Grievance Administrator,

Petitioner/Appellant,

v

Dennis M. Hurst, P 32409

Case No 95-32-GA

Decided: May 10, 1996

BOARD OPINION

Respondent was elected to the office of Jackson County Prosecutor, effective January 1, 1993. Before taking office, respondent represented Jerry Wayne Turner on misdemeanor charges arising out of his transporting a loaded weapon in an automobile. Respondent was unable to negotiate a plea before January 1, 1993, so he withdrew from representing Turner. The Formal Complaint charges respondent with violating MRPC 1.11(c) by participating in Turner's prosecution after assuming office. The complaint also alleges that respondent violated MRPC 5.1(b) and (c) by ratifying, participating in, or failing to take remedial action with regard to alleged unethical conduct by the chief assistant prosecutor McBain. The panel majority found that misconduct had not been proven. One member dissented from a portion of the majority's report and would have imposed discipline under MRPC 1.11(c). The Grievance Administrator filed a petition for review. We affirm the panel's order of dismissal.

Respondent defeated the incumbent Prosecutor in the primary election held in August 1992. He was unopposed in the November general election.

On November 16, 1992, the second day of deer hunting season (firearm), Jerry Wayne Turner was stopped by a state trooper for expired plates. Turner was ticketed for certain traffic offenses and for the misdemeanor of transporting a loaded or uncased firearm

in a motor vehicle. The trooper seized the gun which Turner had borrowed from his employer, Larry Wetherby.

Turner went to respondent for representation. Respondent told Turner that he "thought we could get right through it but . . . if it ran past [January 1, 1993] he would have to withdraw" (Tr II, p 127). Respondent accepted the case and a $200 fee. On November 18, 1992, respondent mailed his appearance to the court and prosecutor. The panel found all of this to be reasonable.

The panel's report is worthy of extensive quotation:

> On December 2, 1992, (without any notice to Respondent or his client) a Complaint and Warrant was authorized charging Mr. Turner with a two-year misdemeanor under M.C.L.A. 750.227c, Possession of a Loaded Firearm in a Motor Vehicle. This was a charge higher than the first [gun] charge listed above. As originally written by Michigan State Police Trooper Daniel A. Palmer, the gun charge was a "DNR" misdemeanor under M.C.L.A. 300.262(2) punishable by a maximum of 90 days imprisonment. In other words, the first charge was made under a section of the Michigan Law dealing with <u>hunting</u> violations. The second charge was made under the general criminal law. The Panel finds that trooper Palmer was an experienced Michigan State Police trooper. The Panel finds that the first "DNR" charge (a 90 day misdemeanor) was appropriate inasmuch as the uncontradicted testimony of Mr. Turner was that he was stopped the second day of deer season while returning from hunting and was dressed in hunter-orange colored clothing at the time of the stop. He had a hunting license in his possession. (Tr. 71).
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> Respondent attended a pretrial conference for Mr. Turner on the expired plates charge on December 23, 1992. Ms. Renee Semplonious a legal intern was handling the case as acting assistant prosecuting attorney under authority of M.C.R. 8.120(C)(4). Respondent then and there learned that the high misdemeanor gun charge had been authorized by Prosecutor Joseph Filip. Respondent asked Ms. Semplonious to speak with Mr. Filip about reducing the high misdemeanor charge but was told by her that Mr. Filip had personally approved the charge, and would "laugh in his face." Respondent then asked Ms. Semplonious if he might contact Trooper Palmer to discuss the charges and she did not object.
>
> Respondent called Trooper Palmer on or about the same day in his role as Turner's defense counsel and expressed concern about the higher misdemeanor charge. Respondent asked Trooper Palmer whether he (Palmer) felt

that a reduction of the charge was in order. Trooper Palmer deferred to the judgment of the prosecuting attorney.

