

LEGAL ETHICS OPINION 1666

CONFLICTS OF INTEREST; FORMER
PUBLIC DEFENDER AS
COMMONWEALTH'S ATTORNEY;
CAMPAIGN ACTIVITIES WHILE
EMPLOYED AS PUBLIC DEFENDER;
FORMER CLIENTS.

You have presented a hypothetical situation in which an attorney seeks election as Commonwealth's Attorney in the same jurisdiction where the attorney is employed as a public defender.

Under the facts you have presented, you have asked the committee to opine as to: 1) whether the attorney can legally/ethically perform as Commonwealth's Attorney if elected; 2) the propriety of the attorney's continuing to act as public defender while campaigning for Commonwealth's Attorney; 3) whether the attorney could prosecute former clients, especially with the requirements of the new Truth in Sentencing Act; and 4) whether, if the attorney cannot prosecute former clients, the entire Commonwealth's Attorney's office has a conflict.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:4-101(B)(1) and (2) which state that a lawyer shall not reveal a client's confidences or secrets or use such information to the disadvantage of the client; and DR:5-105(D) which prohibits an attorney from representing a client adverse to a former client if the legal matter being handled for the current client is substantially related to the matter handled for the former client, unless the former client consents after disclosure.

The obligation of an attorney to protect client confidences and secrets continues after the termination of his employment. EC:4-6. Therefore, even if the attorney becomes a Commonwealth's Attorney he must continue to safeguard the confidences or secrets of former clients served by him in his capacity as a public defender. Thus, the attorney may not use, in his prosecution of cases for the Commonwealth, confidences or secrets gained from the representation of clients he served while employed as a public defender unless those former clients consent after a full disclosure to them. DR:4-101(B)(2), (3); DR:4-101(C)(1).

The committee has previously opined that unless the former client consents, a lawyer cannot be adverse to a former client in a substantially related matter, or if the lawyer learned relevant confidences during the earlier representation. LE Op. 672. However, if an attorney represents a client adverse to a former client on a matter which is unrelated to the former representation, there is no conflict under DR:5-105(D). LE Op. 933. In addition, a Commonwealth's Attorney is not disqualified under DR: 5-105(D) simply because his former law firm represents a material witness or party, if the Commonwealth's Attorney had no involvement with the former client's case and is thus capable of rebutting any presumption that he acquired confidential information based on his relationship with his former law firm. LE Op. 1046.

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If an attorney has a conflict under DR:5-105(D), the conflict is imputed to all other attorneys in the same office or law firm. DR:5-105(E). Therefore, if a Commonwealth's Attorney must be disqualified because of a conflict under DR:5-105(D), any assistant in the Commonwealth's Attorney's office is vicariously disqualified from prosecuting the case. LE Op. 1020 and LE Op. 1208.

As to your first inquiry, the Committee recognizes that prospects may exist for conflict, and thus disqualification of the Commonwealth's Attorney because of his prior service as a public defender. However, as long as the attorney observes the requirements of DR:5-105(D) and DR:4-101(B) on a case by case basis subsequent to his or her election or appointment as Commonwealth's Attorney, it would not be improper to seek the office of nor serve as Commonwealth's Attorney.

With regard to your second inquiry, the Committee opines that there is no per se impropriety if the attorney continues as public defender while campaigning for Commonwealth's Attorney. Should the attorney become elected, however, he should not accept any cases during the interim between public election and installation into office which are likely to remain incomplete at the time he assumes office. LE Op. 1319.

In response to the third inquiry, as stated above in the cited opinions, the attorney may not prosecute a former client on charges which are substantially related to charges he handled on behalf of the client as a public defender or if the attorney possesses confidences or secrets of a former client which could be used against the former client in the prosecution.

As to your fourth question, if the Commonwealth's Attorney is disqualified under DR:5-105(D) or because he possesses confidences or secrets under DR:4-101, neither the Commonwealth's Attorney nor an assistant in his office may prosecute the case. DR:5-105(E); LE Op. 1020 and LE Op. 1619.

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Legal Ethics Committee Notes. – In *Lux v. Commonwealth*, 24 Va. App. 561, 484 S.E.2d 145 (1997) the court specifically gave approval to a “chinese wall” in a Commonwealth’s Attorney’s office to overcome a conflict. See also *In re Grand Jury*, 790 F. Supp. 109 (E.D.Va. 1992) (two attorneys jointly represented defendants under grand jury investigation in private practice, left law firm, and joined the United States Attorney’s Office; no bases to disqualify the entire U.S. Attorney’s office where the conflicted attorneys had recused themselves and the office had erected a “chinese wall.”).