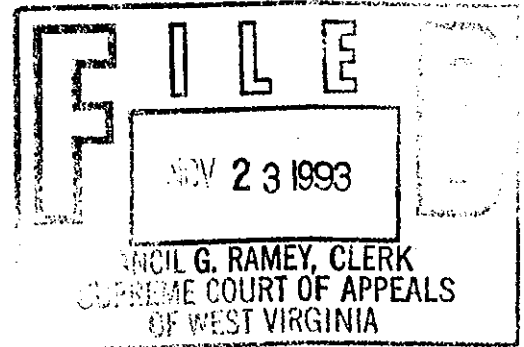


Per Curiam:

Committee on Legal Ethics
of the West Virginia State Bar

No. 21857 v.

Paul R. Goode, Jr., and
Harlan Ray Tiller, Members
of the West Virginia State Bar



In this legal ethics proceeding, the Committee on Legal Ethics of the West Virginia State Bar has charged that a member of the Bar, Paul R. Goode, Jr., while acting as Prosecuting Attorney of Wyoming County, improperly accepted private employment in a matter for which he was substantially responsible as a public employee. It has also charged that he improperly represented the private client in a matter in which he participated substantially as a public employee and that he agreed to dismissal of criminal charges as part of the settlement of a civil matter in which Harlan Ray Tiller, his assistant in the prosecuting attorney's office, represented one of the parties. The Committee on Legal Ethics has additionally charged that Mr. Tiller, who is also a member of the Bar, improperly participated in the matter.

The Committee on Legal Ethics has recommended that Mr. Goode be publicly reprimanded and that he be required to pay one-half of the costs of this proceeding. The Committee has further suggested that this Court require Mr. Goode to pass the Multistate Professional Responsibility Examination and require him to codify

and submit to the Committee a conflicts procedure for himself and for his assistants within thirty days of the date of this Court's decision. The Committee has also recommended that Mr. Tiller receive a public reprimand and that he be charged the other one-half of the costs of this legal ethics proceeding.

After reviewing the questions involved in this proceeding, this Court concludes that the Committee on Legal Ethics has properly established that Mr. Goode and Mr. Tiller violated ethical standards, as charged, and the Court has concluded that the sanctions suggested by the Committee on Legal Ethics are appropriate.

In 1986, at a time when Paul R. Goode, Jr., was Prosecuting Attorney of Wyoming County and Harlan Ray Tiller was Assistant Prosecuting Attorney of Wyoming County, Gloria Townsend, who had a short time previously obtained a divorce from her husband, Mark Townsend, undertook to prosecute a contempt proceeding against her former husband for his failure to pay alimony and child support and for his failure to comply with certain other provisions of the divorce decree.

After Gloria Townsend's contempt petition was verified, but before it was filed, her former husband, Mark Townsend, obtained a criminal warrant against her and her boyfriend, John Paul Allen. The warrant charged that Gloria Townsend and her

boyfriend had abused and neglected the Townsend Children. Mrs. Townsend and Mr. Allen were arrested on July 28, 1986. Paul R. Goode, Jr., one of the respondents in this proceeding, as Prosecuting Attorney, and his office, were responsible for representing the State against Mrs. Townsend and Mr. Allen.

Sometime in July, 1986, Mr. Townsend retained the other respondent in this proceeding, Harlan Ray Tiller, who was then working for Mr. Goode as Assistant Prosecuting Attorney, to represent him in the contempt proceeding contemplated by Mrs. Townsend. It does not clearly appear that Mr. Tiller was aware at the time that a criminal charge had been filed against Mrs. Townsend.

On August 26, 1986, Mr. Tiller, in addition to representing Mr. Townsend in the contempt matter, filed a petition in his behalf to modify the custody provisions of the divorce decree. The petition alleged that there was reason to believe that Mrs. Townsend had abused and neglected the children.

A hearing was held on the contempt and custody-modification petition on August 29, 1986, and at that hearing, according to the court's notes, Mr. Townsend testified that criminal warrants had been filed against Mrs. Townsend and her boyfriend, John Paul Allen.

At the conclusion of the hearing, the presiding judge directed that home studies be made of Mr. and Mrs. Townsend and that a psychological evaluation be made of the parties and one of their children. There was no ruling on the contempt matter.

Subsequently, on October 16, 1986, a criminal trial was conducted in magistrate court on the criminal charge against Mrs. Townsend. At that trial, Mr. Tiller's boss, Mr. Goode, represented the State of West Virginia. At the conclusion of the trial, Mrs. Townsend was found guilty and was fined \$200.00 and sentenced to serve thirty days in the county jail.