During this time, Respondent was assembling his prosecution team in anticipation of assuming office on January 1, 1993. Respondent was not allowed by Mr. Filip the prosecuting attorney to have access to the Prosecutor's Office prior to that time and had no informal transition to his new office before the end of the year.

Respondent testified that he telephoned and met with Ms. Marcia Proctor, then-Ethics Counsel (and now General Counsel) for the State Bar of Michigan, regarding his concerns of possible conflicts of interest because of his active criminal defense practice in Jackson County. Respondent testified that he received and acted on Ms. Proctor's advice, that is, that he could handle the conflict cases by instituting a screening procedure whereby such cases would be handled by assistants within his office but without Respondent's participation. A procedure described as a "chinese wall." Respondent further testified that Ms. Proctor furnished him with a copy of R-4, a formal ethics opinion of the Michigan State Bar Board of Commissioners. (Tr. 424). Respondent also testified that he had campaigned on economy in the office of Prosecuting Attorney and was interested in saving taxpayer money. (Tr. 424). This testimony is uncontradicted and the Panel finds it factual.

Respondent hired as his chief assistant John G. McBain, Jr., an experienced prosecutor who was employed with the Florida State's Attorney's Office. Mr. McBain returned to the State of Michigan in mid-December to begin preparing for his new job.

Respondent circulated a letter to all the judges indicating that Mr. McBain was to be the "conflicts prosecutor."

On December 29, Respondent attended the arraignment in the Turner matter on the gun charge. Respondent intended to resolve the matter by a plea agreement or, failing that, withdraw as Turner's attorney of record. The Panel finds that these actions of Respondent were consistent with the standards of professional conduct. It was proper for the Respondent to attempt to finish the matter and when that was not possible to withdraw. The Panel notes that the court must have approved the withdrawal.

Respondent testified that Mr. McBain went with him on that day on a tour of courthouse and Respondent

introduced Mr. McBain to the judges who were available. The Panel finds that this was appropriate and finds no violation of any ethical standard has been proven in Respondent having Mr. McBain accompany him to the court house when Respondent was doing other work as well as introducing Mr. McBain.

* * *

Respondent was unable to work out a plea agreement and withdrew as Mr. Turner's attorney on the record. Judge Walz noted that the matter of the high misdemeanor was scheduled for pre-exam conference on Monday, January 4, 1993 to be followed by a preliminary exam the following day.

* * *

On January 4, Mr. McBain appeared on the Turner case as a special "conflicts prosecutor" and negotiated a plea agreement with Mr. Turner whereby Turner would plead guilty to a ninety-day misdemeanor of transporting a loaded firearm in a motor vehicle (a criminal as opposed to a "DNR" charge) and obtain dismissals of the two other traffic tickets. A further part of the plea agreement was that the firearm (a family heirloom shotgun Tr. 91) would be returned to the true owner of the gun (Mr. Wetherby). This agreement was placed on the record before District Judge Lysle G. Hall that morning and sentencing was slated for February 10, 1993. The Court also received from Mr. McBain and signed and "Order for Return of Firearm." Based on the testimony of Mr. Donald E. Martin, Ingham County Prosecutor, the Panel finds that the plea agreement was not unusual. The Panel further finds that the ends of justice were served by the agreement and the return of the gun to its true owner. The gun was a family heirloom and owned by Mr. Wetherby, not the person charged (Mr. Turner). The Panel further finds that the plea and agreement and return of the gun were all approved by the court.

* * *

We find the evidence proved and find as fact that Respondent took affirmative action to comply with the Rules of Professional Conduct. Respondent's efforts to screen himself from the prosecution of the Turner matter before and after he withdrew in the case included the following:

1) Doing research on the question and seeking the advice of the State Bar on the subject.

