

Committee Opinion  
February 24, 1998

LEGAL ETHICS OPINION 1713

PROPRIETY OF ASAP PROGRAM  
BEING COMPONENT OF  
COMMONWEALTH'S ATTORNEY'S  
OFFICE WITH COMMONWEALTH'S  
ATTORNEY SERVING ON ASAP  
ADVISORY BOARD.

You inquired about the ethical propriety of having the local Alcohol Safety Action Program (ASAP) included as a component of your office, and your serving on the ASAP Advisory Board. The local ASAP program is administered through the Commonwealth's Attorney's Office with control over the hiring, salary, promotion, and dismissal of ASAP employees subject to review by the Commonwealth's Attorney. Also, the ASAP budget is part of the Commonwealth's Attorney's Office budget, so monetary control of the program is exercised to some extent by the Commonwealth's Attorney.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:8-101(A)(2), DR:8-102(4), and DR:9-101(C).

DR:8-101(A)(2) states "A lawyer who holds public office shall not use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client."

DR:9-101(C) states "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."

The ethical considerations of EC:9-1, and EC:9-2 also give guidance in this situation. EC:9-1 says "Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession." EC:9-2 elaborates further saying

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 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.

The committee will review your inquiry in two parts: 1) is it improper for a Commonwealth's attorney to serve on the ASAP board; and 2) is it improper for the ASAP to be administered through the Commonwealth's Attorney's Office?

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As to the first part of your inquiry, the committee has previously opined in LE Op. 1268 and LE Op. 1682 that it is not improper for a Commonwealth's attorney or a defense attorney to sit on the Board of Directors of a community's Court Services or the Community Corrections Resources Board or the Community Criminal Justice Board, as long as the Board does not make determinations regarding specific individuals prosecuted by the attorney. In such instances where a Commonwealth's attorney or defense attorney sits on a community board, the attorney must be careful to follow DR:4-101(A) and not reveal any client confidences or secrets; DR:8-101(A)(1) and (2) to not use his or her position on this board to obtain an advantage for a client; and DR:9-101(C) to make sure that the attorney does not state or imply to his or her client that the attorney can improperly influence another board member or any tribunal.

As to the second part of your inquiry, the committee believes that due to the significant control the Commonwealth's Attorney's Office has over the local ASAP program, laypersons could perceive that as improper and thereby diminish the public's confidence in the legal system or the legal profession. Another problem with the local ASAP being administered from the Commonwealth's Attorney's Office is that under the ASAP program is funded from the fees of offenders assigned to the program with 10% going to the State Committee overseeing all of the ASAP programs. Since these funds can also include gifts and donations from public or private sources, as allowed under VA Code § 18.2-271.2(C)(4), this could be seen as influencing the Commonwealth's Attorney's Office as a whole instead of singly assisting the ASAP program. Also, under VA Code § 2.1-639.4 subsection (5) expressly prohibits a state or local employee from "accept[ing] any money, loan, gift, favor . . ." and under subsection (8): no officer or employee of a state or local government or advisory agency shall accept a gift from a person who has interests that may be substantially affected by the performance of the officer's or employee's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the officer's or employee's impartiality in the matter affecting the donation.

In view of these factors, the Committee opines that it is improper under the Code of Professional Responsibility for the Commonwealth's Attorney's Office to administer the local ASAP program.

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