

LEGAL ETHICS OPINION 1794
CONFIDENTIALITY OF INITIAL CONSULTATION

You have presented a hypothetical situation in which a husband and wife are planning to divorce. They live in a small community with a limited number of attorneys. The husband wishes to prevent his wife from obtaining adequate counsel. Therefore, he visits each family law attorney in succession, shares his situation, but with no intent to hire them. He in fact already knows that he will retain Attorney A. The wife goes to one of the visited attorneys, Attorney B, seeking representation. When Attorney B writes the husband's attorney (A) establishing B's representation of the wife, Attorney A sends a letter back stating the wife's attorney (B) has a conflict of interest and must withdraw from the representation.

Prior to hiring her attorney, the wife first had gone to Attorney A for representation. Before their initial interview, Attorney A had the wife sign a disclaimer stating that:

I understand that my initial interview with this attorney does not create an attorney/client relationship and that no such relationship is formed unless I actually retain this attorney.

He then listened to her story. After the interview, the attorney did a conflicts check, and announced he could not represent her as he already represented her husband. As part of their discussion, the wife had shared information regarding her finances and her personal life, including details that would relate to child custody issues. The wife tells her own attorney, Attorney B, of that appointment, and he writes Attorney A and asks him to withdraw from representing the husband.

Under the facts presented you have asked the committee to opine as to whether either attorney needs to withdraw from this matter.

Rule 1.6(a) establishes the basic duty of client confidentiality:

A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

The committee notes that the exceptions outlined in paragraphs (b) and (c) are not at issue in the present hypothetical.

At first blush, Rule 1.6 may seem to apply only to those instances where the potential client actually hires the attorney. The committee opines that such a literal reading of Rule 1.6 is too narrow. This committee has on more than one occasion stressed the importance of an attorney's duty of confidentiality as a "bedrock principle of legal ethics." See, LEOs ##1643, 1702, 1749, and 1787. As such, the principle should be interpreted broadly to assure that the public feels safe in providing personal information to attorneys to obtain legal services. The "Scope" section of the Rules of Professional Conduct specifically references application of Rule 1.6's confidentiality duty to the context of initial consultations. That section states, in pertinent part:

Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established.

This committee has consistently applied Rule 1.6 to initial consultations in prior opinions. The court in *Gay v. Libuin Food Systems, Inc.*, 54 Va. Cir. 468 (Isle of Wight County 2001) agreed with that line of opinions and outlined them as follows:

A long line of Legal Ethics Opinions issued by . . . the Virginia State Bar likewise recognizes that a prospective client's "initial consultation with an attorney creates an expectation of confidentiality which must be protected by the attorney even where no attorney-client relationship arises in other respects." Va. Legal Ethics Op. 1546, LE Op. 1546 (Aug. 12, 1993); see also Va. Legal Ethics Ops. 1697, LE Op. 1697 (June 24, 1997); 1642, LE Op. 1642 (June 9, 1995); 1638, LE Op. 1638 (April 19, 1995); 1633, LE Op. 1633 (June 9, 1995); 1613, LE Op. 1613 (Jan. 13, 1995); 1453, LE Op. 1453 (March 24, 1992); 1189, LE Op. 1189 (Nov. 17, 1988); 1039, LE Op. 1039 (Feb. 17, 1988); 949, LE Op. 949 (July 8, 1987); 629, LE Op. 629 (Nov. 13, 1984); 452, LE Op. 452 (Apr. 12, 1982); 318, LE Op. 318 (June 6, 1979). An attorney, therefore, has a "duty to keep confidential those consultations that occur outside formal attorney-client relationships which nonetheless create an expectation of confidentiality." Va. Legal Ethics Op. 1642, LE Op. 1642 (June 9, 1995).

Gay v. Libuin Food Systems, Inc., 5 Cir. CL00121, 54 Va. Cir. 468 (2001).¹

As stated in Comment 2 to Rule 1.6, the ethical obligation to hold inviolate confidential information of the client "encourages people to seek early legal assistance." To enable that result, people must be comfortable that the information imparted to an attorney while seeking legal assistance will not be used against them.

In the present scenario, Attorney A agreed to an interview with the wife as she was seeking legal representation in that divorce. As part of that interview, she disclosed to the attorney information regarding her finances and her personal life, in particular information that would be relevant to the child custody issue that is part of this divorce. As Attorney A received confidential information that is pertinent to his representation of the husband against the wife, this attorney may not represent the husband unless the wife consents to his use of the information in this case.

This committee is not dissuaded from that conclusion by the use of a disclaimer by Attorney A. The disclaimer he provided to the wife for signature disclaimed only that no attorney/client relationship had been formed; it did not on its face address confidentiality. As outlined earlier in this opin-

¹ This Virginia view that the duty of confidentiality may be triggered by an initial consultation is shared by other state bars, such as Vermont and Kansas. See, Vermont Legal Ethics Opinion 96-9; Kansas Legal Ethics Opinion 91-4.

ion, an attorney/client relationship is not required for the duty of confidentiality to be triggered; that duty arises also during a person's initial consultation with a lawyer in seeking possible representation if facts are such that no attorney/client relationship is formed. Accordingly, the disclaimer of an attorney/client relationship by this attorney is ineffective to permit him the unconsented use of information imparted by the wife. As stated above, he can only use this information, and in turn, represent the husband, only if the wife consents to that use, after consultation.

