

**LEGAL ETHICS OPINION 1766
CONTINGENT FEE AGREEMENT THAT CHARGES PERCENTAGE
OF RECOVERY PLUS HOURLY FEE**

You have presented a hypothetical situation in which a client, a former federal worker, has retained counsel to represent him in an appeal to the Merit Systems Protection Board of the decision to deny him disability retirement benefits when he was fired from his position. The attorney entered into a fee agreement which stated that payment was contingent upon obtaining a successful outcome. The appeal was successful and the award called for both a monthly lifetime annuity and a lump sum payment. Certain disputes arose between the attorney and the client, and the client fired the attorney before all necessary paperwork was completed in order for the client's payment to begin; however, all non-administrative, legal work in the case was completed. The attorney asserts that he is entitled to one-third of the lump sum as well as one-third of the value of the lifetime annuity plus compensation of \$200 per hour for time expended by the attorney and \$150 per hour for time expended by his associate. The client maintains that he believed that the attorney would be entitled only to the hourly compensation, as attorney's fees were awarded by the Merit Systems Protection Board. The attorney maintains that the majority of the fee award was paid to the client's first attorney, who had originated the case, and has now filed suit against the client seeking one-third of the lump sum. He plans to amend the pleadings to seek also the life time annuity, though not the hourly compensation called for in the fee agreement. The client maintains that the attorney/client contract is void because it is a "mixed" fee agreement, combining a percentage and an hourly fee, and, therefore, quantum meruit is the only appropriate standard for the attorney's recovery.

Under the facts you have presented, you have asked the committee to opine as to whether it is ethical to include both a percentage of recovery and an hourly fee in an attorney's fee agreement if both are contingent upon a successful outcome and whether it is ethical for the attorney to amend his pleadings to increase his recovery solely because the former client challenges the attorney's calculation of the fee.

Your first question asks for a determination of the propriety of a "mixed fee"¹ involving a contingent fee, with the specific amount to be determined by a sum of a percentage of the award plus an hourly amount for legal work performed. The committee notes that while the term "mixed fee" frequently is used to describe an agreement containing an hourly amount that is fixed combined with a percentage that is contingent, the agreement in the present hypothetical makes both the hourly and the percentage portions of this fee contingent upon a successful the outcome in the case.

This fee agreement, like all fee agreements, is subject to the requirement of Rule 1.5 (a) that the fee be "reasonable." Thus, the fee in the hypothetical is only permissible if the sum of one-third of the recovery plus \$200 and \$150 per hour for the lawyers' time does not amount to an unreasonable fee for the work performed. Determination of whether the fee agreement in this hypothetical is reasonable would involve consideration of the factual context in which the agreement was entered. Rule 1.5(a) provides an extensive list of factors for that determination:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

Application of those factors would involve a fact-specific analysis that is outside of the purview of this committee. However, the committee notes that the fact that a client consents to a fee agreement does not obviate the lawyer's obligation to charge only reasonable fees. See Rule 1.5.

Along with the general requirement of reasonableness applicable to all legal fees, contingent fees have additional requirements. For a contingent fee to be appropriate, there must be actual risk of nonpayment and a res from which the fee can be paid. LEO 1606. The agreement contemplated in the hypothetical meets those criteria in that there is a clear risk of nonpayment as the lawyer is paid nothing if he does not prevail and there is a clear res as the case involves a potential award of retirement benefits. Rule 1.5 (c) proscribes requirements for contingent fees; however, those requirements involve clarity and communication of calculation method and do not dictate whether a contingent fee must be a percentage, an hourly rate or a flat fee. Thus, nothing in rule 1.5(c) directly prohibits a "mixed" contingent fee that is determined by combining an hourly rate with a percentage of the res, nor that is determined by combining a fixed and a contingent fee so long as any resulting total fee remains reasonable.

Your second question is whether it is ethically permissible for the attorney to amend pleadings to seek a larger portion of the fee outlined in the fee agreement in response to the client's challenge of this fee. It is well-established that a lawyer may sue a former client for unpaid fees. See. LEOs #995, 996, 1325, & 1544. As to motive for pursuing a particular amount, the committee lacks sufficient information regarding the motive behind the amended pleading; however, the appropriate standard for determining such a question would be Rule 3.1's directive that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous..." Determination of the merit of the particular pleading in this hypothetical is not within the purview of this committee. The committee does note as pertinent to the resolution of this fee dispute is the concept of quantum meruit as discussed in LEO 1606. That opinion states as follows:

When the attorney is discharged prior to the completion of the representation he may only recover the reasonable value of the services which he has rendered. He cannot recover for damages for the breach of the contract, and, in instances where the fee is contingent upon the outcome of the matter, the attorney may not recover the full agreed upon fee. He is entitled only to a recovery in quantum meruit for services actually rendered.

Whether that concept, first articulated in *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 985 (1977), has been triggered in the hypothetical scenario is for a trier of fact to determine, and as such is outside the purview of this committee.

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

**LEGAL ETHICS OPINION 1767
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 resolv-

**VIRGINIA STATE BAR COUNCIL TO REVIEW
THE STANDING COMMITTEE ON LEGAL ETHICS'
PROPOSED REVISIONS TO THE RULES 3.5 & 5.3**

RICHMOND, VA—Pursuant to Part Six: Section IV, Paragraph 10(c)(iv) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on February 21–22, 2002, in Richmond, Virginia, is expected to consider for approval, disapproval, or modification, proposed amendments to Rules 3.5 and 5.3 of the Virginia Rules of Professional Conduct. The amendments are the result of a comprehensive review of the Rules of Professional Conduct by the Standing Committee on Legal Ethics ("Committee"). That review had two primary goals: (1) the Committee reviewed the American Bar Association's Ethics 2000 initiative, which involved revising the Model Rules of Professional Conduct; and (2) the Committee reviewed Virginia's current rules to determine, now that they have been in place since January 2000, whether any provisions need clarification. The proposed revisions to Rules 3.5 & 5.3 were preceded by a larger package of proposed revisions that were reviewed at the October 2002 Council meeting.

Rule 3.5

The committee proposes additional restriction on an attorney's contact with jurors after the discharge of the jury. This revision is not related to the ABA Ethics 2000 initiative; rather, committee consensus was that these restrictions would further the goals of Rule 3.5's protection of jurors.

Rule 5.3

The committee proposes clarifying language to this rule that is not intended to significantly change the substance of this rule. The purpose of the proposed language is to clarify the rule's general applicability to all lawyers.

Inspection and Comment

The proposed rule amendments may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday.

Copies of the proposed amendments can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at <http://www.vsb.org/profguides/proposed>.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than December 2, 2002.

If the amendment is approved by Council, the Virginia State Bar will petition the Supreme Court of Virginia to adopt Rules 3.5 & 5.3 as amended.

ing 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 