NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

Opinion #52 - 3/28/67 (3-67)

Topic: Conflict of Interest.
Part-time Public Employee.

Digest: Former part-time public employee in District Attorney's office should not defend cases which were in District Attorney's office during his period of employment.

Canon: Former Canons 6, 36, 37

QUESTION

A lawyer who was a part-time assistant to a district attorney has terminated his employment and asks whether he may properly defend a client in a matter which was under investigation by the district attorney's office while he was so employed, although at that time he never knew of the defendant or of the pending investigation surrounding his alleged crime.

OPINION

The following canons are involved:

Canon 6. Adverse Influences and Conflicting Interests.
Canon 37. Confidences of a Client.
Canon 36. Retirement from Judicial Position or Public Employment.

The pertinent provision of Canon 36 reads:

"A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

A substantially identical question was passed upon by the Committee on Professional Ethics and Grievances of the American Bar Association in its Opinion No. 134, which opinion was reaffirmed by its Informal Decision No. 647, which states:

"As the prosecution 'originated' in the office to which counsel was attached as a paid lawyer, he was in a position of confidence and had opportunity to know the facts upon which his client, the state, predicated the prosecution. If he actually acquired such information, manifestly he could not properly use it in favor of a defendant whose interest was in conflict with the interest of the state. But even if he did not so acquire it, the public would naturally infer that he was retained by the defendant so that some advantage in the defense of the case might derive from his former connection with the prosecutor's office.

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"The obligation of undivided fidelity to a client, imposed by Canon 6, is a continuing one, which extends

> beyond formal termination of professional relations to all activities which may adversely affect the interest of the former client in a matter in respect to which the lawyer stood in position of confidence."

This Committee concurs in said ABA opinions, except that it would limit the breadth of the last paragraph quoted above, in accordance with the decision of the United States District Court in U.S. v. Standard Oil Co. and Esso Export Corp., 136 F. Supp. 345 (1955), in which the Court, in a comprehensive 25-page opinion, construed the canons mentioned above. In that case the Government attempted to disqualify a prominent firm of New York lawyers from representing a defendant against whom the Government had instituted a suit, which suit was under investigation during the time that a former employee of the law office was employed in an important agency of the Government administering the Marshall Plan in Europe. His employment with the Government had terminated and he had returned to the New York law firm and was assisting in the defense of the suit by the Government. The Court requested the opinion of The Association of the Bar of the City of New York and of the New York County Lawyers' Association, both of which filed briefs amicus curiae. The position of the Government in the Esso case was so extreme that possibly any young lawyer who had worked for a Government agency for a year or two might be disqualified from accepting employment with a corporation or with a large city law office which might have pending suits instituted by the Government, even though he had no specific knowledge that any such suits were pending or in the course of investigation by the department in which he was employed. The Court, among other things, stated:

> "I agree, that where there is a close question as to whether particular confidences of the former client will be pertinent to the instant case, an attorney should be disqualified to avoid the appearance if not the actuality of evil. But, where an attorney has worked for a vast agency of the United States government, as in the instant case, it is hardly reasonable to hold that an appearance of evil can be found in his undertaking a case against the government where there is not some closer factual relationship between his former job and the case at hand other than that the same vast agency is involved." (p. 364)

In the opinion of this Committee, a former part-time employee of the district attorney's office should be disqualified from representing an alleged criminal shortly after he had terminated his employment with the district attorney, in order to avoid the appearance of evil even if he had not participated in the investigation of the alleged crime during his tenure. It would be going too far, however, to disqualify an attorney specializing in criminal matters from ever taking a case which might have been under investigation for a long period of time by the district attorney. In this connection, we call attention to the Code of Ethics adopted by the State of New York (Public Officers Law Sec. 73-7), disqualifying officers and employees of a state agency for a period of two years after termination of their services with the state regardless of participation in a pending case. See, also, a somewhat similar Code of Ethics adopted by the City of New York (Administrative Code of the City of New York, Sec. 1106-3.0). The appearance of evil that might be involved would be the public inference that an attorney just leaving the public service was being retained by reason of his former connection with the personnel in the district attorney's office.