

Committee Opinion
October 1, 1990

LEGAL ETHICS OPINION 1371

COMMONWEALTH'S ATTORNEY –
APPEARANCE OF IMPROPRIETY –
CONFLICT OF INTERESTS: FORMER
ASSISTANT COMMONWEALTH'S
ATTORNEY ACCEPTING PRIVATE
EMPLOYMENT IN MATTER IN WHICH
HE WAS INVOLVED WHILE A PUBLIC
EMPLOYER.

You have asked the Committee to consider the propriety of a former assistant Commonwealth's attorney, who is now in private practice, handling the following two matters in light of his former employment.

Attorney A was an assistant Commonwealth's attorney from April 1, 1984 through January 31, 1990. In February and April, 1984, a defendant was indicted in the same jurisdiction on a total of five felony charges and subsequently was tried and convicted of three of the charges. The defendant appealed to the Court of Appeals but was denied an appeal at the time. Recently, however, after a petition for a writ of habeas corpus, the defendant was granted a late appeal to the Supreme Court of Virginia and Attorney A was appointed to represent the defendant on the appeal. You have indicated that the Petition for Appeal was filed, but the Chief Deputy Commonwealth's Attorney questioned whether A could represent the defendant in his appeal since he was an assistant Commonwealth's attorney during the time the defendant was prosecuted. Your letter of August 7, 1990, reiterates that, in the above situation, A had nothing to do with the prosecution of the case, never saw the file or, to the best of his recollection, heard the case mentioned and had no knowledge of the case in question until he was appointed to represent the defendant on appeal.

You have stated that the second matter in question involves a defendant whom A prosecuted on a drug charge last year. You indicate that the court treated the defendant as a "first offender" and placed him on probation without a finding of guilt. Recently, while still on probation, the defendant was arrested on a new drug charge. Attorney A was then appointed by the court to represent the defendant in Circuit Court where his case is now pending. In addition, you have stated that the defendant has given his informed consent to A's representation of him.

The appropriate and controlling disciplinary rule relative to your inquiry is DR:9-101(B), which provides that a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

The Committee directs your attention to LE Op. 1243 and LE Op. 1250 which, in the Committee's view, are dispositive of your inquiry. Both opinions cite examples of situations where either a former assistant Commonwealth's attorney or Commonwealth's attorney has been precluded from representing an individual in criminal matters in which the former prosecutor had substantial responsibility as a public employee.

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In LE Op. 1243, the former Commonwealth's attorney prosecuted a number of convictions against individuals for Driving Under the Influence and driving on suspended operator's licenses. The Committee found that, representing private individuals in offenses of (1) driving after being declared an habitual offender, (2) second offense of DUI or driving on a revoked license, (3) civil proceeding to void an order declaring an individual an habitual offender, and (4) proceedings to declare an individual an habitual offender, all were considered matters in which the former prosecutor would have had substantial responsibility as a government employee. Likewise, in LE Op. 1250, the former assistant prosecutor had been assigned to a case that was never tried during his tenure in the Commonwealth's attorney's office, but the assistant had at least engaged in discussions of the case on more than one occasion, particularly with regard to some evidentiary issues. In addition, because of the assistant prosecutor's responsibilities of handling the summarizing of the police reports and preparing lists of witnesses who needed to be summoned on behalf of the Commonwealth, the Committee opined that the former assistant prosecutor's activities constituted sufficient responsibility to fall under the proscriptions of DR:9-101(B). Thus, it would have been improper for the former assistant prosecutor to continue to defend the criminal matters described in that inquiry.

In response to the first fact situation you present, the question of whether the matter is one in which the former Commonwealth's attorney had substantial responsibility is a factual determination which should be made on a case-by-case basis. Under the limited facts presented in the inquiry, the Committee opines that if, as you have pointed out in your recent letter, the former assistant Commonwealth's attorney had no involvement or substantial responsibility over the defendant's earlier case, the conclusion reached in prior LE Op. 303 is applicable and therefore it would not be improper for Attorney A to represent the defendant in the appeal.

In the second situation, the Committee is of the opinion that the representation of defendant in the pending drug charges by the former assistant prosecutor would be per se improper since the same defendant had been prosecuted on other drug charges by the same attorney while he was a public employee. The fact that the defendant continues on probation for the earlier charge creates an impermissible conflict since, in defending the client against the current charge, Attorney A would be unable to simultaneously defend him against any probation violation.

Finally, the Committee has also previously opined that consent from the present client/defendant or the acting Commonwealth's attorney would not cure the appearance of impropriety under DR:9-101(B), because of the heightened sensitivity of public perception regarding private practice of a public employee. (See LE Op. 1241, LE Op. 1243 and LE Op. 1250)

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