

Committee Opinion
July 25, 1989

LEGAL ETHICS OPINION 1250

COMMONWEALTH ATTORNEY -
CONFLICT OF INTEREST: PARTNER
OF LAW FIRM REPRESENTING
DEFENDANTS IN THE SAME
JURISDICTION IN WHICH ANOTHER
PARTNER OF FIRM WAS FORMER
ASSISTANT COMMONWEALTH
ATTORNEY.

You have asked the Committee to consider the propriety of the continued representation of criminal defendant by a partner of Law Firm A when the firm had recently hired the former assistant Commonwealth's attorney for the jurisdiction in which the criminal defendants would be prosecuted. You believe the following three situations may be governed by L E Op. No. 303 which provides that it is not improper for the present law firm of a former assistant Commonwealth's attorney to defend clients' cases that arose during the time that the attorney was associated with the Commonwealth's Attorney's Office, provided the attorney was not involved in the case while he was assistant Commonwealth's attorney.

The first situation involves the representation by the former assistant Commonwealth's attorney's present law firm, of a defendant charged with driving under the influence. The matter had been assigned to this assistant Commonwealth's attorney for prosecution but was never tried during his tenure in the Commonwealth's Attorney's Office. The second and third situations involve the representation of, (1) a defendant who has been indicated for operating a motor vehicle after having been declared an habitual offender, and (2) a defendant charged with shooting into an occupied dwelling. As part of his duties, the assistant Commonwealth's attorney read the police report, summarized its contents and prepared a list of any witnesses who needed to be summonsed on behalf of the Commonwealth. Your inquiry indicates that the former assistant Commonwealth's attorney states that this was the extent of his contact with the cases of the second and third situations, as he was not assigned to prosecute them. In all three situations you advise that the former assistant Commonwealth's attorney has no recollection of the facts of the case nor does he believe he ever had any discussions with the Commonwealth's attorney assigned to the cases concerning issues involved in the case, nor did he make any court appearances on behalf of the Commonwealth with regard to any of the cases described above. Your inquiry further states that the Commonwealth's attorney contends that your firm should be precluded from representing the defendants involved since he believes that the assistant Commonwealth's attorney prepared the cases for preliminary hearings, exercised substantial responsibility, and, in the first case, discussed evidentiary issues with the Commonwealth's attorney.

The appropriate and controlling rule relative to your inquiry is DR:9-101(B) which provides that, to avoid even the appearance of impropriety, 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 is of the view that based upon the facts as you have presented them, LE Op. 303 is not dispositive of the question since that Legal Ethics Opinion permits the law firm to defend clients' cases that arose during the time that the attorney was associated with the Commonwealth's Attorney's Office so long as the attorney had no involvement in the case while he was an assistant Commonwealth's attorney. (emphasis added) It appears to the Committee that the activities described as undertaken by the former assistant Commonwealth's attorney while in that position do constitute sufficient responsibility as to come under the proscription of DR:9-101(B). Therefore, based on the facts as presented, the Committee opines that it would be improper for the former assistant Commonwealth's attorney's current law firm to defend the clients' cases you have described.

The Committee would also direct your attention to LE Op. 1241, in which the Committee opined that a law firm's continued representation of a defendant in an action arising out of a former criminal proceeding, prosecuted by a partner of the firm when he was an assistant Commonwealth's attorney, constitutes the appearance of impropriety. The Committee further stated in that opinion that the firm's continued involvement in the case would be improper because of the need for a heightened sensitivity to public perception regarding private practice of a former public official. No consent would cure the appearance of impropriety under the general prohibition DR:9-101(B) under the circumstances. (See also LE Op. 1012)

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Legal Ethics Committee Notes. – Rule 1.11 allows a law firm to avoid disqualification in certain circumstances if it screens the former government lawyer.