2) Advising McBain in December, 1992 that part of

> McBain's duties would include acting as a Special Conflicts Prosecutor.
>
> 3) Naming McBain and another attorney, Michael Dungan, along with Barb Heischelwerdt, who would be Respondent's Executive Assistant when he assumed office, to a Conflicts Committee to screen cases for a potential conflict of interest . . . (Tr. 424-428)[.]
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> 4) Advising the Jackson County judges on December 29 of his intended method of handling his conflicts cases.
>
> 5) Not personally participating or interfering with the work on the conflicts team.
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> The testimony (and the experience of the majority of the Panel members . . .) is consistent with the fact that the plea agreement which Turner and McBain agreed to was a reasonable exercise of McBain's discretion and well within the range of acceptable resolution of the three tickets.
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> Respondent notified the court of the conflict, withdrew his appearance, notified the court of a special conflicts prosecutor and appointed that prosecutor. He did so after doing his own research and after seeking and receiving the advise of the State Bar Ethics official.
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> Moreover, we find no credible evidence of conduct on Respondent's part which was designed to or did in fact influence McBain's handling of the matter or otherwise improperly affect the result. Mr. McBain was a seasoned, experienced prosecutor. It is quite likely that he could, based on his experience, size up a case like Turner's rather quickly and make the decision that a guilty plea to a ninety-day misdemeanor gun charge and dismissal of the two minor tickets was in the best interest of the people of the state of Michigan.
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> The Panel finds that the Petitioner did not prove the allegations of the complaint by a preponderance of the evidence.

I

The Grievance Administrator argues that the panel majority's findings of fact as to the allegations that respondent violated MRPC 1.11(c) should be reversed. The Administrator also argues that, even if the panel's factual findings are accepted, the majority erred in concluding that MRPC 1.11(c) was not violated.

MRPC 1.11(c) provides in pertinent part:

> Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
>
> (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter;

The Grievance Administrator first argues that the panel majority erred in finding that respondent did not participate in the <u>Turner</u> matter after he assumed the office of Jackson County Prosecutor.

We review a hearing panel's findings of fact for proper evidentiary support on the whole record. <u>Grievance Administrator v Denton</u>, 92-208-GA (Bd Op 1/27/94); <u>Grievance Administrator v Paul R. Jackman</u>, ADB 189-87 (Bd Op 1/16/90). Because of the panel's unique opportunity to observe the witnesses, we accord great deference to the panel's assessment of credibility and demeanor. <u>Jackman</u>, <u>supra</u>; see also <u>In Re Petition for Reinstatement of McWhorter</u>, 449 Mich 130, 136 n 7; 534 NW2d 480 (1995).

The hearing panel heard testimony from several witnesses, including respondent and McBain. McBain testified that he never discussed the facts or the disposition of the <u>Turner</u> case with respondent. The principal evidence adduced to contradict this was the testimony of Rene Semplonious that respondent said "I'll take care of this Monday" after he was unsuccessful in resolving the case with her at the December 29, 1992 arraignment. Respondent denied this. The panel majority strongly denounced Semplonious' credibility and found that respondent did not make such a statement. The dissenting member does not disagree with this finding.

The Grievance Administrator argues that "[t]he circumstantial and testimonial evidence shows that Mr. McBain could not have presented [the order for return of the gun] without the

participation and influence of Respondent." The panel, noting the absence of any direct proof of participation by respondent in Turner's prosecution and the insufficiency of the circumstantial evidence, rejected the Grievance Administrator's arguments. There is proper evidentiary support in the record for the majority's findings.

The Grievance Administrator also argues that the panel improperly applied MRPC 1.11(c)(1) to the facts as it found them. Relying on (1) the finding that respondent introduced Turner to McBain as "my client"; (2) the finding that McBain was introduced as "part of [respondent's] team"; and (3) Turner's testimony that he told McBain that he considered the charges to have been politically motivated, the Administrator contends that: "By introducing his client to Mr. McBain and allowing his client to share the defense view that the case had become a political prosecution . . . , respondent violated Rule 1.11(c)(1)."

