

ADVISORY ETHICS OPINION 92-06

SYNOPSIS:

An attorney, who is a member of a municipal utility commission, but who does not act as counsel to the commission, may represent a state agency which is involved with the regulatory process affecting the utility regulated by the commission, in a matter, despite his membership on a commission which the agency oversees, after full disclosure to and with the consent of both organizations.

FACTS:

An attorney is a member of a commission which oversees the operations of a municipal utility. He does not represent the commission as its attorney. He wishes to accept employment from the Vermont Department of Public Service (VDPS), to review and approve a proposal to purchase and sell electricity under 30 V.S.A. §212a to several other municipal utilities. The municipal utility governed by the commission will not participate in the proposed transactions. The Department and the commission have consented to the representation after full disclosure.

QUESTIONS PRESENTED:

1. Would the attorney's role as commissioner preclude him from accepting employment from VDPS?
2. Would representation of VDPS violate the attorney's ethical obligations as a public official by his participation in "activities in which (his) professional interests are or foreseeably may be in conflict with (his) official duties"? (Cf. EC 8-8)
3. Assuming the attorney learns confidences and secrets while representing VDPS, would this knowledge foreclose his service on the commission?
4. Does the representation of a state agency entrusted with policing the municipal utility managed by the commission violate EC 9-7 which urges the "avoidance of impropriety."

OPINION:

1. DR 5-105 (A) which forbids multiple representation that would "adversely affect" the "exercise of . . . independent professional judgment" does not apply to the factual situation presented because the attorney does not act as counsel to the commission.
2. EC 8-8, which counsels against "a lawyer who is a public officer" engaging "in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties" does not preclude the attorney's employment by VDPS because the specific transaction for which the attorney is to be employed does not involve the municipal utility on whose commission the attorney serves and to the extent that related issues may affect the utility in the future, the attorney may recuse himself from participating in any commission discussion or determination where such a situation might arise.
3. Full disclosure and consent by VDPS and the commission satisfies the requirement of DR 4-101 (1). The attorney was formerly employed by VDPS. He is unlikely to learn any new information constituting a secret or confidence of VDPS, which he does not already know, other than facts related to the specific transaction on which he will work.
4. EC 9-7, which urges all attorneys "to strive to avoid . . . the appearance of impropriety" does not bar the attorney's representation of VDPS in light of the disclosure and consent granted by VDPS and the commission. DR 9-101 (8) bars acceptance " of private employment in a matter in which the attorney had substantial responsibility while he was a public employee." This Disciplinary Rule does not relate to the facts presented. The Rule is intended to preclude public officials from entering private practice and participating as a private advocate in matters handled by the attorney as a public employee.

CONCLUSION:

The attorney is free to accept employment from VDPS under the facts presented.