The committee notes that the conclusion that this disclaimer failed to eliminate the attorney's duty of confidentiality is limited to this particular disclaimer. While general disclaimers regarding the attorney/client relationship may not be effective, there may be others that would be. To be effective, the disclaimer must clearly demonstrate that the prospective client has given informed consent to the attorney's use of confidential information protected under Rule 1.6. Nonetheless, in the present scenario, as the particular disclaimer used failed to address the confidentiality of information provided and as important information was communicated by the wife to Attorney A, A's duty to keep that information confidential prevents A from properly representing the husband, absent the wife's consent. Attorney A must withdraw from the representation unless that consent from the wife is obtained.²

Your request also inquires whether Attorney B has a conflict of interest arising from his earlier appointment with the husband. The potential for a conflict of interest for Attorney B is distinguishable from that for Attorney A. The basis for the conclusions drawn in the discussion of Attorney A's conflict is that the potential client (in that discussion, the wife) has a reasonable expectation of confidentiality. The committee maintains that when most members of the public contact a lawyer to discuss obtaining legal services from that lawyer, those members of the public assume the details of the conversation will remain private. However, the husband did not meet with Attorney B for the legitimate purpose of obtaining legal representation; he in fact had already decided he would retain Attorney A. His primary purpose in meeting with Attorney B was to preclude him from representing the wife. The husband's purpose does not create the sort of "reasonable expectation of confidentiality" Rule 1.6 exists to protect. Accordingly, no duty of confidentiality is created for Attorney B out of the visit with this husband who misrepresented his purpose for the appointment. The committee opines that as Attorney B has no duty to maintain the confidentiality of information received from the husband, no conflict of interest

2 This Committee recommends the detailed advice provided by the Kansas Bar as to how to avoid conflicts arising from initial consultations in Kansas Ethics Opinion 91-04. In summary, that advice is as follows:

- 1) Run a conflicts check before the initial consultation;
- 2) Caution the potential client not to provide confidential information at that point;
- 3) Ask whether the potential client has met with other attorneys;
- 4) Send a "non-engagement" letter if declining the representation; and
- 5) Be prepared for responding to a motion to disqualify should the opposing party become a client.

See, Kansas Legal Ethics Opinion 91-04.

3 The Committee notes that in analyzing the present hypothetical, Rule 1.6 was the pertinent authority. Rule 1.9 was not applicable as, under the facts provided, neither party was a former client of the opposing counsel. However, in any situation where the initial consultation does create an attorney/client relationship, Rule 1.9 would need to be considered in addition to Rule 1.6.

was triggered by that initial consultation. Attorney B is not required to withdraw.³

While not present in this hypothetical, the committee notes that were an attorney to direct a new client to undertake this sort of strategic elimination of attorneys for the opposing party, that attorney would be in violation of Rule 3.4(j)'s prohibition against taking any action on behalf of a client "when the lawyer knows or when it is obvious that such action would merely serve to harass or maliciously injure another." That such an attorney would not himself be attending the initial consultations does not remove the attorney from ethical impropriety; Rule 8.4(a) establishes that it is improper for an attorney to violate the rules through the actions of another.

Committee Opinion
June 30, 2004

LEGAL ETHIC OPINION 1795
IS IT ETHICAL FOR A CRIMINAL DEFENSE ATTORNEY TO DISCOURAGE A WITNESS FROM SPEAKING WITH THE COMMONWEALTH'S ATTORNEY?

I am writing in response to your request for an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics ("Committee").

You have presented a hypothetical situation involving a lawyer's representation of a criminal defendant. The defense attorney represented a client charged with felony unauthorized use of a vehicle. The defendant's mother reported the incident as victim of the crime. On the day of trial, the Commonwealth Attorney attempted to interview her in the hall of the courthouse, within earshot of the defense attorney. The defense attorney joined them and asked the victim/mother, in a terse fashion, if the defense attorney could speak with her. The defense attorney then told the mother that she did not have to speak to the Commonwealth Attorney.

The Commonwealth Attorney learned from this interview that the mother, while the primary driver of the vehicle, was not the owner. The titleholder of the vehicle was the defendant's father. The victim/father came to the courthouse to discuss the matter with the Commonwealth Attorney prior to the trial. The Commonwealth Attorney observed the defense attorney speaking with the two victims/parents. The defense attorney then announced that he planned to go to trial. The Commonwealth Attorney realized that while the mother was waiting in the courtroom, the victim/father was not. The mother told the Commonwealth Attorney that the father was in the hallway. This turned out not to be the case. The defense attorney admitted that he had instructed the father that he could leave as he was not under subpoena. The defense attorney had also told the father that as he was a necessary witness to prove ownership of the vehicle, if he left the courthouse, the Commonwealth would lose the case. The defense attorney later explained he had checked the court's file for the subpoena as the father had told him he did not know why he had to be there.

Under the facts you have presented, you have asked the Committee to opine as to whether it was a violation of the Rules of Professional Conduct when:

- 1) The defense lawyer asked the victim/mother if he could speak with her before she spoke with the Commonwealth Attorney;

- 2) The defense lawyer told the victim/mother that she did not have to speak with the Commonwealth Attorney;
- 3) The defense lawyer told the victim/father that he had checked the court's file and that as there was no subpoena, the father was free to leave; and
- 4) The defense lawyer told the victim/parents that if the father left the courthouse, the Commonwealth attorney would lose the case due to the absence of the father's necessary testimony.

