

You have advised that you are serving as a part-time assistant Commonwealth's attorney and that some of your duties include prosecuting welfare fraud cases brought before the Commonwealth attorney's office by the county's Department of Social Services. In addition, you maintain a private practice in which your services have been requested by a former client to represent her before a Medicaid hearing officer regarding the denial of Medicaid benefits on the issue of whether or not a trust fund is a resource (the client is not, nor do you have any knowledge why she would be, the subject of a future welfare fraud case).

You wish to know whether you may represent the Medicaid applicant before a hearing officer and possibly later before the State Board of Social Services; or will your duties as prosecutor for the Department of Social Services preclude you from accepting such employment to the extent that this may present a possible conflict of interest.

The Committee believes that DR:9-101(B) and (C), DR:8-101(A)(2), and DR:5-105(D) are the appropriate and controlling rules in this matter. DR:9-101(B) and (C) state that an attorney shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee; nor shall an attorney state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official. An attorney who is also a public official should, at all times, comply with the provisions of Canon 9 and Ethical Consideration 9-2 [EC:9-2], maintaining his duty to clients or the public while promoting public confidence in the integrity and efficiency in the legal system and the profession to avoid even an appearance of impropriety. DR:8-101(2) states that an attorney shall not use his public position to influence, or attempt to influence, a tribunal to act in his favor or in his client's favor; and DR:5-105(D) states that a lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

While there are no legal ethics opinions directly on point with your situation, LE Op. 843 opined that it was improper for a county attorney charged with the duty of representing the county subdivision committee to also represent a developer in a subdivision application before the subdivision committee. The exception to this was if the county and developer were in agreement after full disclosure and consent.

In addition, you have explained that your duties representing the Department of Social Services involve matters substantially unrelated to the Medicaid application matter before you; nor has this client been a party to, nor in any way related to, your responsibilities as a public employee. LE Op. 819 provides that it is not improper for an attorney to commence an action on behalf of a client injured in an automobile accident by the driver of a vehicle owned by the Virginia Department of Highways and Transportation even though the attorney represents the department in condemnation cases. (DR:5-105(D)) Based upon the facts as you have presented them, the Committee opines that the decision held in LE Op. 819 is dispositive of your inquiry.

Committee Opinion

August 1, 1988