NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY NEW YORK 12207

Committee on Professional Ethics

NYSBA

Opinion #506 - 2/26/79 (77-78)

Topic: Disqualification of counsel; appearance of impropriety; assistant county attorney; client in private practice.

Digest: Assistant county attorney may not privately represent wife in seeking to enforce separation agreement where he had represented her in proceedings brought under the Uniform Support of Dependents Law.

Code: EC 8-8, 9-2, 9-3, 9-6; DR 8-101, 9-101(B)

QUESTION

May an assistant county attorney who represented a wife in his official capacity in proceedings brought against her former husband under the Uniform Support of Dependents Law, now represent the wife privately in an action, also directed against her former husband, to recover arrearages due under a separation agreement?

OPINION

This Committee has repeatedly held that lawyers in the public's employ, whether full or part-time, must scrupulously avoid using their public offices to promote their private interests and practices. See, e.g., N.Y. State 457 (1977), N.Y. State 435 (1976) and N.Y. State 392 (1975).

Consistent with this view, the Code of Professional Responsibility expressly forbids a lawyer "to accept private employment in a matter in which he had substantial responsibility while he was a public employee." DR 9-101(B)

The term "matter" has been defined by the Standing Committee on Ethics and Professional Responsibility of the American Bar Association. As that Committee observed in ABA 342 (1975):

"Although a precise definition of 'matter'

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> as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties."

The ABA Committee then concluded:

> "The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the same 'matter' is not involved because there is lacking the discrete, identifiable transactions of conduct involving a particular situation and specific parties."

Applying the foregoing definition to the circumstances here present, we can easily discern a single "matter." The wife's effort to secure support from her former husband satisfies the definitional touchstone of "identifiable ... conduct involving a particular situation and specific parties." ABA 342, supra. Hence, under the principle articulated by DR 9-101(B), the assistant county attorney would be precluded from undertaking to represent the wife in her action to recover arrearages.

While the lawyer in question has not left public office, we believe that the use of the past tense in DR 9-101(B) is without relevance to a resolution of the question posed. Cf., EC 8-8 and DR 8-101 with EC 9-2, EC 9-3, EC 9-6 and DR 9-101(B). The ethical proscription we note traces its origin, at least in part, to a concern that the proscribed conduct would engender suspicion that the official had somehow improperly used his position to assure himself of future employment upon his return to private practice. Logically, if a lawyer may not accept private employment in a matter after leaving public office because of the possibility that he might have used his former position to garner future business, a fortiori, he should not be permitted to accept such private employment while he remains capable of abusing his office still further. The appearance of impropriety would then be exacerbated rather than lessened.

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We also consider immaterial the fact that the objectives of the assistant county attorney's contemplated private employment would be fully consistent with those of his prior representation of the wife in proceedings brought under the Uniform Support of Dependents Law. The apparent impropriety which DR 9-101(B) addresses is not that of undertaking to represent conflicting interests, but that of using a public office to secure some private advantage. Cf., N.Y. State 502 (1979) with N.Y. State 453 (1976). Hence, the ethical proscription exists whether or not the proferred employment is consistent with the lawyer's objectives when engaged in the performance of his public office. See, N.Y. State 260 (1972) and ABA Inf. 1112 (1969); see also, N.C.S.B.A. Op. 313 (1960), N.C.S.B.A. Op. 303 (1960), N.C.S.B.A. Op. 216 (1957), N.C.S.B.A. Op. 111 (1953), Tex. S.B.A. Op. 109 (1955) and Wash. S.B.A. Op. 132 (1965), respectively indexed at 3337, 3326, 3240, 3135, 4166 and 4650 in O. Maru, Digest of Bar Association Ethics Opinions (1970).

For the reasons stated, the question posed is answered in the negative.