These comments by the defense attorney should be analyzed in light of two provisions of the Rules of Professional Conduct. Rule 3.4(h) greatly restricts when an attorney may request that someone decline to provide relevant information to another party. Rule 4.3(b) restricts an attorney's communications with an unrepresented person, such as a witness. Those provisions state as follows:

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

- (h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the information is relevant in a pending civil matter;
 - (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and
 - (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

RULE 4.3 Dealing With Unrepresented Persons

- (b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

Rule 3.4(h) prohibits requesting a person other than a client to withhold information from another party, outside a narrow exception. The Committee notes that the exception only applies to *civil* proceedings and is, therefore, inapplicable in the present scenario. Thus, the communications between this defense attorney and the victim/parents must be reviewed in light of this particular prohibition.

Previous opinions of this Committee on this topic addressed other related provisions less on point than Rule 3.4(h); paragraph (h) was not in effect until January 1, 2000, subsequent to the issuance of those opinions. *See*, LEOs 1426, 1678, 1736. In considering the permissibility of an attorney requesting or encouraging a witness from providing information to the opposing side, Rule 3.4(h) is now the proper authority. The Committee therefore does not base its conclusions regarding this issue on its prior opinions issued before the adoption of Rule 3.4(h). Outside the parameter of the above-mentioned exception, Rule 3.4(h) presents a straightforward directive:

A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party.

In the present scenario, the attorney's first comment to the victim/mother was to speak to him before speaking to the Commonwealth Attorney. That statement alone merely requested preferential treatment; it did not request that she not speak to the Commonwealth Attorney *at all*. Thus, that statement did not constitute an impermissible request under this rule.

The attorney's next statement was to inform the mother that she did not have to speak to the Commonwealth Attorney. That statement may involve the giving of advice, but it does not include a clear request that the mother withhold the information from the Commonwealth Attorney. While it is a possible motivation for that attorney's comments, his actual statement is not in the nature of a request. Therefore, this statement did not constitute an impermissible request under this rule.

The attorney subsequently told the father that as he had not been subpoenaed, he need not appear in court. This statement similarly does not on its face constitute a request to refrain from testifying. Thus, it did not constitute an impermissible request under Rule 3.4(h).

The final statement at issue of this attorney was his assessment that the father's testimony was essential to the Commonwealth's case. Again, this statement, while containing advice, did not contain an impermissible request under Rule 3.4 (h). While the Committee can speculate as to the motives of the defense attorney in providing the advice he did to these individuals, the Committee sees no statement in those communications that went as far as an actual request to withhold information from the Commonwealth Attorney or at trial. Accordingly, the Committee opines that none of the defense attorney's statements violated Rule 3.4(h).

Whenever an attorney, on behalf of a client, is communicating with an unrepresented person, he must be mindful of the broad prohibition against providing advice found in Rule 4.3(b). Thus, in prior LEOs 1426 and 1589, this Committee applied Rule 4.3(b)'s predecessor, DR 7-103(A)(2), to prohibit a lawyer from advising a witness that he need not speak with opposing counsel. While not presenting a complete bar, Rule 4.3(b) does restrict communications with an unrepresented person in many instances. Communications with an unrepresented person are prohibited in a particular instance when each of the following characteristics is present:

- 1) The communication must be on behalf of a client;
- 2) The communication must include advice, other than the advice to secure counsel; and
- 3) The interests of the person must be or have a reasonable possibility of being in conflict with the interest of the client.

In applying Rule 4.3's prohibition to the communications in the present hypothetical, each prong must be considered. In each conversation with these victim/parents, the attorney's comments were on behalf of the attorney's client, a first prong of the prohibition.

In applying the second prong of this prohibition, the statements must each be reviewed to determine whether the attorney provided advice. The Committee notes that the rule is not triggered solely by *legal* advice. The attorney first spoke to the victim/ mother by requesting that she speak with him prior to speaking with the Commonwealth Attorney. Even if such a request was made in a terse fashion, it remains a request, not advice of any sort. Rule 4.3(b) does not prohibit that request. However, the defense attorney did not stop at that point in his communication; rather, he went on to tell the mother that she was not required to speak with the Commonwealth Attorney. The Committee opines that this particular comment meets the second prong; the defense attorney was providing advice to the mother with that statement. The defense attorney then proceeded to inform the victim/father that the attorney had checked the file, there was no subpoena, and thus the father was not required to appear in court. The defense attorney's statement to the father that he was free to leave is a statement of advice and thus meets the second prong. Finally, the defense attorney told both parents that the father's testimony was necessary for the Commonwealth's case so that if he failed to appear, the Commonwealth would lose. Again, the Committee finds advice in that communication as the defense attorney is advising the parents as to the consequences of whether or not the father testified. Three of the four statements of this defense attorney were made on behalf of his client and provided advice.

The third prong of a Rule 4.3(b) violation is that the interests of the unrepresented persons "are or have a reasonable possibility of being in conflict with the interest of the client." Thus, the prohibition is broader than just actual adverse *parties*. Here, all of the defense attorney's statements at issue were made to the victims of the client's crime. Ordinarily, while crime victims are not the clients of the prosecutor, they do nonetheless have interests adverse to those of the defendant. However, in this particular hypothetical the true interest of the two crime victims is less clear cut as they are the parents of the defendant. The mother was the person who originally reported the incident and was the primary user of the vehicle, and the father, as titleholder of the car, may potentially have had civil remedies against the defendant. In communicating with these individuals, this defense attorney was speaking with people whose interests were or possibly could have been in conflict with those of the defendant. The attorney therefore may not without further clarification provide advice to these individuals. However, given the family relationship between the "victims" and the defendant, it would not have been unreasonable for this attorney to ask these parents about their interest in the matter: did they want to pursue criminal charges regarding their vehicle or did they instead want to protect their son from prosecution? If the lawyer had obtained clear indication of the latter from the parents, he would no longer have had to treat them as persons whose interests "are or have a reasonable possibility of being in conflict with the interest of the client," and could have provided them the advice in question. The defense attorney needs to clarify the interests of these unrepresented persons before giving any advice.

