

Committee Opinion
April 3, 1989

LEGAL ETHICS OPINION 1203

COMMONWEALTH'S ATTORNEY –
CONFLICT OF INTEREST – MULTIPLE
REPRESENTATION – DISCLOSURE –
APPEARANCE OF IMPROPRIETY:
COMMONWEALTH'S ATTORNEY
ENTERING INTO CONTRACT WITH
PRIVATE ATTORNEY WHO
REGULARLY DEFENDS CASES IN
THAT COMMONWEALTH
ATTORNEY'S JURISDICTION.

You have asked several questions with regard to Virginia Code § [19.2-349](#) allowing the Commonwealth's attorney to contract with attorneys in private practice as independent contractors for the collection of unpaid fines, costs, forfeitures, and penalties which constitute a civil judgment in favor of the Commonwealth pursuant to Virginia Code § [19.2-340](#) and § [19.2-341](#). Under this contract, the private attorney would seek to enforce collection as a civil judgment in furtherance of the duty of the Commonwealth's attorney to superintend the issue of all executions or judgments for fines and costs pursuant to Virginia Code § [19.2-348](#).

You indicate a potential problem arising in rural areas of the state in which only a few attorneys actually practice in the courts of those jurisdictions and are not able to specialize only in civil cases due to the low volume of legal business. You have asked four questions with regard to the propriety of the Commonwealth's attorney's contracting with attorneys in private practice for the collection of unpaid amounts arising out of criminal cases.

I. May a Commonwealth's attorney enter into a contract for the collection of unpaid fines, costs, forfeitures, and penalties in criminal cases with an attorney in private practice who regularly or occasionally represents defendants in criminal cases in the same jurisdiction in which the Commonwealth's attorney prosecutes cases?

The Committee has previously opined that the Commonwealth's attorney should not prosecute the cases when the defense attorney also represents the Commonwealth's attorney in unrelated personal litigation, and the defense attorney should not defend cases when the prosecutor is also the defense attorney's client in an unrelated matter pursuant to [DR:5-101](#)(A), [DR:5-105](#)(A), (B) and (C). The Committee believes that since the instant situation would be likely to involve the same or substantially related litigation, the prohibition would be even more emphatic. (See [LE Op. 789](#))

II. May an attorney in private practice enter into a contract for the collection of unpaid fines, costs, forfeitures and penalties in criminal cases with the Commonwealth's attorney when the attorney in private practice regularly or occasionally represents defendants in criminal cases in the same jurisdiction in which the Commonwealth's attorney prosecutes criminal cases?

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Since a private attorney contracting to collect unpaid fines, costs, forfeitures and penalties for the Commonwealth's attorney would be entering into an attorney-client relationship with that Commonwealth's attorney, the provisions of [DR:5-105](#) are controlling in any situation in which the same attorney is involved in defending clients prosecuted by the same Commonwealth's attorney. Although under some circumstances the clients' consent after full disclosure of the possible effect of such multiple representation may permit the attorney to represent both clients, it is the opinion of the Committee that such consent would not cure the conflict in the circumstances described here. The preliminary test for continuing multiple representation lies in the mandate of [DR:5-105\(C\)](#), which permits a lawyer to represent multiple clients "if it is obvious that he can *adequately represent the interest of each.*" (emphasis added) It is the opinion of the Committee that the multiple representation of this situation does not permit obviously adequate representation of both the defendant/client and the Commonwealth's attorney. Thus, the Committee believes that it would be improper for an attorney in private practice who regularly or occasionally represents defendants in criminal cases in the same jurisdiction in which the Commonwealth's attorney prosecutes criminal cases to contract with that Commonwealth's attorney for the collection of monies due from criminal defendants. (See [LE Op. 840](#), [LE Op. 622](#))

In addition, the Committee directs your attention to [DR:9-101\(C\)](#), which provides that a lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official. While the existence of the contractual relationship may not cause a *per se* violation of [DR:9-101\(C\)](#), the Committee is concerned that the situation may arise to the level of an implication that the interests of the attorney's criminal defendant/clients may be enhanced because of the attorney's simultaneous contractual relationship with the Commonwealth's attorney.

III. Does Virginia Code § [19.2-349](#) create a statutory exception provision to the Code of Professional Responsibility that might otherwise prohibit the entry into such contracts by the Commonwealth's attorney and an attorney in private practice who represents defendants in criminal cases in the jurisdiction where the Commonwealth's attorney prosecutes the same?

The Committee believes that a legal obligation does not allow an attorney to ignore or otherwise to take exception to his professional responsibility. While Virginia Code § [19.2-349](#) allows the Commonwealth's attorney to contract with a collection agency or an attorney in private practice to collect any unpaid fines, costs, or penalties, the parties should be aware that it is improper under the Virginia Code of Professional Responsibility for a contractor who is an attorney to represent defendants in criminal cases in the same jurisdiction in which the Commonwealth's attorney prosecutes the same.

The statute created an independent service to assist the Commonwealth's attorney in enforcing collection of charges which arise out of criminal convictions of defendants. However, the logistics of not being able to subcontract to another individual or agency, unless co-counsel is needed, as prescribed in paragraph 2 of the Contract Guidelines, will

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result in restricting a firm's criminal practice. Just as in rural counties where the number of attorneys whose practice consists of both criminal and civil law is limited, the potential for a conflict may be obviated if the Commonwealth's attorney pursued a contract with a collection agency. The committee is of the view that with some alteration to the current Guidelines, attorneys in rural areas of the state who have a mixed civil-criminal practice might be able to serve in the collection capacity. The Committee respectfully suggests that this could be achieved by modifying the Guidelines to (a) include provisions for either a subcontractor or multiple contractors where an attorney also wished to maintain a criminal practice; (b) permit a party other than the Commonwealth's attorney to contract with the private attorney, e.g., the Board of Supervisors or the County attorney; or (c) permit private attorneys to contract with the Commonwealth's attorney for neighboring jurisdiction in which the attorney does not practice criminal law.

IV. Where the contract has been made with a private attorney who is a member of a firm, would other members who regularly defend criminal cases in the courts of the same jurisdiction in which the Commonwealth's attorney prosecutes cases be vicariously disqualified from a case if the private attorney/contractor should be disqualified? Disciplinary Rule 5-105(E) is the appropriate and controlling rule, which provides that if a lawyer is required to decline employment or to withdraw from employment under [DR:5-105](#), no partner or another of his firm may accept or continue such employment.

Hence the Committee opines that the vicarious disqualification of members of the private attorney/contractor's firm would be required in any criminal case which the private attorney/contractor would have to personally decline under [DR:5-105](#)(A), (B), (C) or (D).

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