ADVISORY ETHICS OPINION 82-01

SYNOPSIS:

A person who first was law clerk and subsequently a lawyer for a state agency and in such capacities negotiated a compliance order between the state and a private corporation may not represent civil litigants in an action against that same corporation arising either under the compliance order of from the same facts which gave rise to the compliance order.

OPINION:

The committee has been asked to render an opinion on whether a former law clerk and lawyer for the state Agency of Environmental Conservation may represent civil litigants in an action against a corporation which arises either out of the same fact situation under which he represented the state negotiation a compliance order with the corporation or out of the compliance order itself. The issue is covered under EC 9-3 and DR 9-101(B). The disciplinary rule states:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

To apply DR 9-101(B) to a given question, one must look to the definition of each key term in the Rule. Clearly, "private employment" includes representing civil litigants as a private practitioner.

The "matter" and "substantial responsibility" to which DR 9-101(B) refers were defined in Formal Opinion 342 of the ABA Committee on Ethics and Professional Responsibility, issued on November 24, 1975, In an exhaustive opinion, citing the relevant case law and analytical articles, the committee defined "matter" as "a discrete and isolatable transaction . . . between identifiable parties." (at 6). By example, the committee suggested that "[t]he same issue of fact involving the same parties and the same situation or conduct is the same matter." (at 6). In Informal Opinion 1462, issued August 12, 1980, citing Formal Opinion 342 supra, the same committee prohibited a former assistant attorney general from representing class action plaintiffs in matters investigated by him during his public employment. It state that, although the plaintiffs were different, the defendant, the facts, issues and relief were the same.[1]

The question of "substantial responsibility" poses a different question. In Formal Opinion 342, supra, the ABA committee stated that the term "contemplates a responsibility requiring the official to become personally involved to an important material degree, in the investigative or deliberative processes regarding the transactions or facts in question." (at 9). This committee is aware of the policy considerations in not severely limiting a former public attorney's future employment opportunities. Nonetheless, if a public attorney was materially involved in a specific case on behalf of the state, the ethical policies of DR 9-101(B) preclude future employment on that matter.

In this case a close question might be presented if the law clerk/attorney had merely drafted the order under instruction from another. A draftsman need not become materially involved in the deliberative process. He may only be responsible for drafting into cogent terms of a person who "negotiated" the compliance order for the state. This activity clearly raises his responsibility to the level of "substantial."

Regarding the term "public employee," the fact that the law clerk/lawyer may have been employed in a "part-time," "temporary" capacity by the state or solely to perform services which could be performed by one not a lawyer does not change our conclusion. He was a public employee and, as noted, substantially responsible for a particular matter in which he is now offered private employment.

The functions and issues involved in this question all conform to the definitions of the terms in DR 9-101(B). We conclude that the attorney is prohibited from accepting the proffered employment.

[1] See, also, General Motors Corporation v. City of New York, 501 F.2d 639 (2d Cir. 1974).