The panel found that McBain met Turner only briefly outside the courtroom after the arraignment, the meeting "was not contrived but happened by chance," and this brief encounter and introduction was not improper. There has been no suggestion that respondent initiated any conversation regarding the case. We agree that respondent's failure or inability to prevent his client's comments under the circumstances does not constitute "participation" in Turner's prosecution within in the meaning of the rule.

II

The Grievance Administrator next argues that the panel erred when it dismissed portions of the complaint which essentially charged respondent with violating MRPC 5.1(c)[1] by allowing McBain to prosecute Turner. The complaint does not identify the rules McBain allegedly violated.

The Grievance Administrator asserts that notwithstanding the screening procedures established by the prosecutor's office under respondent's direction, respondent committed misconduct for the

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[1] MRPC 5.1(c) prohibits supervisory lawyers from ordering, ratifying or failing to mitigate rule violations by subordinate lawyers.

following reasons:

> Chief Assistant McBain was automatically disqualified by virtue of Rule 1.10(a) because Respondent was barred from representing the State under Rule 1.7(b). Respondent's use of Chief Assistant McBain to prosecute Mr. Turner was a ratification and participation in a violation of the Rules of Professional Conduct by Mr. McBain. [Administrator's review brief, p 8; emphasis added.]

We agree with the panel's conclusion that McBain was not automatically disqualified under MRPC 1.10(a), which provides:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a) or (c), or 2.2.

At the outset, we cannot say that respondent's disqualification under MRPC 1.7(b) has persuasively been shown. This is not to say that respondent necessarily could have personally opposed his former client in these circumstances. We do not address or resolve that question. But we conclude that the basis for triggering MRPC 1.10(a)'s per se imputed disqualification rule has not been clearly demonstrated.

The Administrator argues:

> Respondent was disqualified from prosecuting Mr. Turner because such representation was potentially materially limited by his responsibilities to Mr. Turner and any third person(s) responsible for his retention as his counsel. [Administrator's review brief, p 8; emphasis added.]

A hazy "potential" conflict with some unidentified and perhaps nonexistent "third person(s)" does not suffice to render a representation improper. Thus, all that remains of the Administrator's argument is that MRPC 1.7(b) precludes respondent from prosecuting Turner because "such representation [would be] potentially materially limited by his responsibilities to Mr. Turner." This vague allusion to "responsibilities" does not sufficiently establish the applicability of MRPC 1.7(b) to this

case.

Respondent withdrew from representing Turner before taking the office of prosecutor. MRPC 1.7 "deals specifically with the problem of concurrent representation of clients with conflicting interests."[2] 1 Hazard & Hodes, The Law of Lawyering, §1.7:102, p 220 (emphasis in original). MRPC 1.9 "governs the case of serial representation (or consecutive representation, as it is sometimes called) of clients with conflicting interests, and hence concerns the interests of former clients." Id. (emphasis in original).

Under MRPC 1.10(a) disqualification may be imputed to all lawyers in a firm if one lawyer is prohibited from representation under MRPC 1.9(a) or (c). However, the complaint did not charge respondent with violation of MRPC 1.9, nor did the Grievance Administrator argue its applicability.[3] Thus, the basis for imputed disqualification is not clear in this case. It has not been shown that respondent was precluded from prosecuting Turner under MRPC 1.7, and, therefore, that McBain's prosecution of Turner was improper under MRPC 1.10(a). This is not a mere technicality. Imputed disqualification is strong medicine, and the grounds for it under the Rules of Professional Conduct (as opposed to the common or statutory law of disqualification) are quite specific. We should be certain they exist.

Even if we assume that respondent would be disqualified from prosecuting Turner under MRPC 1.7(b) or 1.9(a), we agree with the panel's conclusion that this would not trigger the imputed disqualification rules of MRPC 1.10(a).

The Administrator relies upon ethics opinions published by the State Bar of Michigan, and a treatise, all of which are cited for the proposition that MRPC 1.10 applies to a prosecutor's office.