The request to speak with the defense attorney before the Commonwealth Attorney was not in violation of Rule 4.3(b) as it did not provide any advice. However, under the limited facts provided, each of the other statements made by this defense attorney to the victim/parents were impermissible under that rule as the statements were made on behalf of a

client and included advice to unrepresented people with interests that have a reasonable possibility of being in conflict with those of the client.

The Committee notes that the materials you provided with your request suggested authorities that do not form the foundation of this Committee's conclusions. Specifically, your materials suggest that the conversations between the defense attorney and these victim/parents qualify as an attorney/client relationship and therefore are the source of a conflict of interest for this defense attorney. The Committee did not find facts in the hypothetical to support the formation of an attorney/client relationship; accordingly, the Committee did not view these conversations from a conflicts perspective but rather from the perspective of conversations with unrepresented persons.

Your materials also raise the issue of whether these conversations constitute the crime of obstruction of justice under Va. Code § 18.2-460 on the part of this attorney. Applying the Virginia Code is outside the purview of this Committee; therefore, this Committee declines to opine on that issue.

In resting its conclusions on application of Rules 3.4 and 4.3, this Committee notes that all such conclusions are limited to this hypothetical with an *individual* client. Were a similar scenario to involve an *entity* client, the analysis would need to extend to include the impact of Rule 1.13, which governs representation of organizations.

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

Committee Opinion
June 30, 2004

LEGAL ETHICS OPINION 1797
IS IT UNETHICAL FOR AN ATTORNEY TO DISBURSE PROCEEDS FROM A TRUST ACCOUNT THE BANK HAS TEMPORARILY FROZEN?

You have presented a hypothetical situation in which a law firm was shocked to learn that it had bounced two checks on its real estate trust account. The firm in its real estate practice believes it complies strictly with CRESPA, the Wet Settlement Act¹ and all other law applicable to real estate closings. When the law firm receives certified or cashiers checks from clients or mortgage institutions for real estate closings, it deposits the checks into the firm's real estate trust account at Bank X ("the Bank"). The Bank has a policy that if the deposit is made after 2:00 on, for example, Monday, the Bank declares the funds unavailable until two days later, in the example—Wednesday. The Bank permits the issuance of a certified or cashier's check after the deposit for purchasing the real estate; however, the Bank puts a hold on the entire trust account. The hold is not just for the amount of the deposited check, but is on all monies in that account. The two checks bounced were written for other clients on the Tuesday in the example and because the Bank had put a hold on the entire account, the checks bounced. The Bank refuses to change its policy regarding this hold procedure. The firm cannot perform all closings early enough to deposit all checks before 2:00. The

1 Virginia Code Section 6.1-2.10 *et. seq.*

Bank tells the law firm that when such checks bounce in the future, the Bank will, as required, notify the Virginia State Bar of the overdraft but explain that the Bank believes the attorney has done nothing unethical. The Bank assures the law firm that it believes its letter protects the lawyers and would meet with Virginia State Bar approval.

Under the facts you have presented, you have asked the following question:

If the law firm continues to use this bank for its real estate trust account and knows that the Bank's policy will lead to occasional checks written to and for clients bouncing (even though there are funds in the account), is the law firm violating the Rules of Professional Conduct or any other real estate law?

Questions involving real estate statutes, regulations and case law are outside the purview of this Committee. Accordingly, this opinion will address only whether by continued use of this bank, with this policy, the attorneys in this firm are in violation of the Rules of Professional Conduct.

The specific provisions at issue for the real estate attorneys in this firm are Rules 1.3's duty of diligence and Rule 8.4's description of misconduct. Specifically, Rule 1.3(c) prohibits an attorney from intentionally prejudicing or damaging a client during the course of the professional representation, except for in two exceptional circumstances not at issue here. Rule 8.4, in pertinent part, deems it unethical for a lawyer to:

- (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law; [or]
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

An attorney handling real estate proceeds faces a dilemma created by his obligation to disburse the proceeds timely according to the Wet Settlement Act yet also stay within the parameters of the ethics rules. This Committee has addressed that dilemma in prior opinions. In Legal Ethics Opinion (LEO) 183, this Committee considered a similar question to the one raised by the present hypothetical regarding whether an attorney serving as a settlement agent could disburse the funds to comply with the Wet Settlement Act immediately upon deposit. The opinion concludes that so long as the items deposited are in a form prescribed in the Wet Settlement Act, such as cashier's and certified checks the attorney can disburse funds immediately after deposit. In coming to that conclusion, the opinion explains the careful balance drawn in this situation:

The Committee believes that the new Wet Settlement Act recognizes the considerable risks, beyond the control of the settlement agent, that funds in other forms, such as ordinary commercial checks, may be uncollectible in any given transaction. The Committee further believes that the forms of funds identified in the statute generally are regarded as completely reliable. The Committee, as a matter of ethical responsibility, is unwilling to impose a stricter rule than that necessary to conform to the Wet Settlement Act. Thus, notwithstanding the fact that some of the forms of funds designated in Section

6.1-2.10 are not "collected" in a commercial banking sense at the time they are deposited by the settlement attorney, the Committee is of the opinion that any risk of noncollectability is so slight as to make it unnecessary to restrict a settlement attorney's ability to disburse upon funds received and deposited by him in such form.