Mrs. Townsend appealed her criminal conviction to the Circuit Court of Wyoming County.

On May 12, 1987, Mrs. Townsend's boyfriend, John Paul Allen, plead nolo contendere to the criminal charges against him. He was fined \$100.00. Mr. Goode also represented the State of West Virginia in the proceedings against Mr. Allen.

On August 18, 1988, the day scheduled for trial of the criminal charges against Mrs. Townsend in circuit court, Mrs. Townsend and her criminal attorney met with Mr. Townsend and Mr. Tiller in Mr. Goode's office and agreed that, in exchange for the dropping of the criminal charges against Mrs. Townsend, Mrs. Townsend would surrender custody of the couple's children to Mr.

Townsend. Mr. Tiller prepared a civil order reflecting the agreement. Mrs. Townsend's civil attorney, who was not present at the time of the agreement, later learned of the order and objected to the arrangement. A new order was prepared which noted the civil attorney's objections. The new order was signed by Mr. Townsend, Mrs. Townsend, and Mr. Tiller.

On August 18, 1988, an order dismissing the criminal charges against Mrs. Townsend was prepared by Mrs. Townsend's criminal attorney. Mr. Goode, acting as Prosecuting Attorney, signed this order for the State of West Virginia.

Subsequent to the change of custody, Mr. Townsend consulted with Mr. Goode about changing visitation rights which had been granted to Mrs. Townsend in conjunction with the change of custody. Mr. Goode, pursuant to the consultation, and acting in Mr. Townsend's behalf, prepared a petition to modify the visitation provisions.

Upon learning that proceedings to change her visitation rights were being contemplated, Mrs. Townsend retained a new attorney, who petitioned that Mr. Goode and the Prosecuting Attorney's Office be disqualified from representing Mr. Townsend further. A family law master considered the motion and ruled that Mr. Goode and Mr. Tiller were disqualified.

Mrs. Townsend's new attorney then moved that the order granting Mr. Townsend custody of the children be vacated.

A hearing was arranged on the new motion, and Mr. Goode moved for a continuance so that Mr. Townsend could obtain new counsel. The continuance was granted, and Mr. Goode did not participate further in the matter.

On December 11, 1989, the family law master ruled that the order modifying custody was not the result of fraud, undue influence, or duress and denied Mrs. Townsend's motion to vacate the custody modification. Mr. Townsend's petition to modify Mrs. Townsend's visitation rights was also denied.

In the present proceeding, the Committee on Legal Ethics claims that Mr. Goode violated three ethical principles in his involvement with the Townsends. First, it claims that by representing Mr. Townsend on the visitation modification petition, Mr. Goode violated DR 9-101(B) of the Code of Professional Responsibility, which, as in effect at the time, stated "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

Secondly, the Committee on Legal Ethics claims that Mr. Goode's continued representation of Mr. Townsend beyond January 1, 1989, violated Rule 1.11(a) of the Rules of Professional Conduct

which states, in relevant part, "[e]xcept as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation."

Lastly, the Committee on Legal Ethics claims that Respondent Goode agreed to the dismissal of criminal charges as part of a negotiated settlement of a civil matter favorable to a party represented by his assistant in the prosecuting attorney's office. It claims that Mr. Goode thus gave the impression of subverting the interests of fairness and justice to the interests of a private litigant. The Committee on Legal Ethics claims that in so doing, Mr. Goode created at least the appearance of impropriety and violated Dr. 1-102(A)(5), which provided "A lawyer shall not: (5) Engage in conduct that is prejudicial to the administration of justice."

The Committee on Legal Ethics, in this proceeding, claims that Mr. Tiller engaged in unethical conduct when he undertook to represent Mr. Townsend while he was an assistant prosecuting attorney and while a criminal charge, over which his office had responsibility, had been filed against Mrs. Townsend. The Committee on Legal Ethics claims that Mr. Tiller's actions violated DR 5-105(A) which provides:

A lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be, or is likely to be, adversely affected by the acceptance of the proffered employment.

This Court has repeatedly indicated that:

In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar . . . the burden is on the Committee to prove by full, preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee.

Syllabus point 1, in part, Committee on Legal Ethics v. Lewis, 156 W.Va. 809, 197 S.E.2d 312 (1973); see also, Committee on Legal Ethics v. Six, 181 W.Va. 52, 380 S.E.2d 219 (1989); Committee on Legal Ethics v. Thompson, 177 W.Va. 752, 356 S.E.2d 623 (1987); Committee on Legal Ethics v. Daniel, 160 W.Va. 388, 235 S.E.2d 369 (1977); and Committee on Legal Ethics v. Pietranton, 143 W.Va. 11, 99 S.E.2d 15 (1957).

