

LEGAL ETHICS OPINION 188

DEFENSE OF CRIMINAL CASES BY
COMMONWEALTH'S ATTORNEYS,
COUNTY ATTORNEYS, CITY
ATTORNEYS AND TOWN
ATTORNEYS.

Subject: Defense of Criminal Cases by Commonwealth's Attorneys, County Attorneys, City Attorneys and Town Attorneys.

Conclusions:

I. It is improper for a Commonwealth's Attorney to defend criminal cases in courts in which he prosecutes or in any federal court in the Commonwealth.

II. It is improper for a Commonwealth's Attorney to defend criminal cases in courts where he does not prosecute unless it is clear that there is no possible conflict of interest, real or apparent, and that the prestige of the office of the Commonwealth's Attorney is in no way used in defense of the case, after taking into consideration all relevant factors including: (1) The distance between the city or county in which the Commonwealth's Attorney has official duties and the court in which the case is to be tried; (2) The nature of the crime charged (whether the crime is of such nature that it may in some way be related to action of the city or county in which the Commonwealth's Attorney has official duties); (3) The identity of the defendant (whether the defendant lives in the city or county in which the Commonwealth's Attorney has official duties or the defendant has engaged in activities in or has any other relationship to such city or county); and (4) The identity of the witnesses (whether the witnesses are persons with whom the Commonwealth's Attorney has contacts in his official capacity).

III. It is improper for a county attorney, city attorney or town attorney to defend criminal cases involving ordinances of such county, city or town, even if the attorney has no responsibility for the prosecution of violations of the ordinances.

IV. It is not improper for a county attorney, city attorney or town attorney to defend criminal cases in the courts having jurisdiction over such county, city or town, so long as the ordinances of the county, city or town, are not involved in the case and the attorney does not defend a criminal case before the same jury panel in which he participates in the prosecution of a criminal matter for the county, city or town he represents.

Explanation: The Legal Ethics Committee of the Virginia State Bar has long held that a Commonwealth's Attorney may not defend criminal cases in the courts where he prosecutes cases for the Commonwealth. In Opinion 5 (Aug. 19, 1943), the Committee concluded that it was not improper for a Commonwealth's Attorney to defend a criminal case in other jurisdictions.

In Opinion 59 (May 20, 1955), the Committee concluded that it was not proper for a Commonwealth's Attorney to defend a criminal case in a United States District Court in Virginia.

The Council of the Virginia State Bar declined to approve the Committee's Opinion 73 which would have held the defense of any criminal case in the Commonwealth of Virginia by a Commonwealth's Attorney to be improper. The Council also rejected Opinion 76 which would have held it to be improper for a city attorney to handle criminal cases in the court having jurisdiction over that city.

In 1958, Council adopted Opinion 2 which concluded that it would not be improper for a Commonwealth's Attorney to defend criminal cases in a jurisdiction in which he does not prosecute criminal cases, so long as there is no possible conflict of interest, real or apparent, and if the prestige of the office of the Commonwealth's Attorney is in no way used in defense of the case after taking into consideration: (1) The distance between the city or county in which the Commonwealth's Attorney has official duties and the court in which the case is to be tried; (2) The nature of the crime charged (in reference to whether or not the crime is of such nature that it may in some way be related to action of the city or county in which the Commonwealth's Attorney has official duties); (3) The identity of the defendant (in reference to whether or not the defendant lives in the city or county in which the Commonwealth's Attorney has official duties or the defendant has engaged in activities in or has any other relationship to such city or county); and (4) The identity of the witnesses (in reference to whether or not the witnesses are persons with whom the Commonwealth's Attorney has contact in his official capacity).

In rejecting a conclusion that a Commonwealth's Attorney is *ipso facto* precluded from defending criminal cases in the courts of Virginia where he does not prosecute, Council on previous occasions has taken into consideration the fact that no state law prohibits such conduct and that such a rule might unfairly impact upon the livelihood of the Commonwealth's Attorney, especially in those areas where salaries are not adequate.

Council continues to believe that a Commonwealth's Attorney may defend only those criminal cases in jurisdictions where he does not normally prosecute and under such circumstances that there is no reasonable perception of the exploitation of the prestige of his public office or a conflict of interest between his public duties and his duties as a defense attorney.

The objection to a Commonwealth's Attorney defending criminal cases in the jurisdiction where he prosecutes is based on the conflict of interest between his duties to the Commonwealth and his duty to the criminal defendant. Further, it represents an exploitation of his public office, either real or apparent, where he appears in the same jurisdictions where he regularly prosecutes. The same is true as to county, city and town attorneys if such attorneys defend criminal cases in which there is alleged a violation of county, city or town ordinances. Even where the attorney is not regularly involved in the prosecution of the violation of such ordinances, there is the appearance of a conflict of interest in that he represents both the town and the defendant. Formerly, where the towns

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had separate courts, the town attorney was precluded from defending criminal cases in the courts of the town he represented even if he did not prosecute the criminal cases.

It is the opinion of the Council that the appearance of a conflict of interest and the misuse of one's public office may be obviated where a county, city or town attorney avoids defending criminal cases involving alleged violations of ordinances of the governmental entity he represents and where he appears as a prosecuting and defense attorney before the same jury panel.

Council adheres to previous rulings that the same rules stated in this opinion are applicable to those serving in part-time positions as county, city and town attorneys and that where a member of a firm is precluded under this opinion from representing criminal defendants, all members of the firm are disqualified in the particular case.

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