In contrast, however, the Committee is of the further opinion that disbursement by a settlement attorney upon a check of a lender or purchaser not within the forms prescribed in Section 6.1-2.10 prior to actual crediting irrevocably of such check to the settlement attorney's trust account by the depository bank is unethical. An attorney must assume that the recipients of checks drawn upon his trust account will present such checks for payment immediately at the drawee bank. Because of the time lag between deposit and collection of checks deposited by the attorney in his trust account, the payment by the drawee bank of trust account checks drawn by the settlement attorney against such uncollected items will necessarily be made from funds of other clients of the attorney who are not even parties to the real estate transaction in connection with which the settlement attorney issues his trust account checks. The attorney has thus used the funds of *other clients* for his own purpose—the conclusion of the real estate transaction from which he is earning a fee. To illustrate the inherent impropriety in such practices, one need only ask the rhetorical question: "Would the lawyer's other clients, not parties to the real estate transaction, be willing to lend their funds to the lawyer without interest so that he could conclude that real estate transaction?"

The Committee is aware that the same type of invasion of other clients' funds may be involved in the immediate disbursement upon funds in some of the forms specified in Section 6.1-2.10, but the Committee also believes that a diligent settlement attorney who presents funds in these forms to his bank with a request that such bank extend immediate credit upon deposit in his trust account will be accommodated by the bank. While the Wet Settlement Act is not a perfect solution to the ethical problems inherent in disbursing upon uncollected funds, the Committee is of the opinion that an attorney who observes its provisions strictly and who uses diligence to obtain credit in his trust account at the earliest possible time upon items deposited therein in the forms prescribed by the Wet Settlement Act, will not be exposing his clients to any serious risk of harm.

The Committee found distinguishable the situation later raised in LEO 898. In that opinion, the question raised is whether an attorney could disburse immediately after depositing a check into the Bank after the Bank has officially closed. The opinion summarizes the prior conclusion drawn in LEO 183 as resting on the concept that, in that situation, the check would be "irrevocably credited" to the account. When a check is deposited after hours, it is in no way credited to the account at the time of the deposit. Therefore, the Committee concluded in LEO 898 that an attorney could not disburse proceeds immediately after depositing the check into a closed bank.

Is the policy of the Bank, regarding the deposit of a check after 2:00 but during the Bank's open hours, the equivalent to the after-hours deposit in LEO 898? The Committee opines that the deposit after 2:00, if made while the Bank remains open, is distinguishable from LEO 898. At this bank, even with its 2:00 policy of freezing accounts for post-2:00 deposits, when a deposit is made, for example at 3:00, the teller would presumably still issue a deposit receipt confirming deposit, thereby rendering the deposit "irrevocable." Those post-2:00 but pre-closing time deposits would be irrevocably credited and thus not directly prohibited by the principle established in LEO 898.

The Committee opines that if the attorneys in the firm in the above hypothetical deposit the checks in question not only after 2:00, but also after the Bank closes, LEO 898 squarely applies and makes clear that immediate disbursement would be impermissible. The question remains then whether the attorneys may deposit the real estate checks after 2:00 but while the Bank is still open, an issue not addressed in LEO 898. Critical here is the principle stated in Rule 1.3(c) that an attorney should not intentionally prejudice or damage a client. The present hypothetical and that of LEO 183 are distinguishable in an important way. In LEO 183, only the amount of the check is frozen by the Bank, with other monies remaining available. In contrast, in the present hypothetical, the Bank freezes the entire account regardless of the amount of the check or the amount of other funds in the account.

In the portion of LEO 183 quoted above, a key point is the following:

... the Committee also believes that a diligent settlement attorney who presents funds in these forms to his bank with a request that such bank extend immediate credit upon deposit in his trust account *will be accommodated by the bank.* (Emphasis added.)

The hypothetical presented in LEO 183 included that sort of bank cooperation. In contrast, the Bank in the present hypothetical is not cooperating and accommodating the real estate attorneys by extending immediate credit. To the contrary, the Bank is freezing the entire account, including all monies deposited on behalf of other clients. The Committee opines that this distinction removes the present hypothetical from the safe harbor developed in LEO 183.

Were these attorneys to deposit real estate proceeds in a trust account with the Bank in the hypothetical situation, it would be done with the knowledge that as checks are written for other clients on Monday or Tuesday, those checks will bounce. To intentionally bounce those checks would be a violation of Rule 1.3(c). That the Bank would explain its policy to the Virginia State Bar each time such a check bounced does not change that the writing of the check violated Rule 1.3(c)'s prohibition against intentionally prejudicing or damaging a client.

Similarly, for those attorneys to write those checks, with the knowledge that the checks will bounce would be impermissible under Rule 8.4. In pertinent part, Rule 8.4 states:

It is professional misconduct for a lawyer to:

- (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law; [or]
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

The intentional writing of a check with the knowledge it will bounce is the sort of deliberate act prohibited in paragraph (b) of the rule. Also, such an act involves a misrepresentation as to the negotiability of the check, and thus violates paragraph (c) of the Rule. The attorney would be making a misrepresentation to whomever the check is written in that transmitting the check suggests that the check is "good" and will provide the stated funds to the payee. Those provisions are violated in that the intentional writing of checks that will bounce would reflect adversely on an attorney's basic trustworthiness and fitness to practice. It is fundamental that when a client or any member of the public receives a check from a lawyer written on his trust account, that person must be able to count on the good faith of the lawyer and the reliability of the check.

