.

cutorial misconduct prejudiced defendant, conviction reversed and matters of misconduct referred to the bar for grievance proceedings).[3/]

We do not overlook this Court's recent decision in Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983). There the court, reversing the defendant's conviction, held that "the State's presentation of the testimony of a member of its office to give an expert opinion as to whether the alibi witness could be prosecuted constituted error." 433 So.2d at 1275.

[3/] The Model Rules of Professional Conduct adopted by the American Bar Association on August 2, 1983, make clear that violations are the concern of the violator and the appropriate disciplinary agency and do not create a procedural weapon in other litigants.

> "Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcment of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."

Since, as we have said, it is clear that in the absence of prejudice to the defendant, a prosecutor's violation of the Code of Professional Responsibility is not a ground for reversal. See State v. Murray, ___So.2d___, Rodriguez can only be read to mean that the testimony presented was inadmissible and prejudicial to the defendant without regard to whether it was presented by a member of the State Attorney's office or a person appointed to the stead of the State Attorney. Therefore, the ensuing decision in Rodriguez concerning the impropriety of the prosecuting attorney calling a member of his own office as a witness is dicta which we are free to disregard.[4/]

Second, we perceive no violation of the Code of Professional Responsibility when an Assistant State Attorney appears as a witness for the State in a case being prosecuted by another member of the State Attorney's office.

Concededly, the Code of Professional Responsibility mandates that "[a] lawyer shall not accept

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[4/] We reiterate that in the present case, there is no contention that the testimony of the assistants is inadmissible. The contention is that such testimony should not be elicited by a member of the same office as the witness.

employment in contemplated or pending litigation if he knows or it is obvious that . . . a lawyer in his firm ought to be called as a witness." Fla. Bar Code Prof. Resp. DR 5-101(B). The Code provides that, under like circumstances, the lawyer's law firm shall not continue with the representations. Fla. Bar Code Prof. Resp. DR 5-102(A)[5/]

In our view, the State Attorney's officer is not a law firm, and an Assistant State Attorney is not a lawyer in the firm for the purposes of DR 5-101(B) and DR 5-102(A). These sections, as do other sections in the Code of Professional Responsibility, clearly indicate that these expressions were intended to refer to law firms undertaking employment for renumeration and to the attorneys in such firms. For example, DR 2-110(A)(3) requires that a withdrawing attorney refund unearned fees; DR 2-102 is a regulatory provision concerning the use of the term "firm" in professional settings; DR 3-102 regulates the sharing of legal fees and payments of the same to non-lawyers; and DR 9-102(A)(2) regulates the use of clients' funds. The definitional section merely states that a law firm "includes a pro-

5/ These rules contain exceptions which are not pertinent here.

fessional legal corporation." We believe that had it been intended that "law firm" should include a multi-assistant State Attorney's Office, that inclusion would have been clearly expressed. People ex rel. Younger v. Superior Court, 86 Cal. App.3d 180, 150 Cal.Rptr. 156 (4th Dist. 1978).

That the word "firm" as used in DR 5-101(B) and DR 5-192(A) was intended to refer to a law firm engaged in practice for renumerations is further appearent from Formal Opinion 339 of the American Bar Association's Committee on Ethics and Professional Responsibility (January 31, 1975). In respect to the requirement that a "firm" and all lawyers in the firm withdraw when a lawyer in the firm intends to testify on behalf of the client, Formal Opinion 339 concludes:

> "Because a trial advocate clearly possesses such [a financial] interest, his testimony or that of a lawyer in his firm, is properly subject to inquiry based on such interst, perhaps including elements of his fee arrangement in some instances. Thus, the weight and credibility of testimony needed by the client may be discounted and in some cases the effect will be detrimental to the clients' cause."

See also E.C. 5-9.

Thus, faced with the identical question which is now before use, the court in People ex rel. Younger v. Superior Court, 86 Cal.App.3d 180, after a thorough review of California's Code of Professional Responsibi-

lity, which in all material respects is the same as Florida's Code concluded:

> "The reasons advanced in support of rule 2-111(A)(4) [Fla. DR 5-101(B) and DR 5-102(A)] and the authoritative discussions of the rule and its reasons previously cited . . . reveal that the balance thus drawn is based on certain fundamental assumptions: that there are available a number of competent, qualified attorneys who are unrelated to the attorney-witness and who are willing to undertake the client's case . . .; that, consequently, the interest of the client in representation by the attorney of choice implicates primarily avoidance of inconvenience and duplicative expense . . .; that the attorney's interest in continuing to represent the client is mostly or wholly financial in nature . . .; that a trial advocate has or appears to have an interest in the outcome of the case, either financial as a result of his fee arrangement or expectation of representing the client in the future, or a partisan interest resulting from his zeal as an advocate . . ., and that an attorney-witness whose law firm represents the client at trial will or will be presumed to continue to have an interest in the outcome of the case, either financial as a result of the fee arrangements and arrangement for his compensation by the firm, or secondarily perhaps, some residual partisanship resulting from his relationship with the law firm nothwithstanding he is not acting as the advocate personally . . . . <u>However valid these assumptions may be in the case of an attorney or law firm engaged in practice for remuneration and the normal attorney-client relationship, they have virtually no validity in the case of the multi-deputy prosecutorial office of a district attorney. The prosecutorial office of an elected district attorney and the relationship between the district attorney and his sole client, the People, are fundamental-</u>

> ly and decisively different from a law firm and the ordinary attorney-client relationship.
>
> 86 Cal.App.3d at 203-04 (citations omitted) (emphasis supplied).

