LEGAL ETHICS OPINION 1776 POTENTIAL CONFLICT OF INTEREST AMONG

CAPITAL DEFENSE UNITS.

You have presented a hypothetical situation in which a Public Defender has represented, on unrelated matters, a victim or a witness in a capital murder case and received confidential information during the representation adverse to a capital defendant now represented by another Public Defender's office or a newly created Capital Defense Unit (CDU)[1]. Your inquiry presents another situation involving two codefendants charged with capital murder who are represented by a Public Defender's office and a CDU in the same jurisdiction.

As an independent judicial branch agency, the Public Defender Commission oversees all the Public Defender offices in the state.[2] The Public Defender offices provide representation only in the specific jurisdictions where the individual offices are located. The Commission, however, does not involve itself in cases and allows the Public Defender offices to operate autonomously. The establishment of Capital Defense Units (CDUs) will provide representation throughout the state, including those served by a Public Defender office. The CDUs will be separately housed from the Public Defender offices, but both are connected by their individual relationships to the Commission (appointments, salaries, etc.).

Under the facts you have presented, you have asked the committee to opine as to whether this organizational structure creates conflicts of interest imputed to all offices under the oversight of the Public Defender Commission, thereby requiring either the CDU or the Public Defender Office to withdraw from representation.

The Virginia Rules of Professional Conduct that are relevant to your inquiry are the following: Rule 1.6(a) stating a lawyer must maintain confidentiality of information; Rule 1.7 (b)(1) and (2) prohibiting a lawyer from simultaneous representation of multiple parties, such as co-

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[1] By the end of fiscal year 2004, the Public Defender Commission is "to establish four regional capital defense units" (CDUs). Va. Code § 19.2-163.2 (10). The primary purpose of the CDU is to represent indigent capital defendants, but the CDU may also act as a resource for private attorneys appointed to represent capital defendants.

[2] The Public Defender Commission was established in 1972 and is currently composed of nine members appointed by the Speaker of the House of Delegates for staggered terms of three years. The duties of the Commission are set forth in Virginia Code § 19.2-163.2 and include *inter alia*, the establishment of Public Defender offices in various locations of the Commonwealth, appointing a Public Defender for each office, and "fix[ing] the compensation for each Public Defender and all personnel in each Public Defender office." The Public Defenders serve at the pleasure of the Commission. Va. Code § 19.2-163.6 (authorizes the Commission to "appoint and employ and, at pleasure remove, an executive director, counsel and such other persons as it may deem necessary; and to determine their duties and fix their salaries or compensation within the amounts appropriated therefore."). The Commission currently has twenty-one Public Defender offices around the state. Pursuant to Va. Code § 19.2-163.2, the overall administrative management of Public Defender offices and Regional Capital Defense units is the responsibility of the Public Defender Commission. However, by written policy, each Public Defender Office and Capital Defense Unit operates independently of all other offices insofar as the representation of clients is concerned and cannot share or divulge information which might create conflicts of interest with regard to clients represented by other offices. *See* Public Defender Commission Policies and Procedure Manual, Chapter 1 at 1 (Revised January 1, 2003).

defendants unless the lawyer believes that neither client will be adversely affected from the representation and both clients consent after disclose is made; Rule 1.8 (b) prohibiting a lawyer from using client information for one's own or a third party's advantage; Rule 1.9(a) prohibiting a lawyer from representing a client adverse to a former client in the same or substantially related matter; and Rule 1.10(a) prohibiting all lawyers in a firm from representing a client when any individual lawyer practicing alone, would be prohibited from doing so.

In regard to your first inquiry, the committee has previously opined that if an attorney represents a client adverse to a former client on a matter unrelated to the previous representation, then no conflict exists. The lawyer may represent a client, but he may not use in his defense, the confidences acquired while representing other former clients, unless disclosure and consent requirements are met. LEO 1666 (1996). *See also, Mackall v. Commonwealth*, 236 Va. 240, 372 S.E.2d 759 (1988), *cert. denied* 492 U.S. 925 (1989) (attorney for murder defendant was properly denied his motion to withdraw based on having previously represented one of the Commonwealth's witnesses on an unrelated matter). Therefore, in the first scenario of your inquiry, there is no conflict if a Public Defender is defending a client adverse to a former client represented by that office, unless the defense of the current client would require the use of information obtained in the representation of the former client that is protected under Rules 1.6 or 1.8 (b).