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[2] MRPC 1.7(b) also proscribes representation when it may be materially limited by a lawyer's responsibilities to a third person or by the lawyer's own interests. These circumstances have not been argued or shown to exist.

[3] MRPC 1.9(a) allows a client to consent to his or her lawyer switching sides. The panel majority, in ruling on the MRPC 1.11(c)(1) charge, found that respondent did not participate in the prosecution of Turner. Accordingly, there was no subsequent representation within the meaning of MRPC 1.9(a) for Turner to consent to. We do not conclude that a criminal defendant's consent under MRPC 1.9(a) would necessarily enable his lawyer to switch sides and participate in his prosecution notwithstanding MRPC 1.11(c)(1). That question is not before us.

This proposition is then used as the basis for the argument that "Chief Assistant McBain was automatically disqualified by virtue of Rule 1.10(a) . . . " (Administrator's brief, p 8; emphasis added).

The Grievance Administrator correctly describes the nature of disqualification under MRPC 1.10(a) as automatic.[4] However, the very authorities relied upon by the Grievance Administrator do not support such automatic disqualification. Indeed, as the Grievance Administrator's own brief states:

> Even more significantly, Formal Ethics Opinion R-13, issued in September 1991, references MRPC 1.10 and directs attorneys to RI-43 for guidance regarding the screening of public lawyers from matters in which they previously participated personally and substantially. [GA's brief, p 8; emphasis added.]

The Grievance Administrator's characterization of State Bar of Michigan Ethics Opinion R-13 (9/27/91) is accurate. It states: "For screening public lawyers from matters in which they previously participated personally and substantially, see RI-43." Ethics Opinion RI-43 (2/6/90) discusses the potential applicability of MRPC 1.10 and 1.11 to a prosecutor's office, and opines that "a prosecutor's office constitutes a 'firm' for purposes of the imputed disqualification rules," and, citing to Ethics Opinion R-4, suggests that screening may be employed to avoid disqualification of the entire prosecutor's office in appropriate circumstances.

Thus, while the Grievance Administrator argues imputed disqualification of the entire prosecutor's office was automatic, he relies upon authorities which expressly contemplate the avoidance of this result by screening the affected lawyer -- authorities having their genesis in the ethics opinion (R-4) which the panel found was given to respondent by the State Bar and formed the basis for the screening procedures he adopted.

Similarly, the Grievance Administrator relies on Dubin & Schwartz, Michigan Rules of Professional Conduct and Disciplinary Procedure, at p 1-122(a) which is said to "recognize . . . the

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[4] 1 Hazard & Hodes, supra, §1.10:201, pp 324-325 ("Rule 1.10(a) . . . imposes imputed disqualification automatically, without requiring any showing of either actual leakage or even access to confidential information.").

application of Rule 1.10(a) to prosecutors" (GA brief, p 8). A fair reading of the passage establishes that it is a summary of an ethics opinion, not a commentary. The authors' views on imputed disqualification in this situation are set forth at pp 1-133--1-134: "Since public lawyers do not practice for profit, they should not be disqualified by imputation; otherwise, outside counsel would have to be brought in at additional cost to the public." This view is widely cited as a basis for rejecting automatic imputed disqualification of a prosecutor's office. See, e.g., United States v Caggiano, 660 F2d 184, 190-191 (CA 6, 1981), cert den 454 US 1149 (1982) (citing ABA Formal Opinion 342 (1975)).

The panel concluded that "the rules of imputed disqualification of a firm under Rule 1.10(a) do not apply to public prosecutors' offices." In reaching this conclusion, the panel relied on the text of, and comments to, MRPC 1.10 and 1.11. One portion of MRPC 1.11's comment relied upon by the panel speaks directly to the question:

> Paragraph (c) [MRPC 1.11(c)] does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Thus, automatic imputed disqualification is rejected by MRPC 1.11(c).