Similarly, in United States v. Hubbard, 493 F. Supp. at 208, the court stated:

> "If any member of a law firm has an interest in the outcome of a case, the entire firm is disqualified. See ABA Opinion 296 (1959). However, this rule does not extend to encompass an Office of a United States Attorney. A United States Attorney's Office is unique in that it does not represent ordinary parties but the sovereign whose obligation is to govern impartially. See Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). Furthermore, the members of an Office of a United States Attorney have no interest in the success of the litigation of their associates as do members of a private firm. Therefore, the fact that one member of the Office may have a disqualifying interest in the case does not preclude the entire Office from handling the case."

This fundamental and decisive difference between the public prosecutor and the ordinary advocate is expressly recognized by the Code of Professional Responsibility, see, E.C. 7-13; DR 7-193; by the ABA Model Rules of Professional Conduct, see Rule 3.8, Special Responsibilities of A Prosecutor; and has long been recognized by our case law, see Smith v. State, 95 So.2d 525 (Fla. 1957); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), cert. denied, 386 So.2d 642 (1980); Fraizer v. State, 294 So.2d 691 (Fla. 1st DCA 1974), cert. denied, 307 So.2d 185 (1975).

Nor does the decision of our sister court in Fitzpatrick v. Smith, 432 So.2d 89 (Fla. 5th DCA 1983), alter our view. In Fitzpatrick, the defendant's motion to disqualify the State Attorney's office was based on the fact that the defendant had consulted with an attorney, one Kimball, concerning the charges against him, and subsequently, while the charges were still pending against the defendant, Kimball became an Assistant State Attorney in the office whose responsibility it was to prosecute the defendant. The defendant claimed that the threat of disclosure of his privileged and confidential communication to Kimball was sufficient grounds to disqualify the State Attorney's office. The Fifth District Court of Appeal, finding a real danger of prejudice to the defense, agreed. In so deciding, the court, relying upon cases holding that a public defender's office is a law firm within the meaning of the Code of Professional Responsibility, determined that a State Attorney's officer is a firm.[6/]

6/ The conclusion that a State Attorney's office which represents a single client is a law firm does not follow from the conclusion that a public defender's office which represents multiple clients with the potential for conflict is a law firm. In the factual context of Fitzpatrick, however, where there existed the spectre of divided loyalties, the problem of conflict existed.

It is obvious that whether the State Attorney's office may be considered a law firm for the purpose of disqualifying its members when one of it number has previously represented the defendant in the very matter being prosecuted is irrelevant to the question of whether the State Attorney's office may be considered a law firm under DR 5-101(B) and DR 5-102 (A) for the purpose of disqualifying its members when one of its number is to testify as a witness for the State. The rationale of Fitzpatrick is the real danger of prejudice to the defendant posed by the possible divulgence of privileged information and, implicitly, the unseemliness of the defendant being prosecuted by an office on a charge he had discussed with his former attorney, now a member of that office. No such prejudice or unseemliness exists here.

We therefore conclude that the trial court did not depart from the essential requirements of the law--indeed, adhered to those requirements---when it denied the petitioner's motion to disqualify the State Attorney's office from further participation in the prosecution of the petitioner. The trial court's decision was eminently correct in that the petitioner failed to show that he would be prejudiced by the State Attorney's office's continued participation in the prosecution. The petitioner'e reliance on Disciplinary

> Rules 5-101(B) and 5-102(A) of the Florida Bar Code of Professional Responsibility as grounds for disqualification is misplaced, since, absent a showing that a violation of these rules will prejudice him the petitioner has no private right to seek their enforcement, and, moreover, the State Attorney's office is not a law firm within the meaning of the cited rules.
>
> Accordingly, the petition for writ of certiorari is Denied.

Judge Pearson's analysis is further supported by the revised Model Rules of Professional Conduct adopted by the American Bar Association on August 2, 1983 and which is being considered for adoption by this Court in In re: Revision of the Code of Professional Responsibility of the Florida Bar, oral argument set for November 5, 1984.

Florida's version of the ABA Model Rules of Professional Conduct, contains comments from the Special Committee on Model Rules of Professional Conduct, which comments contain the corresponding sections, if any, to the present code. Further said commentary provides analysis of both the revised and new provisions.