It is outside the purview of this Committee to regulate this bank or its policies. However, this Committee does opine that it would be impermissible under the Rules of Professional Conduct for these attorneys to write checks on the trust account during this hold period for so long as the Bank maintains this policy.

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

Committee Opinion
June 30, 2004

**LEGAL ETHICS OPINION 1798
ARE COMMONWEALTH'S ATTORNEYS HELD TO THE SAME
ETHICAL REQUIREMENTS AS OTHER ATTORNEYS?**

You have presented two hypotheticals involving the Commonwealth's Attorneys Office of Metro County, which has seven assistants. Based on staffing standards developed by the state agency that funds the Commonwealth's Attorney's Office, the office should have at least 3 additional prosecutors to handle the felony caseload of that jurisdiction. As a result, Assistant Commonwealth's Attorney Smith is assigned far more cases than the state standards suggest he should be handling. Due to recent reductions in staff, Smith is also required to take over the caseload of another prosecutor that left the office and the position cannot be filled. Because of his heavy caseload, Smith does not have adequate time to prepare the cases he takes to trial. Smith tells his boss, the Commonwealth's Attorney, that his caseload is too high and that he does not have the time needed to properly prepare his cases for trial. The Commonwealth's Attorney responds that he knows the office is understaffed, but given the current lack of funding, there is nothing he can do about it. Despite his acknowledgement that the Commonwealth's Attorney has the authority to decline cases for prosecution, and is not mandated by statute to prosecute misdemeanor cases, Smith's boss

tells him it would not be wise politically to say no to any victim regardless of the caseload.

Hypothetical 1

Assistant Commonwealth’s Attorney Smith is assigned to prosecute Defendant Jones for rape. As a direct result of his high caseload, Smith does not have time to start preparing the Jones case for trial until two weeks prior to the trial date. When he reviews the file, he learns that the only evidence against Jones is DNA that was discovered on the victim. By statute, the Commonwealth is required to give the defense attorney 21 days notice of its intent to present DNA evidence.¹ This notice had not been provided. The trial judge refuses to grant a continuance, and the case is dismissed.

Hypothetical 2

Assistant Commonwealth’s Attorney Smith is also assigned to handle the General District Court misdemeanor docket. Although the Commonwealth’s Attorney is not required by statute to appear and prosecute misdemeanor cases, Smith’s boss wants a prosecutor present for all cases in which the defendant is represented by an attorney. The General District Court docket contains approximately one hundred misdemeanor cases each day. Smith is not provided with any police reports prior to trial for purposes of preparation, nor is he able to review the court papers to verify that lab reports or breath test certificates have been properly filed. In most cases, his first knowledge of the facts comes a few moments prior to the case being called for trial. In a prosecution for misdemeanor possession of marijuana, Smith has the officer describe the arrest. As Smith listens to the facts, he realizes that a necessary witness was not subpoenaed by the officer. In addition, when he attempts to admit the lab analysis to prove the item seized was marijuana, he learns that it has not been filed with the court seven days prior to trial as required by statute. As a result of the missing witness and the inadmissibility of the lab analysis, the case is dismissed.

You have asked the Committee to opine, under the facts of the inquiry, the following questions:

- 1) Has Assistant Commonwealth’s Attorney Smith violated Rule 1.1’s duty of competence and Rule 1.3’s duty of diligence in the above hypothetical scenarios when his failure to do that which is required is directly attributable to the exceptionally high caseload he is required to carry?
- 2) Has the Commonwealth’s Attorney violated his supervisory duties under Rule 5.1 by assigning Smith more cases than he can reasonably be expected to prosecute in a competent and diligent manner?

Fundamental to your first question is whether Commonwealth’s Attorneys are held to the same ethical requirements as other attorneys. Specifically, can the handling of a busy caseload ever trigger a violation of Rules 1.1 and 1.3 by a Commonwealth’s Attorney?

Rule 1.1 requires an attorney to provide competent representation for his client; the rule defines “competent” as including “the legal knowledge, skill thoroughness and preparation reasonably necessary for the representation.” Further pertinent clarification is found in Comment 5 to Rule 1.1;

¹ Virginia Code §19.2-270.5.

“adequate preparation” is presented as an aspect of the duty of competence.

Rule 1.3 requires an attorney to perform his legal services with diligence and promptness. Comment 1 to that rule notes that a lawyer should control his work load, “so that each matter can be handled adequately.” Also, Comment 2 to that rule explains that the duty of diligence includes *timely* performance of the legal work. As expressed in that comment, a “client’s interests often can be adversely affected by the passage of time or the change of conditions.”

The language of Rules 1.1 and 1.3 includes no exceptions; there is no language creating a different standard for prosecutors. The “Scope” section for the Rules of Professional Conduct states that the rules “apply to all lawyers, whether practicing in the private or public sector.” While that section does reference that Commonwealth Attorneys may have additional authority under state and/or constitutional law, nothing in the Scope section creates a lower standard for ethical compliance with the rules for prosecutors. The general duties of competence and diligence apply equally to all attorneys licensed to practice in Virginia, including Commonwealth’s Attorneys.²

The Committee recognizes that Commonwealth’s Attorneys have a somewhat different attorney/client relationship than that of attorneys in the private sector. The client for Commonwealth’s Attorneys is the Commonwealth of Virginia. That client must receive the same protection under the ethics rules as any client obtaining legal services.