In determining that MRPC 1.10(a) was inapplicable, the panel relied upon the definition of "firm" found in the comment to MRPC 1.10 which does not expressly include governmental agencies or units,[5] and the first paragraph of the comment to MRPC 1.11, which reads:

> This rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b)

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[5] The comment provides in part:

> For purposes of these rules, the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation or other organization or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts.

> which applies to lawyers moving from one firm to another. [Emphasis added.]

The panel correctly read the comments together as dealing with related subjects. Although the definition of "firm" in the comment to MRPC 1.10 does include "organizations," and is intended to be flexible, the usage of "firm" in the above-quoted first paragraph of the comment to MRPC 1.11 strongly suggests that a "firm" is something distinct from a governmental entity.

This reading is reinforced by yet another portion of the comment to MRPC 1.10:

> Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the rules generally, including Rules 1.6, 1.7, and 1.9. [Emphasis added.]

Thus, by its express terms MRPC 1.11(c) provides that a lawyer may not participate in a matter in which the lawyer participated personally and substantially in private practice or nongovernmental employment, thereby creating the impression that one who avoids such participation is not subject to discipline. The comment to Rule 1.11 states that the affected lawyer does not cause disqualification of other lawyers in the governmental agency, and other portions of that comment and MRPC 1.10's comment support the conclusion that MRPC 1.11 governs the situation to the exclusion of MRPC 1.10. See also ABA/BNA Lawyers' Manual on Professional Conduct, §51:2008, p 26.[6]

Recent decisions addressing disqualification motions agree with the panel that Rule 1.11 applies to this situation, while Rule

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[6] The Lawyers' Manual states in part:

> The Comment to Rule 1.10 makes clear that the rule does not apply to situations involving lawyers who have "switched sides" from government service to private practice, or vice versa. Those situations are covered by Model Rule 1.11 which allows for screening to cure the imputation of disqualifying individual conflict.

1.10 governs "[v]icarious disqualification arising from employment changes within the private sector." State ex rel Romley v Superior Court, 908 P2d 37, 40 n 2 (Ariz App, 1995). See also State v Pennington, 115 NM 372; 851 P2d 494, 500 (NM App, 1993), and State ex rel Tyler v MacQueen, 191 W Va 597; 447 SE2d 289 (1994). In each of these cases, the disqualified lawyer was screened. This is to be expected. MRPC 1.11(c) does not expressly call for "screening" as do other portions of that rule. Plainly, however, screening is at least prudent, and almost certainly required, to assure that the affected lawyer does not participate in the matter.

It should be noted that decisions on disqualification motions comprise a body of law related to, but distinct from, discipline cases. In fact, the allegation that a lawyer is (or should be) disqualified from a particular representation due to a conflict of interests is probably advanced much more often in motions to disqualify counsel, and in challenges to criminal convictions, than it is in discipline cases.[7] While courts often consider ethics rules in deciding these questions, they also consider additional factors which may lead to a disqualification not strictly required by the applicable rules of professional conduct. The primary example of this is a court's duty to avoid the appearance of impropriety or unfairness, which leads to a case-by-case examination "with an eye to the ultimate goal of maintaining confidence in the integrity of the judicial system." Romley, supra, p 41.

Even with these additional considerations tending to tip the balance in favor of disqualification,

> [t]he great majority of jurisdictions have refused to apply a per se rule disqualifying the entire prosecutor's staff solely on the basis that one member of the staff had been involved in the representation of the defendant in a related matter. [State v Pennington, 115 NM 372; 851 P2d 494, 498 (NM App, 1993)]

[7] The Grievance Administrator has cited no decision of an agency or court imposing discipline under Rule 1.10(a) where a prosecutor or government attorney was in fact screened from participation in a matter with which the attorney was formerly involved.

