

LEGAL ETHICS OPINION 1619

CONFLICT OF INTEREST; ATTORNEY
DEFENDING CLIENTS AGAINST
COMMONWEALTH'S ATTORNEY
WHEN COMMONWEALTH'S
ATTORNEY CONTINUES TO OWN
STOCK IN LAW FIRM P.C. WHERE
ATTORNEY IS EMPLOYED AND ALSO
OWNS STOCK.

You have presented a hypothetical situation in which an attorney is one of two fifty percent stockholders and an officer and director of a law professional corporation. The attorney later leaves the firm to become Commonwealth's Attorney.

At first, the Commonwealth's Attorney position is part-time, and the attorney continues as a sole practitioner in the private practice of law for approximately three months. At the end of the three months, the Commonwealth's Attorney becomes a full-time position, and the attorney discontinues the private practice of law. You indicate that the attorney, however, continues to own stock in the former law professional corporation and continues as an officer and director of the professional corporation due to an inability of the Commonwealth's Attorney and the other stockholder to agree on matters concerning the departure of the Commonwealth's Attorney. You advise that matters at issue include the amount of money to be paid the Commonwealth's Attorney for his stock, the monies that should be reimbursed by the Commonwealth's Attorney to the law firm for costs advanced related to cases handled by the Commonwealth's Attorney, and what portion of the fees taken by the Commonwealth's Attorney should be reimbursed to the law firm.

Finally, you indicate that the Commonwealth's Attorney's former firm consists of two attorneys, one who owns fifty percent of the stock in the professional corporation and the other who does not own stock in the professional corporation.

You have asked the committee to opine, under the facts of the inquiry, as to several issues related to attorneys of the law firm defending clients in cases being prosecuted by the Commonwealth's Attorney/shareholder.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:4-101(B) which provides for the preservation of client confidences and secrets; and DR:5-101(A) which states that a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances.

The committee responds to your inquiries relative to the facts presented as follows:

1. As to whether the Commonwealth's Attorney is precluded from prosecuting criminal cases defended by members of his former firm, when those cases were accepted by the firm based on prosecutions that were initiated after the

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Commonwealth's Attorney left the firm, the committee believes that such prosecutions would be improper and violative of DR:5-101(A). The committee is of the view that the Commonwealth's Attorney's continued financial participation in his former law firm represents a personal interest affecting his representation of the Commonwealth. Although a cure to the personal conflict might be effected in other circumstances through the consent of the client after full disclosure, the committee believes that no such cure is available to the Commonwealth's Attorney, a constitutional officer elected by the public. Furthermore, the committee has previously opined that it would be improper for a Commonwealth's Attorney to prosecute a suspect who was a client of the attorney prior to the attorney's assuming the office and when the suspect is represented by the Commonwealth's Attorney's former law firm. See LE Op. 763.

2. As to whether an Assistant Commonwealth's Attorney is precluded from prosecuting cases in the circumstances set forth in inquiry number 1 above, the committee finds that DR:5-101(A) contains no provision for vicarious disqualification of the disqualified lawyer's partners or associates. Cf. DR:5-105(E).

Thus, the committee opines that it would not be per se improper for an Assistant Commonwealth's Attorney to prosecute cases defended by members of the Commonwealth Attorney's former firm, except as otherwise set forth in 4. below.

3. The committee is of the opinion that the remaining attorneys in the Commonwealth's Attorney's former firm are not routinely precluded from accepting employment in criminal cases in the county wherein the Commonwealth's Attorney prosecutes cases. However, since those attorneys remaining in the firm are similarly subject to disqualification for a personal conflict under DR:5-101(A), they may only defend a client in the Commonwealth's Attorney's jurisdiction after consent is received from the client after full disclosure of the circumstances. Furthermore, the committee cautions that the lawyers must make appropriate disclosures while recognizing that inappropriate or unnecessary disclosures could be violative of DR:9-101(C) which prohibits a lawyer from stating or implying an ability to improperly influence either the court or Commonwealth's Attorney. See LE Op. 845.

4. As to whether a special prosecutor should be appointed to represent the Commonwealth in all cases wherein the Commonwealth's Attorney's former law firm represents the defendant, the committee is of the opinion that a special prosecutor is required only if the Commonwealth's Attorney possesses confidences and secrets of a former client which could be used against the former client in the prosecution. In such an instance, neither the Commonwealth's Attorney nor his Assistant may ethically prosecute the case. See DR:4-101.