

Committee Opinion
June 30, 2004
As Revised
August 3, 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

¹ Virginia Code §19.2-270.5.

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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; "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

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.

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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.

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

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.

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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 competently 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.

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