

# ADVISORY ETHICS OPINION 89-05

## **SYNOPSIS:**

A lawyer may accept private employment as attorney in a matter in which he did not have substantial responsibility as a member of State government and when the work as government employee was in reviewing and interpreting government or agency procedures, regulations or abstract principles.

## **FACTS:**

The requesting attorney held a high level position with a State department for a period of approximately three and one-half years. During his employment with this department, the department undertook an initial review and general consideration of a commercial construction project which would have a state-wide impact on energy, environmental, and development issues. The proposal was also a topic of legislation, and the attorney testified on behalf of his department at legislative hearing. The attorney's continued activity on behalf of his department consisted of over-seeing and contributing recommendations toward general approaches to this proposal with a view toward achieving agency procedures, policies, and recommendations.

At no point during the employee's tenure with the Vermont State government did he personally become involved on a level more detailed than these general policy considerations. The Department employing the requesting attorney did not participate in any quasi-judicial or administrative investigation of the project. No substantive analyses or positions were undertaken.

Following the attorney's departure from State government, the developer made a formal proposal to seek approval for the development and construction of a specific project on an identified site. This formal application was completed over a year and one-half after the attorney had left State government.

The attorney has now been offered employment by a "public interest" group within Vermont to identify issues, undertake legal research, and generally represent their interests before a different State board which will rule upon the merits of the project. The attorney, based on these facts, 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 further states that "a lawyer should avoid even the appearance of impropriety."

"Substantial responsibility" as used in DR 9-101(B) has been defined as sufficient responsibility so that the government official became personally involved to a material degree in the investigative or deliberative processes regarding the facts in question.<sup>1</sup> Being the director of an involved government office that is monitoring general issues concerning a proposed project in the conceptual stages, and not participating in any agency case, or controversy, does not rise to the level of that test,<sup>2</sup> where under a very different set of circumstances this committee concluded that the requesting attorney did have substantial responsibility in the same matter and was therefore advised not to continue such employment.

Additionally, in interpreting the scope of the term "matter", Opinion 342 concluded that work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations or laws, or in briefing abstract principles of law did not disqualify the lawyer.

## **CONCLUSION:**

For these reasons, we conclude that the attorney may accept the offered employment.

---

<sup>1</sup> *ABA Formal Opinion 342* (1975).

<sup>2</sup> Cf. *Opinion 87-4*.