

Committee Opinion
May 24, 1989

LEGAL ETHICS OPINION 1261

APPEARANCE OF IMPROPRIETY –
COMMONWEALTH’S ATTORNEY –
PERSONAL INTERESTS:
PROSECUTING CRIMINAL CHARGES
AGAINST UNION STRIKERS WHEN
PROSECUTOR HAS FINANCIAL
INTEREST IN COMPANY.

You have requested an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics (“Committee”) with respect to your contemplated conduct as you carry out the duties of your office as an elected Commonwealth's attorney.

The substance of your inquiry relates to the propriety of your continuing to prosecute large numbers of striking union members who have been arrested and charged with felonies (Class 6 through Class 3) or misdemeanors. You have raised the question based upon your financial interest in a company which contracts with the company against whom the arrested union members are striking. You further advise the committee that you and your wife own a twenty-five percent interest in the company and that both the company in which you own an interest and the company against whom the strike has been called were signatories to a Wage Agreement. Furthermore, the company in which you own an interest obtained an injunction against the striking union members.

Since his law firm represents one of the companies involved in this matter, the chairman of this Committee has recused himself from consideration of this opinion.

The Committee directs your attention to Disciplinary Rules DR:8-101, DR:8-102, DR:5-101(A) and DR:9-101 as the appropriate and controlling rules relative to your concerns. Disciplinary Rules 8-101 and 8-102 refer to the lawyer's action as a public official or prosecutor respectively and specify the parameters of the attorney's ethical conduct in those positions. Disciplinary Rule 5-101(A) precludes a lawyer from accepting employment if the exercise of his professional judgment may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances. Finally, DR:9-101 prohibits an attorney from acting in such a way as to create even an appearance of impropriety despite circumstances which are not in fact violative of any other ethical prohibition.

Whether your partial ownership of the contract company constitutes a conflict of interest under Virginia's State and Local Government Conflict of Interests Act is a legal and not an ethical question and therefore is beyond the purview of this Committee. The Committee is of the view, however, that the proscriptions of DR:5-101(A) are applicable in the circumstances you describe regardless of whether there is a legal conflict since the disciplinary rule is broadly constructed so as to include financial, business, property or personal interests which may affect the lawyer's professional judgment on behalf of his client. (emphasis added) Although the rule provides for the curing of a personal conflict with the consent of the client, for the lawyer who is serving as a Commonwealth's

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Attorney or in other public capacity, the identity of the "client" becomes an important consideration. Since the Commonwealth's Attorney is elected by the citizenry of his jurisdiction and since his charge is to represent the public in the interest of justice through prosecution of those who have endangered public safety, the Committee is of the opinion that there is no specific, readily identifiable client from whom consent may be obtained in order to cure the prosecutor's personal conflict.

Moreover, regardless of the actuality of a conflict of interest or of the potential for curing any conflict with consent of a recognizable client, the Committee is of the emphatic opinion that your continued involvement in the prosecutions you have described would be improper in light of the resounding cautions of Disciplinary Rules 8-101, 8-102, and 9-101. The Committee is cognizant of the need for a heightened sensitivity to public perception of ethical improprieties in the legal profession in general and of the government lawyer in particular. (See LE Op. 1241) A lawyer, and in particular one who is engaged in representing the public rather than individual clients, must be keenly aware of the admonitions within the Code of Professional Responsibility to avoid even the appearance of impropriety; he must not place himself in a situation where his loyalties are or may be perceived as being divided. (See South Carolina Bar Ethics Opinion No. 86-12 (undated)) In disqualifying the entire local U.S. Attorney's Office, the U.S. District Court in Arizona found that where the defendant in a federal criminal trial was a person against whom the local U.S. Attorney had brought a private civil suit, the prosecution could well appear to the public to be retaliatory or coercive as a means of forcing resolution of the disputed civil issues. *U.S. v. Catalanotto*, 468 F. Supp. 503 (D. Ariz. 1978). Even where there might be little actual likelihood of a real conflict of interest, the Committee believes that in many circumstances the appearance of impropriety would preclude a government lawyer from participating in any dual capacity. (See, *e.g.*, N.J. Ethics Opinion No. 560 (1985))

The Committee thus opines that based on your personal financial involvement, the special responsibilities of a prosecutor, and primarily on the potential appearance of impropriety, it would be improper for you to continue to participate in the prosecutions you have described considering your financial interest in the company contracting with the company against whom the union members/defendants are striking where the substance of the arrests is directly related to that employment relationship.

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