As to your second inquiry, the Virginia Rules of Professional Conduct do not impose a *per se* rule prohibiting one attorney or law firm from representing two or more co-defendants charged with the same crime. In some cases, representation of co-defendants charged with the same criminal offense may be appropriate, but in other cases problems involving loyalty, conflicts and confidentiality would make such representation improper. For example, the committee has previously opined that conflicts and confidences and secrets issues arise when an attorney undertakes to represent co-defendants in a criminal matter, especially when one of the co-defendants, pursuant to an agreement with a prosecutor, will testify against the other. In LEO 986, an attorney represented two co-defendants on charges arising out of the same criminal conduct. One of the co-defendants entered into a plea agreement with the Commonwealth agreeing to cooperate by testifying against the other in exchange for a suspended sentence. The plea bargaining defendant obtained new counsel, but the attorney continued to represent the other co-defendant. The Committee concluded that the testifying co-defendant was a former client and that the trial of the other co-defendant at which the former client was expected to testify was substantially related. DR:5-105(D) [now Rule 1.9]. Since the interests of the former client and the client standing trial were adverse, the attorney could not continue to represent the client standing trial without the consent of the former client after full disclosure. In addition, the Committee opined that there was a grave risk that DR4-101 [now Rule 1.6] would be violated if the attorney continued to represent the other client facing trial. Continued representation would also place the attorney in the untenable position of having to cross-examine and impeach his former client at trial in order to defend the existing client. See, e.g., LEO 1181.

The Committee notes that if counsel has been appointed by a court[3] from a Public Defender's office and/or a CDU to represent one or more capital murder defendants, the Commission's policy would require that each office operate independently, and they could not share any information that might in any way create a conflict of interest. By written policy, while the

[3] Currently, indigent criminal representation employs both local Public Defender offices and court-appointed private attorneys. Virginia Code § 19.2-163.7 requires the circuit court to appoint counsel for an indigent capital defendant from the list of attorneys prepared by the Commission. However, Virginia Code § 19.2-163.8 permits the court to appoint an attorney not on the list if the attorney possesses the qualifications set by the Commission for indigent capital defense.

Commission exercises overall administrative management of the Public Defender offices and Regional Capital Defense Units, each office acts independently of all other offices insofar as the representation of clients is concerned and refrains from sharing or divulging information that would in any way result in a conflict of interest.[4] By maintaining discrete confidential files, the various units under the general oversight of the
Commission can successfully avoid conflicts of interest. In the event of multiple defendant cases, two or more defendants cannot be represented by a single office. In particular, the CDU's ability to maintain independence from the Public Defenders Offices will prevent vicarious disqualification for conflicts of interest. The CDU, therefore, must maintain a separate identity from the Public Defenders Offices in order to avoid imputed disqualification.

The first question to determine is whether a Public Defender office is considered to be a law firm, for conflict purposes. Firms are defined in Rule 1.10, Comment [1] of the Virginia Rules of Professional Conduct as those practitioners that hold themselves out to the public as such, have a formal agreement with terms, and have mutual access to client information. This definition however, is fact specific, and requires a case-by-case review. Previous opinions have not addressed this particular issue, but the North Carolina State Bar opined that a "Public defender's office should be considered as a single law firm, due to shared office space and clerical staff under the direction of the Public Defender." See NC Ethics Opinion RPC 65 (1989).

Characteristics of a law firm include, for example, sharing of resources and personnel, mutual access to confidential information, identification of themselves as a firm, and practitioners that possess authority to provide counsel and share professional responsibility for each other. See State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion No. RI-249 (1996); California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1986-90 (1986). For purposes of this question, the committee opines that a Public Defender's office is a firm based upon those listed shared characteristics and the perception that the Public Defender office is an entity devoted to the practice of indigent criminal defense.

