Committee Opinion
June 5, 1989

LEGAL ETHICS OPINION 1253

APPEARANCE OF IMPROPRIETY – PART-TIME HEARING OFFICER – PUBLIC EMPLOYMENT: FORMER PART-TIME ADMINISTRATIVE HEARING OFFICER IN SPECIAL EDUCATION MATTERS ACCEPTING EMPLOYMENT WITH THE STATE AGENCY AUTHORIZED TO PROVIDE LEGAL SERVICES TO PARENTS AND CHILDREN IN THE SAME MATTER.

You indicate that an attorney who previously served as a part-time administrative hearing officer in special education due process proceedings, subsequently left private practice, had his name removed from the list of hearing officers maintained by the Supreme Court of Virginia, and accepted employment as Deputy Director/Managing Attorney of the state agency which is statutorily authorized to provide legal services to parents and children in special education matters. In his prior capacity as a hearing officer, the attorney had presided over a particular special education matter in which the local school division was represented by counsel and the parents/child advocated for themselves. The hearing officer found in favor of the parents/child and that decision was affirmed by the second level state review officer. The school division subsequently appealed those decisions to the local Circuit Court and the parents/child have requested legal representation be made available by the aforementioned state agency authorized to provide such services.

You have further indicated that the primary duties of the former part-time administrative hearing officer/current Deputy Director are to manage the caseload of the agency, supervise the staff attorneys, serve as case attorney in certain cases, and be responsible for all litigation, judicial or administrative, pursued by the agency on behalf of its clients.

You have requested that the Committee consider the general propriety of the agency providing legal representation for the parents/child in the forthcoming court action, considering the agency's Deputy Director's previous quasi-judicial role in the prior administrative proceeding. You have additionally inquired as to the propriety of such representation if the agency is unable to provide an attorney other than the specific individual who now serves as the Deputy Director.

Although the legal services in question are offered from within a public agency, the Committee is satisfied that the relationships established with clients are in the nature of private employment, much the same as are those established within the traditional legal aid system, since the agency represents private litigants in a private right of action. (See Telos, Inc. v. Hawaiian Telephone Company, 397 F. Supp. 1314, 1317 (1975)) Therefore, the appropriate and controlling disciplinary rule relative to your inquiry is DR:9-101(A) which provides that, in avoiding even the appearance of impropriety, a lawyer shall not

accept private employment in a matter upon the merits of which he has acted in a judicial capacity. The broad brush of DR:9-101(A) simultaneously eliminates the perception of impropriety and the potential for the former judicial officer being placed in the untenable position of having to argue the merits of his own judicial rulings. Similarly, DR:9-101(B) precludes a lawyer from accepting private employment in a matter in which he had substantial responsibility while a public employee, in this case a hearing officer empowered by the Supreme Court of Virginia to preside over administrative matters.

The Committee believes it is apparent that, while acting in a quasi-judicial capacity, the hearing officer did not establish an attorney-client relationship and thus did not become privy to any secrets or confidences of either party involved in the litigation. Thus, the admonitions of Canon 4, regarding protection of a client's secrets and confidences, and of Canon 5, regarding the exercise of independent professional judgment in light of an attorney's possible conflicts of interest, are inapposite in this situation.

The Committee is of the view that representation of the parents/child by the attorney/Deputy Director would constitute the appearance of impropriety given his earlier quasi-judicial role in the matter. The committee has earlier opined that it would be improper for an attorney who, in his capacity as a commissioner in chancery, reported on accountings in a suit involving an estate, to subsequently represent as counsel, and file a suit for, the beneficiaries of the same estate. (See LE Op. 269)

In another application of the Canon 9 prohibitions, the Committee opined that it would not be improper for a member of a law firm, other than the lawyer who acted as the substitute judge and heard the traffic case, to undertake the representation of an insured defendant in a civil suit which arose as a result of the traffic accident. (See LE Op. 686) Although the instant matter differs somewhat from the situation in LE Op. 686, the Committee believes that this Legal Ethics Opinion is instructive, and opines that the attorney/Deputy Director can properly supervise the representation of the parents/child by the state agency for which he has responsibility if he concludes that to do so is a good faith exercise of the agency's public responsibility and not merely an exercise to support his own previous conclusions. This opinion is conditioned further on the fact that the staff attorney who becomes attorney of record and actually represents the parents/child, although hired and employed by the state agency, will be primarily responsible for that matter, exercising independent professional judgment and fully discharging his ethical responsibilities. Whereas the attorney/Deputy Director, in carrying out his duties for the state agency, routinely may appear in cases as co-counsel and would ordinarily supervise the staff attorneys with regard to case management, strategies and tactics, it is the opinion of the Committee that in this specific case, because of his prior quasi-judicial role, the attorney/Deputy Director should not appear as co-counsel of record and should limit his role to administrative supervision of the staff attorney assigned to the case. These limitations similarly would apply to any cases where the agency offered representation to clients who had earlier appeared before the attorney/Deputy Director in his capacity as a hearing officer.

The Committee's opinion is further tempered and influenced by the possibility that a failure of the state agency to undertake representation of the parents/child because of the potential for an appearance of impropriety might result in abrogation of the state agency's public duty, and the Deputy Director's responsibility as a manager, to provide such services. Despite the need for a heightened sensitivity to public perception regarding the attorney's involvement as an advocate in a matter in which he earlier had judicial responsibilities, amputations of the disqualification of the Deputy Director to the entire agency might work an undue hardship on the parents/child. In carrying out his public responsibilities as Deputy Director, the attorney may wish to attempt to find a substitute manager within the agency for this particular matter. If no substitute or authorized designee can be found for this matter, however, then the Deputy Director may continue to administratively manage the attorney representing the parents/child under the conditions set forth above. Further, the Deputy Director may permit decisions regarding litigation strategies and tactics to be made by consensus of the group of staff attorneys while taking no personal active role in that decision-making.