Also, the Court has stated in syllabus point 3, of In re Brown, 166 W.Va. 226, 273 S.E.2d 567 (1980), that:

Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Ethics Committee . . . are to be given substantial consideration.

In accord, syllabus point 3, Committee on Legal Ethics v. Smith, 184 W.Va. 6, 399 S.E.2d 36 (1990); and syllabus point 2, Committee on Legal Ethics v. Harmon, 179 W.Va. 298, 367 S.E.2d 767 (1988).

As previously indicated, Mr. Goode has been charged with accepting private employment in which he had substantial responsibility while he was a public employee and with representing a private client in connection with a matter in which he participated personally and substantially as a public employee. He is also charged with engaging in conduct which is prejudicial to the administration of justice.

Although the criminal charges against Mrs. Townsend were slightly different, from a legal point of view, from the change of visitation question on which Mr. Goode undertook to represent Mr. Townsend, the two proceedings involved the same parties and fundamentally the same factual determination. Mrs. Townsend was the defendant under the criminal warrant, and she was the defendant or respondent on the visitation question. In both matters Mr. Townsend was an instigating party. Lastly, both proceedings focused on Mrs. Townsend's treatment of the Townsend children.

Rather clearly, Mr. Goode played a substantial role as prosecuting attorney in the criminal proceedings instituted against Mrs. Townsend, and since those proceedings involved the same fundamental question as were involved in the later visitation proceedings, this Court believes that, at the very least, the evidence shows clearly and convincingly that Mr. Goode did engage in conduct which created the appearance of impropriety and which was prejudicial to the administration of justice.

As previously indicated, the Committee on Legal Ethics has also charged that Harlan Ray Tiller violated Dr 5-105(A), which requires a lawyer to decline proffered employment if the exercise of his independent judgment on behalf of his client will be, or likely will be, adversely affected by the proffered employment. The evidence adduced in the present proceedings shows that, as an assistant prosecuting attorney, Mr. Tiller was a member of the prosecutor's office charged with prosecuting the criminal warrant which was issued against Mrs. Townsend. Although there is some suggestion that Mr. Tiller might not have known of the pending criminal proceedings when he undertook to represent Mr. Townsend in the civil disputes which he had with Mrs. Townsend, it is absolutely clear that he was aware of the criminal charges by the time he was involved in the negotiations which occurred in the prosecuting attorney's office on August 18, 1988. In those proceedings, he met with Mr. and Mrs. Townsend, and, as a result, it was agreed that if Mrs. Townsend would surrender custody of the children, the criminal proceedings against Mrs. Townsend would be dropped. At the time of that meeting, Mr. Tiller, who had a legal duty to represent the interest of the State of West Virginia in the criminal prosecution, also undertook to represent Mr. Townsend. The result of that meeting was an agreement which apparently resulted in the dismissal of the criminal charges.

In this Court's view, the facts rather clearly and convincingly show that Mr. Tiller was in a conflict of interest

situation at the time of the August 18, 1988, meeting and either knew, or reasonably should have known, that he was in such a situation. The real thrust of DR 5-105(A) is that an attorney should avoid a conflict-of-interest situation, and the evidence in the present case shows Mr. Tiller did not.

In this Court's opinion, the Committee on Legal Ethics has met its burden and has shown that Mr. Tiller and Mr. Goode did engage in inappropriate ethical conduct in their involvement in the Townsend affairs. The Court also believes that there has been no showing of mistake of law or arbitrary assessment by the Committee on Legal Ethics in making its recommendations. The recommendations are appropriate, and the Court believes that they should be adopted.

It is, therefore, ADJUDGED and ORDERED, that Paul R. Goode, Jr., and Harlan Ray Tiller be, and the same hereby are, publicly reprimanded for their conduct in the Townsend affair. It is further ordered that they each pay one-half of the costs of this legal ethics proceeding as certified by the Chairman of the Committee on Legal Ethics of The West Virginia State Bar. Paul R. Goode, Jr., is additionally ordered to submit to the Multistate Professional Responsibility Examination, and if he fails to pass the examination within two attempts, his license to practice law is indefinitely suspended until such time as he passes the examination. He is also directed to submit to the Committee on

Legal Ethics of The West Virginia State Bar a conflicts procedure for himself and his assistants within thirty days of the date of this order.