

You advise that you represented two defendants, "A" and "B", on various charges arising from the same criminal conduct. Before accepting the representation, you interviewed each defendant separately to insure that no conflict of interest existed. One week prior to trial, counsel received a letter from the Commonwealth's attorney proposing a plea bargain to "B", which included a suspended sentence conditioned upon his testimony against defendant "A". A hearing was then held and the court ruled that a conflict of representation existed. Since "B" was to obtain new counsel and might refuse the plea bargain, you continued to prepare "A's" case for trial. You have since learned that "B" is inclined to accept the plea bargain and will be testifying against "A". You have also learned that subsequent to the forced withdrawal of representation of "B", "B" met with the Commonwealth's attorney and divulged the work product of counsel for "A". Defendant "A" insists upon your continued representation because of the rapport and confidence developed during the several months of case preparation.

You pose several questions relative to the above situation. First, you ask whether your continued representation of defendant "A" would constitute a conflict of interest requiring your withdrawal from the representation.

Disciplinary Rule 5-105(D) [DR:5-105] states that "a lawyer who has represented a client in a matter should not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of a former client unless the former client consents after disclosure." The Committee opines that defendant "B" is a "former client" who was represented "in the same or substantially related matter" as that involved in your representation of defendant "A". Therefore because it is apparent that the interests of defendant "A" and "B" have now become adverse it would be unethical to continue to represent "A" without the consent of "B" after full disclosure.

Furthermore, DR:4-101 generally provides for the preservation of the confidences and secrets of a client (including those of a former client) and prohibits the use of such for the advantage of a third person. The Committee opines that there would necessarily be a grave risk of a violation of this Disciplinary Rule as to defendant "B" if representation of defendant "A" is continued.

In light of the above-cited disciplinary rules the Committee opines that it would be improper for you to continue to represent defendant "A" in this matter.

You ask whether withdrawal from representation of defendant "A" would violate any rules of conduct or ethical obligations to defendant "A". On the contrary, pursuant to DR:2-108(A)(1) a lawyer must withdraw from representation if "continuing the representation will result in a course of conduct . . . that is . . . inconsistent with the

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Disciplinary Rules". Of course, if you are counsel of record for "B" in any court proceeding you must receive leave of court before withdrawing. In addition, upon termination of representation, you must take steps to protect the interests of "B", pursuant to DR:2-108(D).

You ask whether the conduct of the Commonwealth's attorney in offering a plea bargain to defendant "B" one week prior to trial resulting in a conflict of representation violates any rules of conduct or ethical obligations to defendant "A". There does not appear to be a violation of any of the provisions of the Virginia Code of Professional Responsibility.

Your last question is whether the interview of defendant "B" by the Commonwealth's attorney after your withdrawal from representing "B" and before "B" was appointed new counsel, and where "B" revealed the work product and strategy of "A", violates any rules of conduct or ethical obligations to "A". It does not appear that any rules of conduct or ethical obligations to "A" were violated.

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