

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 defense attorney defending two criminal defendants in separate cases. Defendant #1 retained the attorney to represent him on a charge of possession of a firearm as a convicted felon in state court. Defendant #1 told the police at the time of his arrest that he had a gun solely to protect himself from Defendant #2, who had shot his brother, murdered his step-father, and placed a contract on Defendant #1’s life. The state weapons charge was dismissed against Defendant #1. He was then charged with a federal weapons charge for the same firearm. Defendant #1 again hired the attorney for the federal case. Defendant #2 then hired that same attorney to represent him in state court on charges of first degree murder, abduction, conspiracy to commit murder, possession of a firearm by a convicted felon, and use of a firearm in the commission of a felony. Defendant #1 told the attorney he did not want to plead guilty to the firearms charge because he had the gun solely to protect himself from Defendant #2. The case was set for trial. The attorney reviewed discovery materials which identified Defendant #2, his client, as the person Defendant #1 feared. The attorney did not disclose to either client or either court that he represented both Defendant #1 and #2. The attorney persuaded Defendant #1 to plead guilty, forego raising the self-defense issue, and forego implicating Defendant #2. Defendant #1 was sentenced to fifteen years imprisonment. Defendant #2 was sentenced to 105 years imprisonment. The attorney accepted the court appointment to represent Defendant #1 in his appeal; he again did not disclose to clients or the court that he represented each of these defendants. Defendant #1’s conviction and sentence were affirmed.

Under the facts you have presented, you have asked the Committee to opine as to whether this attorney had an impermissible conflict of interest under the Rules of Professional Conduct by representing these two defendants. The pertinent legal authority regarding this issue is Rule 1.7, which addresses conflicts between current clients. Rule 1.7 has two paragraphs. Paragraph (a) deals with conflicts between clients who are directly adverse to each other. That paragraph is not relevant here as in each of the two criminal cases, the adverse party is the Commonwealth, rather than a victim or other witness. Thus, these two clients are not “directly adverse” for purposes of Rule 1.7.<sup>1</sup>

Paragraph (b) has broader parameters. Paragraph (b) addresses those situations where the representation of a client “may be materially limited by the lawyer’s responsibilities to another

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<sup>1</sup> Comment 7 to this rule clarifies the difference in applicability of subparagraph (a) and (b):

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b).

client or to a third person, or by the lawyer's own interests." A lawyer is prohibited from such a representation unless:

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

The defense attorney's multiple representations in this hypothetical is within the reach of this provision. Specifically, each representation could be "materially limited by the lawyer's responsibilities to another client." In considering Defendant #1's claim of self protection, the attorney had a competing duty to Defendant #2 to present him in the best light and to develop no testimony supporting the charges against him. The two perspectives are irreconcilably at odds; thus, this attorney, upon realizing that Defendant #2 was the source of his other clients' fear, should have known that his representation of Defendant #1 may be materially limited by his representation of Defendant #2. Therefore, his representation of the two clients would only have been appropriate if he had also met the two criteria for the exception in paragraph (b).

The first criterion is that the lawyer "reasonably believe" the representation will not be adversely affected." The Committee finds nothing in these facts to support the reasonableness of such a belief. Defendant #1 had his charges dismissed in state court by presenting the evidence of the threat against him; yet this attorney dissuaded him from presenting the same defense for the federal charges – a dissuasion that stood to benefit his other client. The Committee concludes that the adverse affect of these simultaneous representations was too clear to have reasonably been believed otherwise.

The Committee notes also that this attorney failed to meet the second criterion that could support this simultaneous representation. He did not consult with either of his clients, nor did he seek their consent. Each client, as well as the appointing court for the appeal, operated in a vacuum regarding the attorney's loyalty.

The nature of the conflict of interest in the hypothetical is articulated in Comment 4 to Rule 1.7:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

This Committee opines that the defense attorney in this hypothetical had an impermissible conflict of interest in representing these two defendants in the circumstances outlined in this hypothetical.

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<sup>2</sup> While not relevant here, paragraph (a)(2) continues, "When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involve."

Committee Opinion  
March 31, 2004

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