

Committee Opinion
October 3, 1989

LEGAL ETHICS OPINION 1268

APPEARANCE OF IMPROPRIETY –
COMMONWEALTH'S ATTORNEY –
BOARD/ORGANIZATIONS:
COMMONWEALTH'S ATTORNEY OR
DEFENSE ATTORNEY SERVING ON
BOARD WHICH REVIEWS CRIMINAL
CONVICTIONS FOR SENTENCING
ALTERNATIVES.

You have advised that you have been appointed as a member of the Board of Directors of a community's Court Services while other attorneys have previously been appointed to that organization's Community Corrections Resources Board of the Community Diversion Incentive Program, all of which were established pursuant to authority granted to localities under Virginia Code § 53.1-180 et seq. for the purpose of providing the judicial system with sentencing alternatives for certain nonviolent offenders. You further indicate that the Court Services unit is a joint entity of twelve counties and acts as a policy-making body which contracts with the Virginia Department of Corrections for the provision of services. The Community Corrections Resources Board is established by the Board of the community's Court Services for the principal purpose of reviewing cases referred by participating courts and developing possible community sentencing alternatives as recommendations to be made to the referring court.

You have inquired as to the propriety of practicing criminal defense or prosecuting attorneys serving on either the Board of Directors of the community's Court Services (CS) or the Community Corrections Resources Board (CCRB) where the attorney has represented either the Commonwealth or a defendant in the criminal proceedings which lead to conviction, sentencing and a referral for possible diversion.

You have specifically asked the Committee to opine regarding three issues: (1) the propriety of service on CS by attorneys who might represent a defendant or the Commonwealth; (2) the propriety of service on CCRB by attorneys who might represent a defendant or the Commonwealth; and (3) the propriety of either a Commonwealth's attorney or a defense attorney participating as a member of CS or CCRB in a hearing to determine the eligibility of a criminal defendant to participate in the Community Diversion Incentive Program where the attorney had previously been involved in the prosecution or defense of the underlying charge.

The appropriate and controlling disciplinary rules to the issues you have raised are DR:8-101(A)(1) which provides that a lawyer who holds public office shall not use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest; DR:8-101(A)(2) which makes it improper for a lawyer who holds public office to use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client; and DR:9-101(A)(1) and (2) which provide that a lawyer shall not accept private employment in a matter upon the

Committee Opinion
October 3, 1989

merits of which he has acted in a judicial capacity or in which he had substantial responsibility while he was a public employee.

In response to the first issue you have raised, the Committee is of the view that, since the CS is described as a policy making body and not an adjudicatory body, a Commonwealth's attorney's or defense attorney's membership on the Board of Directors of that entity is not per se improper. Since it is, however, empowered to develop, establish and maintain community diversion programs, an attorney who sits on that Board and who defends or prosecutes individuals in any of the twelve cooperating jurisdictions must be mindful of any perception of an attempt to obtain a special advantage or influence on behalf of any individual clients or the Commonwealth.

While the responsibilities of the [CCRB] do not appear to be totally adjudicatory in nature, the Committee recognizes that among the Board's responsibilities, as outlined in § 53.1-185, is the determination of whether "an appropriate, rational behavioral contract can be developed with [an individual offender] for participation in a community diversion program" and the provision to the judge of the referring court of "findings and recommendations of the board made on individual offenders. ..." Thus, the Committee is of the view that the CCRB is quasi-adjudicatory in nature in that it is empowered to make recommendations upon which a punitive disposition will be based. The Committee has previously opined that even where a legal services attorney who was appointed to the board of a local Redevelopment and Housing Authority was screened from cases in which his legal services office represented clients against the Authority, an appearance of impropriety still existed which could only be cured by the attorney/board member's recusal from participation on the board in cases where the legal services office represented a client in an action before or against the board. (See LE Op. 1195; see also LE Op. 987)

Therefore, in response to the second and third issues you have raised, the Committee is of the opinion that a Commonwealth's or a defense attorney's membership on the CCRB is similarly not per se improper with regard to determinations made by that entity regarding recommendations for community diversion contracts for individuals who were not prosecuted or represented by the attorney/member on the underlying charge. The Committee is of the view, however, that participation in such a determination by an attorney/board member who was involved in the prosecution or defense of the underlying charge would be improper. The Committee further advises that a potential for conflict may exist with future individuals whose prosecution or defense is conducted by an attorney/member, which conflict may be cured or recusal.

In addition, although membership on either entity does not, in the Committee's view, constitute the creation of an attorney/client relationship, the Committee cautions that in carrying out his official duties, the attorney/board member must be mindful of the proscriptions of DR:4-101 in the protection of a client's (defendant or Commonwealth) confidences and secrets. Similarly, the Committee cautions that the attorney/board member recognize the proscription, as stated in DR:9-101(C), against stating or implying that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative

Committee Opinion
October 3, 1989

body or public official. Thus, any reference to the attorney's membership on the board, including but not limited to business announcements, must be made in such a way as to avoid any implication of improper influence.

Committee Opinion
October 3, 1989