

Committee Opinion
March 28, 1989

LEGAL ETHICS OPINION 1208

APPEARANCE OF IMPROPRIETY –
COMMONWEALTH’S ATTORNEY –
CONFLICT OF INTEREST – CRIMINAL
REPRESENTATION – VICARIOUS
DISQUALIFICATION: IMPROPER FOR
ATTORNEY OR ANY MEMBER OF HIS
FIRM TO REPRESENT A DEFENDANT
IN EITHER A FELONY OR
MISDEMEANOR ACTION WHILE
SIMULTANEOUSLY REPRESENTING
THE COMMONWEALTH’S ATTORNEY.

You have asked the Committee to provide a more specific opinion than the one rendered in LE Op. 840, which held that it would be improper for an attorney to represent the Commonwealth's attorney personally in a federal suit and, at the same time, represent criminals to be prosecuted by the same Commonwealth's attorney.

You advise that an attorney with your firm is called upon to represent the local Commonwealth's attorneys from time to time. The same attorney has avoided accepting felony matters when he is representing that Commonwealth's attorney, but will, if the opportunity presents itself, take a felony while he is not personally representing that Commonwealth's attorney. You are not aware of any occasion in which the attorney has been directly involved in the active representation of a felon while simultaneously involved in the defense of the participating Commonwealth's attorney. However, you have not declined an occasional misdemeanor (most of which are accommodation cases) while your firm actively represented the Commonwealth's attorney.

You believe that the misdemeanor representation was not improper since the assistant Commonwealth's attorney, like the Commonwealth's attorney, is not full time, both maintain separate offices, and the assistant Commonwealth's attorney does not get involved in felony cases, nor does the Commonwealth's attorney get involved in misdemeanor cases.

You wish to know whether, in light of LE Op. 840, it would be unethical for a law firm to actively defend misdemeanors while at the time personally representing the Commonwealth's attorney, who would not participate in the prosecution of misdemeanors.

The appropriate and controlling rule relative to your inquiry is DR:9-101(C), which provides that a lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official. Under DR:5-105(A) and (C) a lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client is likely to be adversely affected by his representation of another client, unless it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure under the circumstances. Given the prosecutorial authority of the

Committee Opinion

March 28, 1989

Commonwealth's attorney to establish the conviction of a defendant, the simultaneous representation of both the Commonwealth's attorney and a defendant, may be perceived as unethical. (See LE Op. 789 and LE Op. 840) The Code of Professional Responsibility does not distinguish between misdemeanor (or accommodation cases and felonies. A lawyer who is actively representing the Commonwealth's attorney must be mindful of DR:9-101(C) and should decline representation of a defendant who will be prosecuted by the office of the same Commonwealth's attorney in order to avoid even the appearance of impropriety.

The Committee opines that LE Op. 840 has been properly rendered and is dispositive of your inquiry. To the extent that the facts of LE Op. 840 do not distinguish between misdemeanors and felonies, the Committee opines that "criminal practice" has been defined to include both; hence the same conclusion reached in the earlier opinion may also be reached under the facts of your inquiry.

In addition, the Committee would direct your attention to LE Op. 1020, in which the Committee opined that the plan for erecting a "Chinese wall" within the Commonwealth attorney's office by providing separate telephone lines and separate offices does not obviate any potential convicting professional responsibilities under DR:5-105; thus, the partners and associates of the disqualified attorney would be disqualified vicariously. (See DR:5-105(E)) As a public employee, the Commonwealth's attorney should be aware that he must exercise sound judgment, strive to maintain the public confidence in the legal profession and avoid any potential professional impropriety.

Committee Opinion

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