

Committee Opinion

June 1, 1989

LEGAL ETHICS OPINION 1243

APPEARANCE OF IMPROPRIETY –
COMMONWEALTH'S ATTORNEY –
CRIMINAL PRACTICE – CURRENT
REPRESENTATION SUBSTANTIALLY
RELATED TO RESPONSIBILITIES OF
FORMER COMMONWEALTH'S
ATTORNEY.

You have advised that during the time that Attorney X served as Commonwealth's attorney numerous persons were convicted of driving under the influence of alcohol and driving on a suspended operator's license. In addition, numerous individuals were declared habitual offenders based on records certified to the Commonwealth's Attorney's Office by the Division of Motor Vehicles and presented to the court as required by the Code of Virginia.

You have asked the Committee to consider whether the former Commonwealth's attorney may ethically represent private individuals in an action in which he had responsibility while he was a public employee in the following situations:

(1) May the former Commonwealth's attorney represent a defendant who was charged with the criminal offense of driving after being declared an habitual offender, based on a declaration obtained during the former Commonwealth's attorney's tenure in office;

(2) May the former Commonwealth's attorney represent a defendant in a civil proceeding to void an order declaring an individual an habitual offender, where the individual was so declared in the jurisdiction, and during the tenure of the Commonwealth's attorney;

(3) Can the former Commonwealth's attorney represent a defendant charged with a second offense DUI or second offense driving on a revoked license where the prior conviction will not be raised but which occurred during the former Commonwealth's attorney's tenure in office;

(4) May the former Commonwealth's attorney represent an individual in a proceeding to declare him an habitual offender if one of the required convictions was obtained during the former Commonwealth's attorney's tenure in office.

Further, you have inquired if any of these situations constitute a conflict, can that conflict be cured by disclosure and a waiver from the current acting Commonwealth's attorney and the former Commonwealth's attorney's present client.

The appropriate and controlling rule relative to your inquiry is DR:9-101(B) which provides that a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

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The Committee directs your attention to LE Op. 1241 which is dispositive of the questions you have raised in your inquiry. In that opinion, the Committee indicated that a law firm's continued representation of a defendant in a civil action arising out of a criminal proceeding, which criminal proceeding was earlier prosecuted by a present partner of the firm while he was an assistant Commonwealth's attorney, constituted the appearance of impropriety even though the partner/former assistant Commonwealth's attorney had not been involved nor would he become involved in the defense of the civil action in question. The Committee exhorted that the firm's continued involvement in the case was improper because of the need for a heightened sensitivity to public perception of the former public official's current private practice.

In the view of the Committee, the situations you have presented are matters in which the attorney had substantial responsibility while he was a public employee and to accept employment under the circumstances described would be violative of DR:9-101(B). The Committee further opines that consent by either the present client or the acting Commonwealth's attorney would not cure the appearance of impropriety under the general prohibition of DR:9-101(B). (See also LE Op. 285, LE Op. 702 and LE Op. 1012)

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