ADVISORY ETHICS OPINION 87-04

SYNOPSIS:

A lawyer may not accept private employment as lobbyist in a matter in which he had substantial responsibility as a member of the state government and should not accept such employment when it will tend to discredit the public's confidence in and respect for the legal profession and government.

FACTS:

Prior to 1984, Attorney A engaged in the private practice of law in Vermont, with an emphasis on representation of clients before the legislative and executive branches of Vermont state government. In 1984, Attorney A left private practice and, in 1985, he accepted full time employment in state government.

Also in 1985, by virtue of his state government position, Attorney A was appointed as a member of a State Commission charged with examining regulatory issues and competition within one sector of Vermont industry. There were fifteen persons appointed to the Commission in total. The Commission was charged with examining:

1. The nature and quality of service within the industry currently available in the state;
2. The nature of the industry services that must be available in five years and in ten years to best serve the citizens of the State of Vermont and ensure the appropriate social and economic development of the state;
3. Such policies and actions that the state should take to bring about the industry. services that are needed.

The Commission served in an advisory capacity to the Governor. Its report made recommendations in three broad areas including development of technology; consumer service; and competition, and the most desirable amount of regulation. The Commission met four or five times prior to January 1, 1986, produced a detailed report, and submitted the report and recommendations to the Governor and General Assembly.

With respect to competition and the regulation thereof, the Commission reported on the current situation and made several recommendations for action by the General Assembly and by public regulatory bodies. These recommendations specifically addressed pricing and regulation in the context of competition among the present industry members. None of these recommendations were adopted as part of the Governor’s program for 1986, and Attorney A had no involvement with respect to the competition issue beyond issuance of the Commission work. There is no indication that the Commission's findings and recommendations are dated or outmoded.

Regulation of the industry is currently the responsibility of the Vermont Public Service Board, an independent quasi-judicial body. Representation of the public with respect to industry matters is the responsibility of the Department of Public Service, an agency of the executive branch, the commissioner of which is appointed by the Governor. A member of the Governors senior staff has specific ongoing liaison responsibility between the Governor and the Public Service Department Attorney A did not hold that liaison responsibility at any time during his government employment. The commissioner of public service and the Governors liaison to the Public Service Department are the Governor’s primary advisors with respect to matters related to the industry before the Public Service Board.

The issues of competition in the industry and the extent to which that industry and competition within it should be regulated by the Public Service Board are likely to be the subject of legislative proposals and debate during the 1987 legislative session and beyond. The Commission addressed and made specific recommendations on these issues.

Attorney A has now been offered employment by a private company in the industry. One of the Commission members represented the prospective employer while Attorney A was a member. The employment offered is representation of the company before the Vermont General Assembly with respect to legislation concerning competition in the industry and the regulation thereof. There is no indication of whether the prospective employer is a former client or whether Attorney A had substantial experience or expertise in this sector of Vermont industry before joining the government. Attorney A, based on these facts, now requests this Committee's opinion concerning the ethical propriety of accepting such employment.

DISCUSSION:

DR 9-101(B) provides that a "lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." EC 9-3 provides that “After a lawyer leaves judicial or other public employment, he should

not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety, even if none exists." Canon 9, itself, states that: "A lawyer should avoid even the appearance of impropriety."

In addition, EC 9-2 provides that "Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his clients of material developments in the matters being handled for the client. 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 ethical 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." Similarly, EC 9-7 provides, *inter alia,* that "[e]very lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety"

The ABA Committee on Professional Ethics has provided a detailed discussion of DR 9-101(B)'s meaning in "Formal Opinion 342."[1] In our Opinions 86-1 and 86-2, this Committee also addressed the Canon 9 restrictions raised in what are commonly referred to as "Government Lawyer" issues. Because this subject necessarily depends on the particular circumstances of each case, however, our decisions in 86-1 and 86-2 were expressly based on the facts presented. This Opinion's conclusion, similarly, is expressly limited to the particular facts and circumstances provided by Attorney A.

Opinion 342 set out the following policy considerations under- lying DR 9-101(B): "the treachery of switching sides; the safe-guarding of confidential governmental information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a manner as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil." (footnotes and citations omitted.)

Opinion 342 also sets out considerations against an unduly restrictive interpretation of DR 9-101(B):

> "the ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraint upon future practice nor should too great a sacrifice be demanded of lawyers willing to enter government service; the rule serves no worthwhile public interest if it becomes a mere tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel; and the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their own choosing, particularly in specialized areas requiring special, technical training and experience." (footnotes and citations omitted.)

Some of these policy considerations, obviously, apply only in the area to which the ethical rules originally spoke-litigation. Attorney A has not presented a question arising in a litigation or contested case scenario, and the Committee has interpreted the rule, based on the underlying policies, with this in mind. The contemplated employment here involves the influence of legislation.

