

LEGAL ETHICS OPINION 1319

COMMONWEALTH'S ATTORNEY –
APPEARANCE OF IMPROPRIETY –
CONFLICT OF INTERESTS:
COMMONWEALTH'S ATTORNEY-
ELECT CONTINUING TO REPRESENT
DEFENDANTS WHILE AWAITING
BEING SWORN INTO OFFICE.

Your letter was written while you were Commonwealth's attorney-elect, approximately five weeks prior to your assuming office. You have requested that the Committee opine as to the propriety of a Commonwealth's attorney-elect continuing to represent criminal defendant clients in the jurisdiction in which he will subsequently serve as chief prosecutor, prior to his assuming office. The Committee is cognizant of the fact that a Commonwealth's attorney-elect neither holds the office nor is required (or permitted) to perform the duties of the office to which he has been elected.

Since you have now been installed in office, it is the opinion of the Committee that your inquiry appears to be a moot question. Nevertheless, the Committee believes that the disciplinary rule applicable to your prior role as a private attorney while awaiting the assumption of the office of Commonwealth's attorney is DR:9-101(C) which requires that, in order to avoid even the appearance of impropriety, a lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official. Further guidance may be gleaned from Ethical Consideration 9-2 [EC:9-2] which suggests that

Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. ... While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession. (emphasis added)

Thus, the Committee believes that although there may not have been any per se impropriety during the interim period in continuing to represent defendants before the same courts in which you now prosecute, your attention is emphatically directed to the above-cited Disciplinary Rule and Ethical Consideration and the need to guard against any implication of improper influence. The Committee is of the opinion that the Rule requires that a lawyer may not suggest or imply the ability to obtain results through improper governmental influence or political power. In addition, the committee believes that it is irrelevant whether a lawyer making such a suggestion or implication actually

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intends or attempts to influence the tribunal, legislative body, or public official; the suggestion or implication alone is enough to bring the profession into disrepute. (See, e.g., *Mississippi Attorney v. Mississippi State Bar*, 453 So.2d 1023 (1984); *In re Fasig*, 444 N.E.2d 849 (Ind. 1983). See also ABA Informal Opinion 1215 (May 18, 1972))

Furthermore, the Committee cautions that in the situation you pose there are concerns regarding any effect the dual loyalties of the Commonwealth's attorney-elect may have on the rights of his present defendant clients. The Committee believes that it is foreseeable that the defendant may at some point question his counsel's possible prejudice or ineffective assistance, in light of the attorney's ultimate assumption of public office as prosecutor. (See also LE Op. 1043)

Finally, the Committee directs your attention to DR:7-101(A)(2) which requires that a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services except under the Code's provisions for withdrawal. Thus, the Committee is of the opinion that during the interim between a public election and installation into office, an individual who is a Commonwealth's attorney-elect should not accept cases which are likely to remain uncompleted at the time of his assumption of the office.

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