LEGAL ETHICS OPINION 1020 ASSISTANT COMMONWEALTH'S ATTORNEY – REPRESENTING CIVIL CASES.

You advise that you have been elected to the position of Commonwealth's attorney in your area effective January 1, 1988. You wish to hire a lawyer with trial practice as your assistant Commonwealth's attorney. This attorney will experience a financial loss should he accept your offer of employment. You wish to know whether or not it is possible for the part-time assistant Commonwealth's attorney to engage in personal-injury litigation when there has been a collateral criminal prosecution in the jurisdiction. You have attached certain safeguards which you plan to implement in your office. You wish to know whether or not the part-time assistant Commonwealth's attorney would be able to engage in personal-injury litigation when there has been a collateral criminal investigation in the jurisdiction once these safeguards are implemented.

LE Op. 594 states that "it is not improper for a part-time Commonwealth's attorney or assistant Commonwealth's attorney to handle civil domestic relations cases so long as the adversary party is not then the subject of criminal proceedings".

LE Op. 696 states in pertinent part that "it is improper for a part-time assistant Commonwealth's attorney to continue representation of a party in a previously pending civil matter after a criminal charge is brought against either party to the civil proceeding *although the part-time assistant Commonwealth's attorney avoids involvement in said criminal prosecution*" (emphasis added).

The above-cited Legal Ethics Opinions, especially LE Op. 696, are inconsistent with paragraphs A, B and C of your proposal.

Disciplinary Rule 5-105 prohibits a lawyer from employment involving actual or potential conflicting professional responsibilities. Under DR:5-105(E), partners and associates of the disqualified party are also disqualified. The Committee disagrees with the submitted analysis concerning these code provisions. The Committee does not believe that an artificial wall can be erected within the office of the Commonwealth's attorney by providing for separate telephone lines and separate offices.

Committee Opinion
January 21, 1988

Legal Ethics Committee Notes. – The Rules of Professional conduct define "Firm" as "a professional entity, public or private, organized to deliver legal services, or a legal department, corporation or other organization." This presumably includes a Commonwealth's Attorney's Office. Rule 1.11(b) prohibits the prosecutor who handled the criminal case from participating in the subsequent related civil case absent consent. Where the prosecutor is *the* Commonwealth's Attorney (as opposed to an assistant commonwealth attorney), obtaining consent is problematic. The same rule prohibits members of the law firm from handling the civil case unless the requirement of Rule 1.11(b) are met. The Ethics Committee believes that the rules prohibit a part-time prosecutor and any assistants in the office from participating in a civil matter which is related to a prosecution handled by that office unless Rule 1.11(b)'s requirements are met.

Impact of appearance of impropriety on criminal defendant. – While an ethical rule that strives to avoid the appearance of impropriety is a worthy standard for professional

conduct, a criminal defendant's constitutional right to due process does not entitle him to a prosecution free of such appearances. Lux v. Commonwealth, 24 Va. App. 561, 484 S.E.2d 145 (1997).

A criminal defendant is denied due process only when his former counsel joins a Commonwealth's Attorney office and is not effectively screened from contact with the Commonwealth's attorneys who are handling the defendant's case on a related matter. Lux v. Commonwealth, 25 Va. App. 561, 484 S.E.2d 145 (1997).