

LEGAL ETHICS OPINION 1320

ATTORNEY AS WITNESS –  
COMMONWEALTH'S ATTORNEY:  
COMMONWEALTH'S ATTORNEY  
CALLED AS A WITNESS BY  
ASSISTANT COMMONWEALTH'S  
ATTORNEY PROSECUTING  
DEFENDANT WHOSE INDICTMENT  
RESULTED FROM INVESTIGATION  
HANDLED BY THE  
COMMONWEALTH'S ATTORNEY.

You have asked the Committee to consider whether it is unethical for the Commonwealth's attorney who was involved in the prosecution of a defendant to testify on behalf of the Commonwealth in the trial of a second defendant where the prosecutor of the second defendant is an assistant of the Commonwealth's attorney. The following is a summary of the pertinent facts as presented in the inquiry on which the Committee based its opinion.

A Commonwealth's attorney's office involved in a drug prosecution case against Defendant A successfully convicted Defendant A of illegal possession of a controlled substance with intent to distribute. Following the guilty verdict, A filed post-trial motions, specifically, a motion was filed for a new trial based upon after discovered evidence supported by an affidavit of Defendant B. At the scheduled hearing to consider the motion for a new trial, Defendant B made multiple admissions of perjury that were contained in the affidavit. As a result, the Commonwealth's Attorney's Office opened an investigation of perjury of Defendant B, and an indictment was returned charging Defendant B with perjury.

The Committee believes the appropriate and controlling rules relative to your inquiry are DR:5-101(B)(1) and DR:5-102(A). In particular, DR:5-101(B)(1) provides that a lawyer shall not accept employment in contemplated or pending litigation, nor shall he continue in the conduct of a trial if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify if the testimony will relate solely to an uncontested matter or matter of formality and there is no expectation that substantial evidence will be offered in opposition to the testimony. (See also LE Op. 487)

The Committee previously opined in LE Op. 597 that an assistant Commonwealth's attorney may testify on behalf of the Commonwealth and against a defendant on the charge of driving after having been previously adjudicated an habitual offender, notwithstanding the fact that the assistant Commonwealth's attorney had served as the prosecutor in the prior adjudicatory proceeding, unless the defendant's identity is questioned and the Commonwealth's attorney has reason to believe that substantial evidence will be offered in opposition to his assistant's testimony.

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In the Committee's view, the distinction between LE Op. 597 and the facts of the instant inquiry is that an indictment of perjury of a defendant returned based on the results of the Commonwealth's investigation is not tantamount to a conviction since it is a preliminary proceeding. Unless the defendant enters a guilty plea, the prosecution may reasonably conclude that the defense may offer evidence in opposition to the Commonwealth's testimony. Thus, barring a guilty plea from the defense, it would be improper for the assistant Commonwealth's attorney to prosecute a new matter arising out of an indictment returned pursuant to the Commonwealth's investigation, when the Commonwealth's attorney in the assistant prosecutor's office should testify on behalf of the prosecution. The Committee believes that, under the facts presented in the inquiry, a special prosecutor will have to be appointed to avoid the potential for a conflict arising as a result of the Commonwealth's attorney's testimony.

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**Legal Ethics Committee Notes.** – See Rule 3.7 (c) stating that there is no longer disqualification of the entire firm when a lawyer must testify, unless representation would create a conflict under Rule 1.7 or Rule 1.9. Under Rule 3.7(c), this disqualification is not imputed to the lawyer's firm unless there is an actual conflict of interest.