

CONFLICT OF INTEREST:
COMMONWEALTH'S ATTORNEY AS CLIENT
OF PRIVATE LAW FIRM WHICH
REPRESENTS DEFENDANTS IN THAT
JURISDICTION.

You have presented a hypothetical situation in which a private law firm seeks execution of a contract for collection of unpaid fines, costs, forfeitures and penalties with the Commonwealth's Attorney's Office, when that law firm also represents defendants in criminal cases in that jurisdiction.

Under the facts you have presented, you have asked the committee to opine as to whether it is impermissible for either the Commonwealth's Attorney or the private law firm to enter into such a contract. You further ask, if the contract *does* trigger a conflict of interest, whether there is a Virginia Code section that would create a statutory exception to the application of the Rules of Professional Conduct in this context. Finally you ask where the contract has been made with a private attorney who is a member of a firm, would other firm members be similarly disqualified from defending criminal cases in the Commonwealth Attorney's jurisdiction?

In addressing your questions, this committee is, in effect, providing reconsideration of the conclusions previously drawn in LEO 1203. The committee considers your request for reconsideration to be timely made as the ethics rules have been revised since the issuance of that opinion.

Question 1: May the Commonwealth's Attorney contract with an attorney to do collections work where that attorney represents defendants prosecuted by that Commonwealth's Attorney?

The key consideration here, if he enters enter this contract, is the Commonwealth's Attorney's duty of loyalty to his client, the Commonwealth. LEO 1203 analyzed former DR 5-101 to conclude that the fact that the Commonwealth's Attorney was a client of the defense attorney was a personal interest that could impermissibly affect the representation of the Commonwealth in cases against that defense attorney. DR 5-101 (A) did allow for proper consent to cure such a conflict; however, as the Commonwealth's Attorney is the Commonwealth itself, there is no way to obtain that consent. The current authority for resolving this issue is Rule 1.7 (b), which addresses those personal interests of the attorney formerly addressed by DR 5-101 (A). Rule 1.7 deems it a conflict of interest if an attorney's representation of a client, "may be materially limited by ... the lawyer's own interest." Such a conflict can only be cured if the "lawyer reasonably believes that the representation will not be adversely affected," and "the client consents after consultation."

This committee agrees with the concern raised in prior opinions on this issue. Similar to LEO 1203, discussed above, in LEO 1384, this committee found that it would be improper for a Commonwealth's Attorney to prosecute defendants represented by a defense attorney who represents that prosecutor in an unrelated civil matter. A prosecutor who is the client of a defense attorney may find his ability to represent the Commonwealth against that attorney compromised. Loyalty to a client must not be watered down by a personal business or other relationship with opposing counsel. This committee finds that, applying Rule 1.7 (b) to the scenario raised in the present request, the Commonwealth's Attorney's representation may be materially limited" in any case where he is the client of opposing counsel. The curative provision in 1.7(b) is not available for this conflict as the client in a criminal prosecution is the Commonwealth, which is unable to provide consent. Therefore, this committee opines that the Commonwealth's Attorney may not prosecute any cases where the defendant is represented by the private attorney who has contracted to do collections work for the Commonwealth's Attorney.

Question 2: May a private attorney contract to do collections work for the Commonwealth's Attorney and continue to defend clients being prosecuted by that attorney?

This question raises two concerns: loyalty to multiple clients and loyalty to former clients. The issue of multiple clients arises as the defense attorney's on-going representation of the Commonwealth's Attorney may compromise his rigorous defense of clients prosecuted by that Commonwealth's Attorney. In LEO 1203, this committee applied the former DR 5-105(C), which provides that an attorney may only represent multiple clients "if it is obvious that he can adequately represent the interest of each" and if consent is obtained after proper disclosure. The conclusion drawn from that application was that a defense attorney cannot adequately represent clients against a prosecutor who is his collections client. The current applicable provision is Rule 1.7 (b), which as outlined above, requires that the lawyer must reasonably believe that the representation will not be adversely affected. The committee notes that the prior rule was interpreted in former EC 5-2 as incorporating this concept of an adverse affect; the committee does not believe that the new rule changes the soundness of the conclusion drawn in LEO 1203 on this point. Specifically, this committee opines that a belief that the defense attorney's representation would not be adversely affected is unreasonable in this situation. A defense attorney should not be beholden to the prosecutor for income. That relationship presents an impermissible influence that constitutes a conflict of interest. Once he enters into this contract, this defense attorney may not represent any defendants against this Commonwealth's Attorney.

A second concern presented by this situation is that of loyalty to prior clients. Rule 1.9 proscribes that, absent consent from the former client, an attorney shall not be adverse to a prior client in a substantially related matter. In the present scenario, the defense attorney has contracted to perform collections work for the Commonwealth's Attorney. The information presented to this committee is that as a result of the contract, its enabling legislation, and its mandatory guidelines; a Commonwealth's Attorney may only contract with *one* attorney, with that attorney only able to subcontract to another where the defendant is out of the jurisdiction. Thus, that attorney would not be able to subcontract those cases involving former clients. Where the monies to be collected stem from the case defended by this attorney, the matters would be substantially related. Thus, the attorney would have a Rule 1.9 conflict of interest. The committee assumes that universal consent from former clients is, at best, unlikely. Accordingly, absent a change in the contract and its applicable law as described in the request, it would seem that this attorney is apt to have recurring 1.9 conflicts of interest should he continue to defend clients against this Commonwealth's Attorney.

Question 3: Does any provision of the Virginia Code create a statutory exception to the conflicts of interest identified in Questions One and Two, above?

This question is actually outside the purview of this committee's responsibility to provide interpretation of the Rules of Professional Conduct. However, the committee notes that an attorney's ethical obligations stem not from the Virginia Code, but from the Rules of the Supreme Court, of which the Rules of Professional Conduct are part. It is those rules to which an attorney should look for determining ethical parameters to his legal practice.

Question 4: Do the conflicts of interest identified in Questions One and Two, above, prevent any other attorney in this private attorney's firm from defending cases against the Commonwealth's Attorney?

The conflicts identified above are founded on an application of Rule 1.7(b). Rule 1.10 establishes that no member of a firm shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule...1.7." Accordingly, no member of this private attorney's firm may represent clients prosecuted by this Commonwealth's Attorney

for the duration of the private attorney's collections contract. Moreover, under the same analysis, these conflicts may not be cured by having some other attorney in the Commonwealth's Attorney's office prosecute cases against this private attorney or his firm. Due to the imputation of Rule 1.7 conflicts, via Rule 1.10, no member of the private firm will be able to defend cases against anyone in this Commonwealth Attorney's office once this contract is entered.

This committee reaffirms the conclusions drawn in LEO 1203.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
September 25, 2002