Any attorney serving as a Commonwealth’s Attorney, in fulfilling his duties of competence and diligence, must be mindful of a pertinent directive from Rule 1.16. Paragraph (a) of Rule 1.16 dictates that a lawyer not accept or continue a particular representation if it means violating another ethical rule. As explained in Comment [1] to the rule:

A lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

This Committee finds persuasive the analysis and conclusions drawn by the Arizona Bar regarding a prosecutor’s obligations, in its Ethics Opinion 86-4:

Ethical Rule 1.16 makes clear that a lawyer with a maximum caseload must decline new cases or terminate representation where the representation will result in violation of the Rules of Professional Conduct or other law. Consequently, where the demands of an extreme caseload make an attorney unable to devote sufficient attention to a particular case, acceptance of that case will cause a violation of Ethical Rules 1.1 on competent representation, 1.3 on attorney diligence and 1.16 for failing to decline or terminate representation where the representation will violate these rules.

Thus, a lawyer who accepts more cases than he can competently prosecute will be committing an ethical violation.

² Although this opinion addresses workloads for prosecutors, excessive caseloads for public defenders and court-appointed counsel raise the same ethical problems if each client’s case cannot be attended to with reasonable diligence and competence.

This Committee agrees and opines that a Commonwealth's Attorney who operates with a caseload so overly large as to preclude competent, diligent representation in each case is in violation of the ethics rules.³

Your inquiry presents very specific details regarding Attorney Smith's cases and asks whether those details constitute a violation of Rules 1.1 and 1.3. Whether a particular matter has been handled with competence and diligence is very fact-specific, involving many factors such as the complexity of the matter as well as the knowledge, skill and preparation needed for the matter. Such a context-specific determination is for a fact-finder and goes beyond the purview of this Committee. Accordingly, the Committee declines to opine as to whether the two instances provided violate the rules. Nonetheless, the Committee notes that if an attorney fails to take critical steps or makes a critical mistake in a client's case where such omission or error rises to the level of a Rule 1.1 and/or 1.3 violation, the fact that the attorney represents the Commonwealth and has a large caseload does not provide a safe harbor.

Your second question regards the supervision of Attorney Smith. If Attorney Smith has violated Rule 1.1 and/or Rule 1.3, is there any ethical issue faced by the lead Commonwealth's Attorney who supervises him?

Rule 5.1 (a) requires that a lawyer in a managerial position make reasonable efforts to ensure that the firm has measures in place so that lawyers in the office conform to the Rules of Professional Conduct. Also, paragraph (b) of Rule 5.1 states that where one attorney has direct supervision over another lawyer, the supervisor should make reasonable efforts to ensure the other lawyer complies with the Rules of Professional Conduct. The rule continues in paragraph (c) to hold responsible a supervising attorney for the ethical violations of an attorney he supervises if the supervisor orders or knowingly ratifies the conduct involved. In elaborating upon those duties, Comment [2] to the rule presents a list of procedures a supervising attorney should have in place; one example is a procedure to "identify dates by which actions must be taken in pending matters."

Those provisions do place responsibility on the shoulders of a Commonwealth's Attorney for having in place policies and procedures to establish an office that practices within the parameters of the Rules of Professional Conduct and that the Commonwealth's Attorney properly supervise the Assistant Commonwealth's Attorneys reporting to him to assure ethical compliance. Attorney Smith in struggling with his caseload and missing important deadlines was under the supervision of the Commonwealth's Attorney. That lead attorney in deciding the case load to be borne by Attorney Smith is in a position to render impossible Attorney Smith's ability to work compe-

tently and diligently. Where a supervising attorney assigns a caseload so large as to preclude any hope of the supervised attorney's ethically representing the client (or clients), that supervisor would be in violation of Rule 5.1.

As in question one above, whether a particular attorney's caseload is in fact of such a detrimental size is so context-specific as to be a determination proper only for a fact-finder and is, therefore, outside the purview of this Committee. Nonetheless, if a Commonwealth's Attorney has in fact assigned such an impermissibly large caseload to an Assistant Commonwealth's Attorney, the facts that the client is the amorphous Commonwealth and that the Commonwealth's Attorney has himself a large caseload provide no safe harbor from the requirements of Rule 5.1.

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

Committee Opinion
June 30, 2004

Revised
August 3, 2004

LEGAL ETHICS OPINION 1799
CONFLICT OF INTEREST—CAN A COMMONWEALTH'S ATTORNEY PROSECUTE CASES WHERE THE DEFENDANT IS REPRESENTED BY THE COMMONWEALTH'S ATTORNEY'S FORMER PARTNER WITH WHOM HE/SHE OWNS AN INTEREST IN REAL ESTATE?

You have presented a hypothetical in which A and B were the only partners in a firm. A and B as individuals owned the office building in which the law office was located. A was appointed the Assistant Commonwealth's Attorney for the locality. B continued as a sole practitioner in the office building. B pays no rent for the law practice, but two other tenants pay rent, which goes to the mortgage payments and for upkeep of the building. A is responsible for one-half of the real estate taxes, with B responsible for the other half, only if rents are insufficient to cover the taxes. Where the rent paid is insufficient to cover the mortgage, B pays the balance. A and B benefit from the increasing equity and from tax deductions for the building. A and B also own the office equipment, computers, and furniture used by the tenants of the building, including B's law practice. The AB law firm obtained a loan for partnership business. Monthly payments on that loan are now paid solely by B, but A remains legally responsible for the balance, along with B. B represents criminal defendants in A's jurisdiction.

