

LEGAL ETHICS OPINION 1575

CONFLICT OF INTEREST - MULTIPLE
REPRESENTATION OF CRIMINAL CO-
DEFENDANTS; CONFIDENCES AND
SECRETS OF FORMER CLIENT; DUTY
TO REPORT MISCONDUCT.

You have presented a hypothetical situation in which Attorney A represented two co-defendants (1 and 2) on charges of possession with intent to distribute cocaine and possession of a firearm while possessing a Schedule II controlled substance. The charges against Defendants 1 and 2 arose as a result of a search warrant executed upon the residence of 1 and 2 by narcotics investigators. At the time of their arrests, both Defendants 1 and 2 made statements denying any knowledge of items found at their residence. Attorney A appeared on behalf of both co-defendants at their initial appearance and for a preliminary hearing before the general district court. The charges against Defendants 1 and 2 were certified to the grand jury after presentation of the Commonwealth's evidence at the preliminary hearing. The grand jury returned indictments against both defendants.

You further advise that, on grand jury day, both defendants appeared before the circuit court. At that time, Attorney A, by appearance of an associate, withdrew from representation of Defendant 2 but continued his representation of Defendant 1. Thereafter, Defendant 2 appeared before the circuit court, along with an associate of Attorney A, and advised that she needed time to hire new counsel. Defendant 2 thereafter appeared before the circuit court with Attorney B, and Attorney B advised the circuit court that he had been retained by Defendant 2 to represent her.

You indicate that, while the cases against Defendants 1 and 2 were still in the general district court, the Deputy Commonwealth's Attorney advised Attorney A of the possibility that Defendant 2 would be called to testify against Defendant 1. Furthermore, after the matters were in the circuit court, the Deputy Commonwealth's Attorney discussed with Attorney B the possibility that Defendant 2 would testify against Defendant 1.

Attorney B then contacted investigators to arrange a time to meet with them to debrief Defendant 2 regarding her knowledge of the case. During a second conversation between Attorney B and the investigator, Attorney B advised that Defendant 2 would not testify. Attorney B advised the investigator that he had not yet been paid by Defendant 2 and that Defendant 2's retainer, paid to Attorney A, was being withheld by Attorney A on the condition that she not testify against Defendant 1. Attorney B advised the investigator that Defendant 2 had advised him of this situation during a phone conversation with Defendant 2 and that Defendant 1 was present with Defendant 2 during the conversation and affirmed that \$2500 was being withheld by Attorney A. Attorney B had also advised the Deputy Commonwealth's Attorney that he had not yet been paid and that Attorney A had not yet returned Defendant 2's retainer but did not state a reason for Attorney A's retention of funds.

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The Deputy Commonwealth's Attorney, upon receiving this information, filed with the circuit court a motion, including an affidavit sworn by the investigator regarding his conversation with Attorney B, to recuse Attorney A from any further representation of Defendant 1. Attorney B has denied any responsibility on his part to report the matter to the appropriate professional authority.

You further indicate that Defendant 2 will be subpoenaed and called as a witness by the Commonwealth to testify in the trial of Defendant 1.

You have asked the committee to opine under the facts of the inquiry, (1) whether Attorney A may continue to represent Defendant 1; and (2) whether Attorney B has a duty to report to the Virginia State Bar the information given to him by Defendant 2.

As to your first question, following its review of your request at its February 4, 1994 meeting, the Committee determined to decline to render an opinion under the discretion granted it by the Rules of the Virginia Supreme Court, Part Six: Section IV. Para. 10(c) (ii), since the issue you raised was the subject of litigation.

As to your second question, the Rules of Court require that the Standing Committee on Legal Ethics determine whether requests for advisory opinions present previously unresolved issues. The staff of the Virginia State Bar has reviewed your inquiry and believes that earlier opinions are dispositive of your inquiry. Enclosed are the full texts of the relevant Legal Ethics Opinions. Please review these Opinions for guidance on the issue you raised.

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