

Committee Opinion  
November 21, 1989

LEGAL ETHICS OPINION 1271

APPEARANCE OF IMPROPRIETY –  
COMMONWEALTH'S ATTORNEY –  
CONFLICT OF INTEREST: PART-TIME  
COMMONWEALTH'S ATTORNEY  
ACCEPTING PRIVATE EMPLOYMENT  
IN A MATTER INVOLVING CRIMINAL  
ALLEGATIONS.

You have advised that, in 1983, T executed a general power of attorney in which he appointed H and W as his attorneys-in-fact. It is alleged that, in the 30 months preceding T's death in 1987, H and/or W used the power of attorney to transfer to themselves several hundred thousand dollars' worth of stock owned by T. After T's death, several beneficiaries named in his will brought a suit in equity in L County, where H and W reside and where T resided, alleging that the transfers of stock by the attorneys-in-fact were violations of the fiduciary responsibilities of H and W, in furtherance of a scheme by H and W to obtain and dispose of the assets of T, and a conversion of T's property for the benefit of H and W and not for the use and benefit of T. The suit seeks to recover for T's estate the property transferred by H and W to themselves by use of the power of attorney. The part-time Commonwealth's attorney of County L has a private law practice and is representing H and W in the pending suit.

You have inquired if the Commonwealth's attorney's representation of H and W is proper in light of *Creasy v. Henderson*, 210 Va. 744 (1970), which held that the use of a power of attorney to transfer the principal's assets to the holder of the power is presumptively fraudulent.

The appropriate and controlling rules relative to your inquiry are DR:5-105(B), which provides that a lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client except if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each; DR:8-101(A)(2), which provides that a lawyer who holds public office shall not 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, which directs that, in order 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 ( DR:9-101(B)) and shall not state or imply that he is able to improperly influence any tribunal, legislative body, or public official ( DR:9-101(C)).

The Committee is of the opinion that if a determination is made by a finder of fact that H and W committed fraud in the transfer of T's assets to themselves, giving rise to the lawyer's conflict under DR:5-105(B) if he were to represent both the Commonwealth and H and W, the conflict would not be curable under the provisions of DR:5-105(C) since it would not be obvious that he could adequately represent the interest of each, regardless

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of whether both would consent. Even though there has not yet been such a determination of fraud, the Committee is of the further opinion that the Commonwealth's Attorney must be cognizant of the potential for the appearance of impropriety and for the implication that he would be using his public position to attempt to improperly influence the tribunal in favor of his clients. Finally, the Committee is of the view that it is the responsibility of the Commonwealth's Attorney to exercise appropriate judgment as to his ethical responsibilities without awaiting an actual verdict leading to criminal charges.

Thus, the Committee opines that where there are allegations of criminal misconduct ostensibly requiring the Commonwealth's Attorney to assume substantial responsibility in the investigation of the matter, and where there is a potential presumption of fraud, the Commonwealth's Attorney must be sensitive to the public perception regarding part-time private law practice of a public officer. Therefore, the Committee is of the opinion that under the circumstances you have related there is an appearance of impropriety which can only be cured by the withdrawal of the Commonwealth's Attorney, despite the fact that there is no per se ethical impropriety. (See LE Op. 1241, LE Op. 1243, LE Op. 1250.)

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