See also MCL 49.160; MSA 5.758[8]

The supervisory status of the conflicted lawyer may be a factor militating in favor of office-wide disqualification in a particular case. See, e.g., People v Doyle, 159 Mich App 632; 406 NW2d 893 (1987). But this would be on the basis that the court has the discretion to order disqualification in a particular case to protect the integrity of the process and maintain public confidence, not because the prosecutor's office, due to the status of a particular member, has somehow been transformed into a "firm" within the meaning of MRPC 1.10(a). See, e.g., Turbin v Superior Court, 165 Ariz 195; 797 P2d 734 (Ariz App, 1990).[9]

Moreover, disqualification of the principal officeholder has not always resulted in disqualification of the entire prosecutor's office. In United States v Goot, 894 F2d 231 (CA 7, 1990), cert den 498 US 811 (1990), the Seventh Circuit, in facts similar to those here, endorsed screening of the United States Attorney while an assistant in the same office handled the case as "Acting United States Attorney."

In summary, we conclude that MRPC 1.10(a) does not apply in this case. To conclude otherwise would, among other things: defy the clear language of the foregoing comments; ignore the majority rule that automatic imputed disqualification is not required in prosecutors' offices; disregard the intent apparent from our

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[8] That statute provides that a special prosecutor may be appointed if the county prosecutor is disqualified by reason of conflict of interest, but that "[t]his section shall not apply if an assistant prosecuting attorney has been or can be appointed by the prosecuting attorney pursuant to [MCL 776.18] . . . or if an assistant prosecuting attorney has been otherwise appointed by the prosecuting attorney pursuant to law and is not disqualified from acting in place of the prosecuting attorney."

[9] The Turbin court was faced with the claim that adoption of the Model Rules of Professional Conduct changed the disqualification standard. The court held that:

> Today, our ethical rules distinguish between private law firms and government law offices for purposes of vicarious disqualification. Private law firms are guided by [Rule] 1.10 . . . . Government attorneys, on the other hand, are guided by [Rule 1.11(c) . . . . [797 P2d at 736.]

However, noting that "criminal prosecutions must appear fair, as well as actually be fair," the court concluded that "the appearance of impropriety [factor] . . . still has a definite place in the balancing test the trial court must apply in resolving the question of disqualification."

Supreme Court's adoption of a specific rule of professional conduct applicable to governmental service; and, serve to mislead lawyers attempting to adhere to the Rules. The panel correctly determined that McBain did not violate MRPC 1.10(a) by prosecuting Turner while screening respondent from participation. In any event, we conclude that discipline is clearly unwarranted under the circumstances of this case.

III

The Grievance Administrator next argues that the admission of expert testimony was error requiring reversal. We disagree.

The Administrator cites only one case, People v Drossart, 99 Mich App 66; 297 NW2d 863 (1980), lv den 410 Mich 892 (1981) which holds that testimony as to the legal definition of insanity invades the province of the court as it is the court's function to instruct jurors on the law. It is not clear that the rationale would be applicable where there is no jury. However, even under Drossart and similar cases, the admission of expert testimony is harmless "when the expert's opinion states the law consistent with the applicable law and the trial court's jury instructions." Thorin v Bloomfield Hills Bd of Ed, 203 Mich App 692, 704; 513 NW2d 230 (1994).

Respondent makes the point that the Administrator relies upon ethics opinions in this very case, and those are simply the opinions of lawyers in written form. Our review leads us to conclude that the panel understood its obligation to find and apply the law. The members did not abdicate this responsibility nor did they place undue emphasis on the testimony of the expert or the State Bar ethics opinions. Even if admission of the testimony was erroneous, it does not require reversal. MCR 2.613(A).

Board Members Miles A. Hurwitz, Albert L. Holtz, Marie Farrell-Donaldson, George E. Bushnell, Jr., C. Beth Duncombe, Elaine Fieldman, Michael R. Kramer concur in this opinion.

Board Members Barbara B. Gattorn, and Paul D. Newman were absent and did not participate.