

LEGAL ETHICS OPINION 1799

CONFLICT OF INTEREST – CAN A
COMMONWEALTH’S ATTORNEY
PROSECUTE CASES WHERE THE
DEFENDANT IS REPRESENTED BY THE
COMMONWEALTH’S ATTORNEY’S FORMER
PARTNER WITH WHOM HE/SHE OWNS AN
INTEREST IN REAL ESTATE?

You have presented a hypothetical in which A and B were the only partners in a firm. A and B as individuals owned the office building in which the law office was located. A was appointed the Assistant Commonwealth’s Attorney for the locality. B continued as a sole practitioner in the office building. B pays no rent for the law practice, but two other tenants pay rent, which goes to the mortgage payments and for upkeep of the building. A is responsible for one-half of the real estate taxes, with B responsible for the other half, only if rents are insufficient to cover the taxes. Where the rent paid is insufficient to cover the mortgage, B pays the balance. A and B benefit from the increasing equity and from tax deductions for the building. A and B also own the office equipment, computers, and furniture used by the tenants of the building, including B’s law practice. The AB law firm obtained a loan for partnership business. Monthly payments on that loan are now paid solely by B, but A remains legally responsible for the balance, along with B. B represents criminal defendants in A’s jurisdiction.

You have asked the Committee to opine, under the facts of the inquiry, whether A is precluded from prosecuting those defendants represented by B.

This Committee has in the past considered landlord/tenant relationships between opposing counsel. *See* LEOs ##1416, 1578. The focus of those opinions was less on the mere fact of a landlord/tenant relationship and more on the fact that the offices of opposing counsel were in the same building. For instance, in LEO 1416, this Committee found a conflict where the opposing counsel shared a law library, waiting room, and receptionist while the situation in LEO 1578 was distinguished in that no such sharing was present. Neither opinion addresses whether the landlord/tenant relationship rose to a personal interest creating a conflict of interest for the attorneys.

It is this question of potential conflict of interest that is at issue in the present inquiry. Prior opinions considering business relationships between opposing counsel as a source of conflicts of interest applied DR 5-101(A), predecessor to the current Rule 1.7(b). DR 5-101(A) stated the following:

A lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances.

In contrast, the current Rule 1.7(b) states, in pertinent part, the following:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

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

Thus, the prior opinions looking at business relationships between opposing counsel applied the DR 5-101 standard of "may affect," as opposed to the current, Rule 1.7's narrower standard of "may be materially limited." *See*, LEO ## 789, 1311, and 1767. Only recent LEO 1767 has applied Rule 1.7(b) to a business relationship between opposing counsel to consider the issue of a conflict of interest.

LEO 1767 involved a Commonwealth's Attorney who retained private counsel to do collections work for the Commonwealth's Attorney. That opinion found that such a relationship did create a conflict of interest for the Commonwealth's Attorney in any case where that private attorney represented the defendant. The normal Rule 1.7(b) conflicts "cure" was not available in that instance due to the Commonwealth's Attorney having no means to obtain the necessary consent from his client, the Commonwealth of Virginia. The Committee in finding a conflict in that scenario noted the following:

The prosecutor who is the client of the defense attorney may find his ability to represent the Commonwealth against the attorney compromised. Loyalty to a client must not be watered down by a personal business or relationship with opposing counsel. This Committee finds that ...the Commonwealth's Attorney's representation "may be materially limited" in any case where he is the client of opposing counsel.

The concern of diminished loyalty to one's client is at the heart of a "personal interest" conflict for a lawyer. Comment 4 to Rule 1.7 states that a critical question for determining a conflict of interest is "whether it will interfere with the lawyer's independent professional judgment." In LEO 1767, the Committee concluded that interference with or watering down of the lawyer's professional judgment and loyalty to the client would always be present whenever a lawyer is the client of his opposing counsel.

In contrast, not all conflict scenarios can be decided so categorically. The determination of whether the business relationship between opposing counsel constitutes a conflict will often be very fact-specific. A landlord/tenant relationship between opposing counsel is that sort of fact-specific context; the mere existence of the leasing arrangement will not always give rise to a conflict, nor will it never do so. It will be the particular details surrounding each such situation that will be critical to the determination.

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In the present scenario, several facts indicate further entanglement between the prosecutor and the defense attorney beyond a mere landlord/tenant relationship. While the prosecutor is a landlord for the defense attorney's law practice, the following conditions are also present:

- 1) The two opposing counsel co-own the building;
- 2) The two opposing counsel are each responsible for the mortgage on that building;
- 3) The prosecutor is landlord not for a residence or a nonlegal business of the defense attorney, but for his law practice; and
- 4) The prosecutor is co-owner of the computers, office equipment and furniture of the defense attorney's law practice.

Because the business connection between the prosecutor and this defense attorney is directly related to the law practice of the defense attorney, the Committee opines that this business relationship qualifies as a personal interest of the prosecutor giving rise to a conflict of interest under Rule 1.7(b). As the prosecutor's client is the Commonwealth, he is not able to obtain client consent as contemplated in Rule 1.7(b)(2). Accordingly, in this hypothetical, the Assistant Commonwealth's Attorney is precluded from prosecuting clients represented by the defense attorney. Moreover, as the all conflicts arising under Rule 1.7 are imputed to each member of a firm¹ under Rule 1.10(a)², no other prosecutor in that office may prosecute a defendant represented by this defense attorney.

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

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¹The definition of "firm" from the Terminology section of the Rules of Professional Conduct is as follows, "a professional entity, public or private, organized to deliver legal services, or a legal department or a corporation or other organization." That definition is not limited to private law firms but also applies, for example, to a Commonwealth Attorney's office.

² Paragraph (a) of Rule 1.10 states in pertinent part, [while] lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ... [Rule] 1.7.