

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-146
Issued: July 1976

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May a former assistant Commonwealth's attorney defend against a criminal charge when the alleged crime occurred while he was in office, but no formal charge was made and no judicial proceeding was had against the defendant until after he had left office, and he, in fact, had no access to any confidential information concerning the matter while in office?

Answer: Yes.

References: DR 101(B), 9-101(B); EC 6; Silver Chrysler Plymouth v. Chrysler Motor Corp., 518 F.2d 751 (2d Cir 1975); General Motors v. City of New York, 501 F.2d 639 (2d Cir 1974)

OPINION

While the applicant was an assistant Commonwealth's attorney, a burglary occurred in his judicial district. X was taken into custody but was released without bond or any judicial proceeding following an investigation of the charge by the state police. No further official or judicial action was taken in the matter while the applicant was an assistant Commonwealth's attorney. The applicant had advised the Commonwealth's attorney that he could take no part in any investigation or prosecution of X because of personal friendship, and in fact did nothing in behalf of the Commonwealth in the matter. The applicant's office was completely separate from that of the Commonwealth's attorney. He had no access to any information concerning the matter in the possession of the Commonwealth's attorney or any other officer or agent of the Commonwealth. A few days after applicant left his office as assistant Commonwealth's attorney, X was indicted on the burglary charge. May the applicant defend him?

DR 9-101(B) states that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." A public employee might be improperly influenced in his handling of a particular matter if he had any hope of private employment in the same matter after leaving public service. The purpose of DR 9-101(B) is to dash any such hopes, General Motors v. City of New York, 501 F.2d 639 (2d Cir 1974). Obviously such hopes could not influence the handling of matters about which he is doing nothing and for which he has no supervisory responsibility. The purpose of DR 9-101(B) is served if its application is limited to matters on which the lawyer actually worked, or for which he had supervisory

responsibility, while a public employee. DR 9-101(B) does not bar the applicant's representation of X.

DR 4-101(B) provides that "a lawyer shall not knowingly: 2) use a confidence or secret of his client to the disadvantage of his client." EC 4-6 states that this obligation continues after termination of the lawyer's employment. As a corollary to these rules, a lawyer may not accept employment adverse to the interests of a former client in the same matter in which he formerly represented the client, Silver Chrysler Plymouth v. Chrysler Motor Corp., 518 F.2d 751 (2d Cir 1975). The Commonwealth and its officers and agents are as much entitled to this protection as are private clients.

There are dozens of reported judicial opinions applying this rule where, as here, the lawyer is not shown to have worked on the particular matter himself but it was pending in his law firm, corporate law department, or public legal office while he was member, associate, or employee in the firm, department, or office. Such pendency does not *ipso facto* require application of the rule, Silver Chrysler Plymouth cited above. The purpose of the rule is protection of the client's confidences. Obviously they are protected against misuse by someone who had no access to them. We believe the correct rule in these circumstances is that if the lawyer had no access to a client's confidences in a particular matter pending in his firm, department, or office, he is not barred from accepting employment adverse to the interests of the client after he leaves the firm, department, or office. In this case, by hypothesis, the applicant had no access to any confidential information in possession of the Commonwealth in the matter of X, and he is therefore not barred from representing him.

In any case in which agents of the Commonwealth feel that confidential information may be used to the disadvantage of the Commonwealth by a former prosecutor, the Commonwealth has the same remedy available to any one else, i.e., a motion to disqualify the former prosecutor to represent the defendant in the particular matter.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.