You have asked the Committee to opine, under the facts of the inquiry, whether A is precluded from prosecuting those defendants represented by B.

This Committee has in the past considered landlord/tenant relationships between opposing counsel. See LEOs ##1416, 1578. The focus of those opinions was less on the mere fact of a landlord/tenant relationship and more on the fact that the offices of opposing counsel were in the same building. For instance, in LEO 1416, this Committee found a conflict where the opposing counsel shared a law library, waiting room, and receptionist while the situation in LEO 1578 was

3 In addition, Comment 1 to Rule 3.8 provides:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided on the basis of sufficient evidence. (emphasis added).

Rule 3.8 (a) prohibits a prosecutor from initiating or maintaining a charge once the prosecutor knows that the charge is not supportable by probable cause. The term "knows" as used in this rule denotes actual knowledge on the part of the prosecutor. While the cited rule may not be violated under the circumstances presented in your hypothetical, the inability of the prosecutor, due to his or her crushing caseload, to prepare his or her case and evaluate the strength of the Commonwealth's case frustrates these principles.

distinguished in that no such sharing was present. Neither opinion addresses whether the landlord/tenant relationship rose to a personal interest creating a conflict of interest for the attorneys.

It is this question of potential conflict of interest that is at issue in the present inquiry. Prior opinions considering business relationships between opposing counsel as a source of conflicts of interest applied DR 5-101(A), predecessor to the current Rule 1.7(b). DR 5-101(A) stated the following:

A lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances.

In contrast, the current Rule 1.7(b) states, in pertinent part, the following:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation.

Thus, the prior opinions looking at business relationships between opposing counsel applied the DR 5-101 standard of "may affect," as opposed to the current, Rule 1.7's narrower standard of "may be materially limited." See, LEO ## 789, 1311, and 1767. Only recent LEO 1767 has applied Rule 1.7(b) to a business relationship between opposing counsel to consider the issue of a conflict of interest.

LEO 1767 involved a Commonwealth's Attorney who retained private counsel to do collections work for the Commonwealth's Attorney. That opinion found that such a relationship did create a conflict of interest for the Commonwealth's Attorney in any case where that private attorney represented the defendant. The normal Rule 1.7(b) conflicts "cure" was not available in that instance due to the Commonwealth's Attorney having no means to obtain the necessary consent from his client, the Commonwealth of Virginia. The Committee in finding a conflict in that scenario noted the following:

The prosecutor who is the client of the defense attorney may find his ability to represent the Commonwealth against the attorney compromised. Loyalty to a client must not be watered down by a personal business or relationship with opposing counsel. This Committee finds that . . . the Commonwealth's Attorney's representation "may be materially limited" in any case where he is the client of opposing counsel.

The concern of diminished loyalty to one's client is at the heart of a "personal interest" conflict for a lawyer. Comment 4 to Rule 1.7 states that a critical question for determining a conflict of interest is "whether it will interfere with the

lawyer's independent professional judgment." In LEO 1767, the Committee concluded that interference with or watering down of the lawyer's professional judgment and loyalty to the client would always be present whenever a lawyer is the client of his opposing counsel.

In contrast, not all conflict scenarios can be decided so categorically. The determination of whether the business relationship between opposing counsel constitutes a conflict will often be very fact-specific. A landlord/tenant relationship between opposing counsel is that sort of fact-specific context; the mere existence of the leasing arrangement will not always give rise to a conflict, nor will it never do so. It will be the particular details surrounding each such situation that will be critical to the determination.

In the present scenario, several facts indicate further entanglement between the prosecutor and the defense attorney beyond a mere landlord/tenant relationship. While the prosecutor is a landlord for the defense attorney's law practice, the following conditions are also present:

- 1) The two opposing counsel co-own the building;
- 2) The two opposing counsel are each responsible for the mortgage on that building;
- 3) The prosecutor is landlord not for a residence or a nonlegal business of the defense attorney, but for his law practice; and
- 4) The prosecutor is co-owner of the computers, office equipment and furniture of the defense attorney's law practice.

Because the business connection between the prosecutor and this defense attorney is directly related to the law practice of the defense attorney, the Committee opines that this business relationship qualifies as a personal interest of the prosecutor giving rise to a conflict of interest under Rule 1.7(b). As the prosecutor's client is the Commonwealth, he is not able to obtain client consent as contemplated in Rule 1.7(b)(2). Accordingly, in this hypothetical, the Assistant Commonwealth's Attorney is precluded from prosecuting clients represented by the defense attorney. Moreover, as the all conflicts arising under Rule 1.7 are imputed to each member of a firm¹ under Rule 1.10(a)², no other prosecutor in that office may prosecute a defendant represented by this defense attorney.

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

Committee Opinion
June 30, 2004

1 The definition of "firm" from the Terminology section of the *Rules of Professional Conduct* is as follows, "a professional entity, public or private, organized to deliver legal services, or a legal department or a corporation or other organization." That definition is not limited to private law firms but also applies, for example, to a Commonwealth Attorney's office.

2 Paragraph (a) of Rule 1.10 states in pertinent part, [while] lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by . . . [Rule] 1.7.