

Committee Opinion
October 6, 1988

LEGAL ETHICS OPINION 1162

COMMONWEALTH'S ATTORNEY –
APPEARANCE OF IMPROPRIETY –
ATTORNEY AS WITNESS: FORMER
ASSISTANT COMMONWEALTH
ATTORNEY'S LAW FIRM
REPRESENTING CLIENT IN
MALICIOUS PROSECUTION.

A partner in your law firm was formerly the assistant prosecutor of your client. Your client has brought a civil action for malicious prosecution against his former employer, based upon the fact that the prosecution was successfully terminated in favor of your client. The termination of the prosecution did not involve your partner. You have also advised that your partner was unaware of your representation of this client when he joined your firm and has handled only one motion on your client's behalf since that time. You maintain a "Chinese wall" with respect to the case, with the exception of the single pretrial motion which he handled.

Based upon the facts and information furnished, it is the opinion of the Committee that your continued representation of the client in this civil matter may be improper. Disciplinary Rule 9-101(B) [DR:9-101] provides that a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee. Ethical Consideration 9-3 [EC:9-3] further states that to accept such employment would give the appearance of impropriety even if none exists.

Further, DR:8-102(A)(1) provides that a prosecutor shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. An action for malicious prosecution cannot be maintained unless it appears that the prosecution took place without probable cause. It would appear that your partner, while acting as a prosecutor handling the criminal case against your client, believed that there was probable cause to prosecute. Therefore, it would also appear that your partner is likely to be a witness and that DR:5-101(B) or DR:5-102 will apply since he will have knowledge of one of the essential elements of proof.

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