Rule 3.7, Lawyers as Witness, as modified by the Special Committee provides:

Rule 3.7 Lawyer as Witness

(a) A laywer shall not act as advocate at trial in which the lawyer is likely to be a necessary witness except where:

(1) The testimony relates to an uncontested issue;
(2) The testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
(3) The testimony relates to the nature and value of legal services rendered in the case; or
(4) Disqualification of the lawyer would work substantial hardship on the client.
(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

The committee found that Rule 3.7 addresses the dilemma of an advocate acting as a witness more concisely than Florida's DR 5-101(B) and DR 5-102. The committee notes that Rule 3.7(b) is a departure from DR 5-101(B) in permitting a member of a lawyer's firm to act as a witness in a trial in which the lawyer is an advocate. Since this change allows the lawyer witness to assist in trial preparation like any other witness the change was approved. In so approving the change it was recognized to remain as an advocate when a member of the firm is a witness is a tactical consideration rather than a ethical one.

The rule explicitly allows a lawyer to be an advocate even if a lawyer in his firm is a witness unless there is either a conflict with a present client[4] or with a former clients.[5] Only when the lawyer, who is a member of a firm,

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[4] Rule 1.7, Conflict of Interest: General Rules provides:

> RULE 1.7 Conflict of Interest: General Rule
>
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless;
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities 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 explanation of the implications of the common representation and the advantages and risks involved.

[5] Rule 1.9 Conflict of Interest: Former Client, provides:

> RULE 1.9 Conflict of Interest: Former Client
>
> A lawyer who has formerly represented a client in a matter shall not thereafter:

may not act as both advocate and witness by reason on conflict of interest, is the firm disqualified. See comment to Rule 3.7.

The new Rules further support the State's contention in its definition of the term "firm". The first clue is in the "Terminology" section. It provides:

> "Firm" or "Law Firm" denotes a lawyer or lawyers in a private firm, lawyer employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See comment Rule 1.10.

Comment to Rule 1.10 further expands the definition of law firm, by dealing with office space sharers and other less tangible associations. However, it excludes any reference

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(Footnote 5 continues)

> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit the respect to a client or when the information has become generally known.

to a State Attorney's Office as a law firm. It does include the Office of the Public Defender as a legal services organization.

The new Rules also recognize the special role the prosecutor plays as an advocate. Once again, prosecutors are given special attention in the rules. Rule 3.8, Speical Responsibilities of a Prosecutor provides:

> RULE 3.8 Special Responsibilities of a Prosecutor
>
> The prosecutor in a criminal case shall:
> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
> (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
> (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
> (e) exercise reasonable care to prevent investigators, law enforce-

> ment personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Finally, the scope of the Rules are to guide the lawyer through his conflicting responsibilites. The Rules state that a:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the prupose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is just a basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Since the Code of Professional Responsibility, the revised Model Rules, and the established case law treat the State Attorney as an advocate, differently from all other

advocates, it is clear that the State Attorney's Office is not a law firm subject to the constraints of DR 5-102. An ordinary advocate has a duty to prevail for each of his clients, as well as a financial interest in each of his cases. The State Attorney's duty is specifically limited, in accord with our democratic system, to insure that each accused will received a fair trial. Therefore, when DR 5-102(A) is viewed in its proper perspective as only part of the Code of Professional Responsibility, it is applicable only to "law firms" engaged in the practice of law renumeration.

Therefore the State urges this Court to adopt Judge Pearson's analysis on this issue.

II

If it is a breach of the Code of Professional Responsibility of The Florida Bar for a State Attorney or any Assistant State Attorney in the office to continue to act as the prosecutor in a criminal case when it is his or her intention to call another Assistant State Attorney in the same office to testify at the trial of the case as to a material matter, is disqualification of the State Attorney and any Assistant State Attorney in the same office from prosecuting the case required whether or not prejudice to the defendant can be demonstrated?

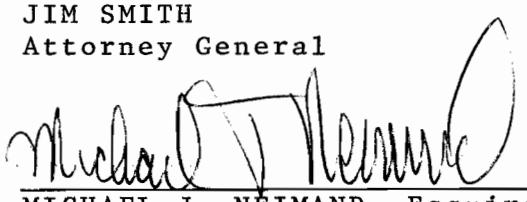
The State submits that in accordance with Judge Pearson's opinion a finding of prejudice to the defendant must be demonstrated in order to disqualify the State Attorney's Office when an non-prosecuting Assistant State Attorney is going to testify.

CONCLUSION

Based upon the points and authorities contained herein, the State respectfully request that this Court answer the first certified question negatively and the second certified question with a finding of prejudice.

Respectfully submitted,

JIM SMITH
Attorney General



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401 N.W. 2nd Avenue, Suite 820
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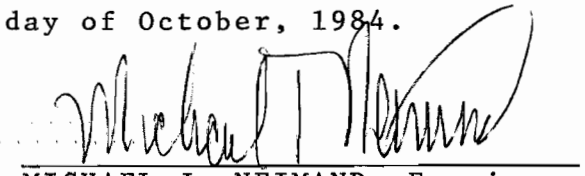
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to ROBERT D. KLAUSNER, 28 W. Flagler Street, Miami, Florida 33130, on this 14 day of October, 1984.



MICHAEL J. NEIMAND, Esquire
Assistant Attorney General

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