The next question to be determined is whether each Public Defender office and Capital Defense Unit may be considered as a separate law firm. Given the facts in your hypothetical, each Capital Defense Unit will be separately housed from the Public Defender Offices and will maintain separate phone, fax, and filing systems. The committee further believes that the Capital Defense Units must be perceived as separate and distinct entities from the Public Defender offices and have a secure computer system that prevents sharing of information, the establishment of a conflicts checking policy and procedure, and the enforcement of said policy. Under those circumstances, the committee believes that the Public Defender Offices and Capital Defense Units will be considered as separate firms.

The committee believes that the structure of the Public Defender Office and a Capital Defense Unit, over which the Commission has general oversight, can be distinguished from two physically distinct offices of a private law firm. Perhaps the most fundamental difference is the sharing of client information between different offices of a private law firm which is presumed under the Rules of Professional Conduct and the common law relating to partnerships. In contrast, the Public Defenders Offices and the Capital Defense Units do not share client

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[4] The committee does not mean to suggest that attorney-to-attorney consultations are prohibited. Under Rule 1.6, Comment [7a], the committee realizes the need for attorneys to consult with one another for educational and training purposes and to competently represent a client's interests. A lawyer who wishes to consult with another lawyer should endeavor, whenever possible, to consult with another lawyer who likely has no conflict and should carefully disclose the information in generic or hypothetical terms.

information and do not have access to each other's files. Another distinguishing characteristic of a law firm with multiple offices is that a managing committee, board, partner or group within the firm may control what cases are accepted, how particular cases will be handled and which lawyers in the law firm will be responsible for the engagement. No such control is exercised by the Commission over the Public Defender Offices or the Capital Defense Units. Further, as a profit-making entity, a private law firm will often have fee sharing and profit sharing arrangements and use attorneys and staff from different offices to work on a particular engagement. These attributes also make it logical to treat a private law firm with multiple offices as a single entity because the employees or agents are united with a common goal or purpose to enhance the law firm's profits. These attributes are conspicuously absent from the structure under which the Public Defender Offices and Capital Defense Units operate.

While the Commission has the authority to set the compensation for the Public Defenders and personnel at each office, in actual practice, however, the Public Defender at each office establishes the compensation for subordinate personnel, including pay raises for such personnel. Also matters involving discipline and performance evaluation of subordinate personnel are addressed by each Public Defender, not the Commission. The committee notes that conclusions reached in this opinion are premised upon this practice. Should the Commission depart from this practice, a new conflicts analysis would be necessary.

If the Capital Defense Units and Public Defender Offices are treated as separate autonomous units, the third question is whether conflicts may be imputed, under Rule 1.10, to the entire the entire Public Defender System when one Public Defender experiences a conflict. The Illinois Supreme Court held that a public defender office is not disqualified simply because one attorney experiences a conflict. *See* ISBA Advisory Opinion on Professional Conduct, Opinion 85-14 (1986); *See People v. Robinson*, 79 Ill. 2d 147 (1980)(Court rejecting argument that public Defenders should disqualified themselves in three consolidated cases involving representing former clients and clients with adverse interests.)

In the facts you present, the committee believes that the Capital Defense Units and the Public Defender Offices may represent defendants without violating Rule 1.6(a), Rule 1.7(b)(1)and (2), Rule 1.8 (b), or Rule 1.9(a), providing that the offices enact and enforce safeguards and review each case carefully. Since the Public Defender Offices and the CDUs are separate and autonomous "law firms," a conflict of interest in one office under the two scenarios you have described should not be imputed to another office under Rule 1.10. Client information known by one office should not be presumed shared by other offices simply because they are subject to the Commission's oversight. The committee's analysis of the ethical considerations in conflict cases is limited, however, to the facts presented in your inquiry as there are additional procedural determinations concerning constitutional issues that can not be answered by the committee and would best be handled by the Attorney General's office.

The committee cautions, however, that if a public defender or capital defense lawyer moves from one office to another, there may be conflicts issues under Rule 1.7 or Rule 1.9 that must be addressed. *See* Comments 3, 4 and 5 to Rule 1.9 concerning lawyers moving between firms.

This opinion is advisory only and not binding on any court or tribunal.

Committee Opinion
May 19, 2003