

Committee Opinion
June 14, 1989

LEGAL ETHICS OPINION 1266

APPEARANCE OF IMPROPRIETY –
COMMONWEALTH'S ATTORNEY –
CONFLICTS OF INTEREST – PRIVATE
PRACTICE: PART-TIME
COMMONWEALTH'S ATTORNEY
PERSONAL INTEREST AND
REPRESENTATION OF STRIKERS IN
CIVIL MATTERS CONFLICTING WITH
PROSECUTORIAL DUTIES.

You have advised that the Commonwealth's attorney in a jurisdiction which is the site of a major labor dispute and strike also maintains a private practice. You have further indicated that, in his capacity as a private attorney, the Commonwealth's attorney has been retained by plaintiffs - strikers in several personal injury and property damage claims currently pending against the target company ("company") in the Circuit Court of the county in which he has criminal prosecutorial responsibilities. He has also filed a lawsuit against the company in the Virginia Supreme Court seeking to address an important industry issue and enjoin industry operations at one of the company's facilities. The facts as you have stated them also indicate that, in his official capacity, the Commonwealth's attorney is responsible for prosecuting large numbers of misdemeanor and felony charges brought against strikers and their sympathizers. Finally, the Commonwealth's attorney also has an equity ownership interest in a non-union company. He became personally involved in the particular labor dispute in question when he publicly criticized actions of the state police, most of whom made the arrests for the criminal violations in question, and when he appeared as a spectator at court proceedings against the union displaying a lapel button supportive of the union's cause.

You wish to know if it is proper for the Commonwealth's attorney to continue to represent the Commonwealth in prosecutions against strikers under the circumstances you have described.

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 believes the appropriate and controlling disciplinary rules relative to your inquiry are Disciplinary Rules DR:8-101, DR:8-102, DR: 5-101(A), DR:5-105(D) and DR:9-101. Disciplinary Rules 8-101 and 8-102 refer to the lawyer's action as a public official or as prosecutor respectively, and the parameters of the attorney's ethical conduct in those positions. Disciplinary Rule 5-101(A) precludes a lawyer from accepting employment when his own financial, business, property or personal interests may impair the exercise of his independent professional judgment unless the client has consented after full and adequate disclosure. Disciplinary Rule 5-105(D) precludes a lawyer from accepting or continuing employment in the same or a substantially related matter if the interests of that client are adverse in any material respect to the interest of a former client unless the former client consents after disclosure. Finally, Disciplinary Rule 9-101

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prohibits an attorney from engaging in any activity that would create even the appearance of an impropriety regardless of whether there is any per se violation of any other ethical prohibition.

The Committee is of the view that the Commonwealth's attorney's equity ownership interests in a non-union company, together with the activities as described in support of the union cause, constitute a financial, business, property, or personal interest which, under the proscriptions of DR:5-101(A), would appear to affect the lawyer's professional judgment on behalf of his client. Furthermore, the Committee believes the Commonwealth's attorney's private employment as counsel for the plaintiffs - strikers in their property damage and personal injury claims and in a law suit to enjoin work at one of the company's facilities is not only substantially related to the labor dispute from which certain alleged criminal violations against the strikers arose, but also creates a situation wherein the interests of the plaintiffs-strikers are materially adverse with respect to the interest of the Commonwealth in the instant criminal matters. Thus, it would be improper for the Commonwealth's attorney to prosecute the charges against the strikers absent their prior consent after full disclosure pursuant to DR:5-105(D).

While informed consent from the plaintiffs-strikers regarding the prosecution of the criminal charges pending against them by the Commonwealth's Attorney, who is also their private attorney, may cure the potential conflict under DR:5-105(D), the Committee directs your attention to LE Op. 1241 and LE Op. 1261 in which the Committee opined that there is no specific, readily identifiable public client from whom consent may be obtained in order to cure the prosecutor's personal conflict with his official duties under DR:5-101(A). In those opinions, it was the view of the Committee that the Commonwealth's Attorney's involvement in the prosecutions in question would be improper in light 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.

In addition, the Commonwealth's attorney's continued involvement in the prosecutions would be improper in light of the overwhelming ethical proscriptions of Disciplinary Rules 8-101, 8-102, and 9-101. 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 LE Op. 1261; South Carolina Bar Ethics Opinion No. 86-12 (undated)) The Committee also directs your attention to U.S. v. Catalanotto, 468 F. Supp. 503 (D. Ariz. 1978), in which the entire staff of the local U.S. Attorney's Office was disqualified from the prosecution of a criminal defendant against whom the local U.S. Attorney had brought a private civil suit since the prosecution could appear to the public to be retaliatory or coercive as a means of forcing resolution of the disputed civil issues.

Whether the Commonwealth's attorney will be in violation of Canon 5, DR: 5-101(A) or Canon 9 if he proceeds with the prosecution of a strike - related criminal warrant is a

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factual determination which may properly be addressed only by the District Committee. However, under the facts presented in your inquiry and based on the professional responsibilities of a prosecutor to represent the interests of the citizenry of his jurisdiction and promote the public safety of his jurisdiction as well as his obligation to avoid the potential appearance of impropriety, the Committee opines that it would be improper for the Commonwealth's attorney to continue to participate in the prosecution of criminal charges against the strikers because of his personal, professional and financial involvement in collateral issues.

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