Although Attorney A has indicated that his representation would be before the General Assembly, rather than the executive, the rules speak in terms of employment by the "government" and "public service" work. Thus, we do not believe the Code limits the restrictions imposed as a result of Attorney A's government experience to proceedings before the executive. If he is disqualified from accepting the employment, the contemplated forum is irrelevant. In any event the executive simply plays too vital a role in the entire legislative process to even consider an exception, based on the forum of practice, here.

With respect to DR 9-101(B), itself, Opinion 342 requires consideration of four key terms and the policies they represent to decide the ethical propriety of a former government employee's contemplated employment These terms are (1) "private employment;" (2) "matter;" (3) "substantial responsibility;" and (4) "public employee." If he had substantial responsibility for a matter as a public employee, Attorney A may not accept private employment in the same matter.

There is no question that Attorney A contemplates private employment for compensation; this fact triggers the following considerations. First, this employment would come only a short time after Attorney A left government. Second, the same administration which he left is currently in office. Third, Attorney A would be paid by and would be representing a corporate

[1] 62 A.B.A.J. 518-21 (1976).

client which was represented by a member on the Commission. This turn of events poses the dangers that Attorney A might be perceived as handling his governmental work to encourage his future employment, with financial benefit from subsequent fees, or with a special instead of the public interest in mind. In this regard, we also note that Attorney A formerly practiced with an emphasis on representation of clients before the legislature and executive, and he left private practice for only a relatively short time in government service. He did not have prior experience in the substantive area of law in which he now contemplates employment. Since he is a sole practitioner, the prospective employer contacted him, personally and for the specific purpose of the contemplated employment, not his firm which may have assigned, or another lawyer who may have referred, the matter to him. On balance, then, these considerations heavily weigh against Attorney A's accepting the contemplated employment.

The next consideration is whether Attorney A will be associated with the same "matter." Opinion 342 provides that the term matter "seems to contemplate a discrete or isolatable transaction or set of transactions between identifiable parties." If the same factual issues among the same parties and situation or conduct are present, the matters are sufficiently similar to trigger the rule's application. In Attorney A's case, he served on a government committee which made duly authorized findings and recommendations on the same issues and affecting the same parties with which he now seeks private employment. The scope of the contemplated employment is directly within the substantive area covered in his government employment.

Opinion 342 sets out the following examples to illustrate the "scope" of the term matter: "[t]he same lawsuit or litigation is the same matter. The same issue of fact involving 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." Based on the facts, Attorney A's conduct falls within the examples in which the contemplated employment is prohibited, not the examples of work with agency procedures, regulations, or abstract legal principles in which the contemplated employment is permitted.

Attorney A has not provided any facts or representations indicating that significant changes have occurred since the Commission issued its report and recommendations. Since no facts or legislation which would indicate a significant change in those findings have come to our attention. Attorney A' s contemplated employment, apparently, would be with regard to the same scenario he left while a public employee. Accordingly, we feel that any of Attorney A's representations made in connection with his contemplated employment would be, at this point, so connected to issues, situations, conduct, and parties present when he was in government as to constitute representations made on the same “matters” addressed by the Commission.

Although the "substantial responsibility" term is often the most difficult to interpret in DR 9-101(B), Attorney A, here, clearly had substantial responsibility with respect to the matter in which private employment is contemplated. Opinion 86-2 indicates that the term includes "those matters in which the lawyer had actual significant involvement as a public employee." Attorney A was appointed to the Commission membership in his role as a state employee. He played an active role in conducting the affairs of the Commission while he was a member. Attorney A acknowledges a significant role in preparing the Commissions published "Report and Recommendations." We, therefore, conclude that Attorney A had substantial government responsibility in the "matter".

The capacity in which Attorney A served, as a state employee, also makes clear that he had substantial responsibility as a “public employee,” not as an individual or as a private practitioner. Attorney A's membership on the Commission was directly tied to his position in state government. Accordingly, we conclude that Attorney A's contemplated employment would violate the terms and underlying policies of DR 9-101(B). Attorney A, then, may not accept the contemplated employment. We emphasize, however, that this decision is limited to the fact as presented, and we note that several specific facts have been treated as generalizations to preserve some degree of confidentiality. With that understanding, those considering government or post-government private employment should not interpret this opinion as broadening the scope of DR 9-101(B) beyond its present, established parameters.

A fortiori, we conclude that the contemplated employment would not be in accord with the ethical aspirations embodied in the ECs quoted earlier in this Opinion or Canon 9. With respect to these last two standards, such employment, we feel, would be clearly inappropriate.

Finally, we note our mention of legislation, proposed but unenacted, concerning the "Government Lawyer" issue in Opinion 86-1. Unlike the Model Rules of Professional Conduc1 (specifically, 1.11(a)) the success or failure of that unenacted legislation may influence the interpretation of but does not necessarily broaden or limit the Vermont Code of Professional Responsibility. That failure, however, leaves lawyers with dim, cult decisions on contemplated employment, unguided by bright line standards, and often with few options for determining a proper course. Attorney A, we believe, made an advisable decision when requesting this Committee's opinion.