

COA Opinion: Attorney General disqualified under MRPC from prosecuting judge after representing judge in substantially related civil action

6. March 2010

On March 4, 2010, the Court of Appeals published a *per curiam* opinion in *People v. Waterstone*, No. 294667, directing the Attorney General (AG) to withdraw from prosecution of the case because of a conflict of interest under Michigan Rules of Professional Conduct (MRPC) 1.9 and 1.10. In this action, the AG brought a felony complaint against Circuit Court Judge Waterstone, alleging that she knowingly permitted witnesses to commit perjury during a criminal trial. One of the two defendants from that criminal trial had earlier filed a federal civil rights suit against the judge and others, based on admission of the alleged perjured testimony. The AG's office assigned an assistant AG from the Public Employment, Elections and Tort (PEET) Division to defend the judge in the civil action, which was eventually dismissed. The Wayne County Prosecutor withdrew from prosecution of individuals allegedly involved in the perjury because of a conflict of interest, and eventually the AG agreed to prosecute the cases.

The Court of Appeals held that because the prosecuting attorney learned confidential information during representation of the judge in the civil action and was then asked to investigate an alleged crime by that former client, for purposes of this case, the AG's office was a "firm" under MRPC 1.10. Accordingly, the AG's office should have conducted a conflict check before undertaking the prosecution. Even though the assistant AGs involved in the prosecution did not have actual knowledge of the AG's former representation of the judge, the court held that prosecution of a judge is unusual, and knowledge of the potential federal case against the judge could be inferred under the circumstances. Because a simple conflict check would have revealed the federal lawsuit, and knowledge could be inferred, the AG should have obtained the consent of the former client before undertaking the prosecution. Further, the AG's failure to disclose the conflict prejudiced the judge, because it was reasonable for the judge to believe that the AG was still representing her when an investigator from the AG's office interviewed her in connection with the perjury claims. Because of the conflict of interest, the court directed the AG to withdraw from prosecuting the judge in the criminal matter.