The following are opinions issued by the Standing Committee on Legal Ethics. The opinions are issued pursuant to the Rules of Court, Part Six; Section IV, Paragraph 10, and are advisory only. The opinions have no legal effect and are not binding on any judicial or administrative tribunal.

Upon request for LEOs involving a specific issue, the VSB Ethics Counsel will furnish full texts or relevant opinions at no cost. The bar reserves the right to charge for volume requests. Charges will be based upon staff time and copying costs.

LEGAL ETHICS OPINION 1742

ACTIVITIES OF CLOSING ATTORNEY IN CONNECTION WITH REAL ESTATE TRANSACTION WHEN TITLE COMPANY IS REPRESENTING SELLER

You have presented a hypothetical situation in which Attorney has received a contract concerning a real estate transaction showing that Attorney will be the settlement agent. The contract has an addendum which indicates that the settlement agent was chosen by the purchaser and that seller will have a separate attorney. The contract states, "Fees for the preparation of the deed, that portion of the Settlement Agent's fee billed to the Seller, costs of releasing existing encumbrances, appropriate legal fees and any other proper charges assessed to the Seller shall be paid by the Seller." Subsequently, Attorney receives a letter from a title company stating: 1) that the title company has been retained to represent the seller; 2) that the title company will prepare the seller's documents, including the deed, the Certificate of Satisfaction, etc.; and 3) that Attorney's settlement statement should show no charges to the seller from Attorney. The letter further states that the title company's fee to the seller should be shown on the settlement statement, payable to the title company, and that seller will sign all documents in the title company's office.

Under the facts you have presented, you have asked the committee to opine on the following questions:

1. Can the title company be retained to represent the seller in the real estate transaction if the title company is not the settlement agent named in the contract?

    a. If so, does representation by a title company put the named settlement agent in the same position as if the sellers were represented by an attorney, i.e., does this representation by a title company relieve the seller of any charges by the settlement agent except those disclosed and agreed to by the seller?

    b. If the title company can represent the seller, can the fee to the title company on the settlement statement include the preparation of the deed, or should this be itemized separately with the preparing attorney's name?

2. If Attorney complies with the instructions of the title company, is Attorney aiding the unauthorized practice of law and thus subject to disciplinary action?

3. Would the answers be different if the person representing the title company is an attorney who owns or is employed by the title company?

4. Can an attorney acting in his capacity as an owner/employee of a title company ethically perform legal services for clients of the title company, or is he considered to be the same as a non-attorney in his relationship with title company clients? Are the clients considered to be represented by their own attorney in this situation?

The appropriate and controlling rules relative to your inquiry are: Rule 1.5 (b), requiring that fees be adequately explained to the client; Rule 5.4 (a) which prohibits a lawyer from sharing fees with a nonlawyer; Rules 5.4 (b) and (d) which generally prohibit a lawyer from practicing law as an employee of a corporation owned or controlled by nonlawyers; and Rule 5.5 (a)(2), stating that a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The committee has previously opined, in the context of a real estate closing, that absent an agreement with or forewarning to the seller or seller's attorney, it is improper for a closing attorney engaged by the purchaser to impose certain fees on the seller. LEOs 425, 647, 878, 911,[1] 922, 927, 1177, 1228, and 1346.

Your inquiry raises the question of whether these opinions apply if the seller is represented by a lay title company as opposed to a licensed attorney. The conclusion reached in these opinions was not based, however, on whether the seller was separately represented. As we stated in LEO 1346, "if purchaser's attorney undertakes to perform those functions on behalf of the seller, the fees for the services first must be adequately explained to the seller who must then, after consulting with his own attorney, consent to the charge before it can be imposed on the seller." LEO 1346 (1990). The committee believes that Rule 1.5 (b)'s requirement that fees be adequately explained to a client would require advance notice and agreement by the seller, *even if the seller has not engaged independent counsel*. In that case, the closing attorney would be representing the seller as well as the purchaser. *Pickus v. Virginia State Bar*, 232 Va. 5, 348 S.E.2d 202 (1986)(When a lawyer acts as a closing or settlement attorney and no other lawyer is involved, the closing or settlement attorney represents all the parties and, in this limited sense, all the parties are his clients). Regardless of whether the title company is authorized to represent the seller, the seller must consent to the charges imposed by the closing attorney. This requires notice to the seller that he or she will be charged for certain fees or costs by the clos-

1 It is no longer permissible for the buyer's (or lender's) attorney to charge the seller for the preparation and filing of an IRS Form 1099-S. I.R.C. § 6045 (e)(3). This provision overruled, in part, LEOs 911, 922 and 927.

ing attorney sufficiently in advance of the closing. The purpose is to provide an opportunity for the seller, if he or she chooses, to avoid the imposition of charges for the performance of certain ministerial functions. LEO 1228.

In the companion opinion issued by the Standing Committee on the Unauthorized Practice of Law, that committee determined that the lay title company which is the subject of your inquiry could not lawfully undertake a legal representation of the seller. UPL Op. 197 (2000). The UPL committee opined that no employee of the title company is authorized to give legal advice to the seller nor prepare on the seller's behalf legal instruments affecting the title to real estate such as a deed transferring title to the purchaser. **Id.** Therefore, the UPL committee concluded that the closing attorney may regard the seller as unrepresented by independent counsel. This means, for example, that the closing attorney may communicate directly with the seller to obtain consent regarding the fees and costs the closing attorney intends to charge to the seller without violating Rule 4.2 of the Virginia Rules of Professional Conduct.[2]

As to your second inquiry, if the closing attorney complies with the instructions of the title company, the committee believes that the closing attorney would be assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. Rule 5.5 (a)(2). In the facts you present, the closing attorney would be disbursing to the title company payment for the preparation of the seller's deed, knowing that the title company is not authorized to practice law. Such conduct, in the committee's opinion, is violative of Rule 5.5 (a)(2).

With regard to your third and fourth inquiries, the committee agrees with the distinction drawn by the UPL committee in UPL Op. 197 between a lawyer who is an employee of the title company as opposed to a lawyer in private practice who simply owns the title company. If the seller were represented by a licensed attorney in private practice and that attorney also owns the title company, the attorney could properly advise the seller and prepare legal instruments on seller's behalf, subject to the ethical obligations discussed in LEO 1564 concerning lawyer-owned title companies. In contrast, if the attorney owns the title company but is working not as the seller's private attorney but on behalf of the title company, then that attorney should not be treated by the purchaser's attorney as representing the seller. Only an attorney engaged in private practice specifically retained by the seller may undertake legal representation of the seller. Similarly, if the licensed attorney is employed directly by the title company, and subject to its control, it would not be proper for the lawyer to provide legal services to customers of the title company. Rule 5.4 (a) prohibits the lawyer from sharing legal fees with the title company. Rules 5.4 (b) and (d) generally prohibit a lawyer from providing legal services or practicing law within a corporation owned by nonlawyers. Since the title company is not authorized by law to serve as the seller's legal representative at closing, the committee believes that the seller should not be regarded as represented by their own counsel.

Committee Opinion
June 26, 2000
Corrected October 29, 2000

LEGAL ETHICS OPINION 1746

PRACTICE ISSUES FOR FORMER COMMONWEALTH'S ATTORNEY NOW IN PRIVATE PRACTICE (RECONSIDER LEO 1243)

You have presented several hypothetical situations in which an attorney is engaged in the private practice of law after having served as a Commonwealth's Attorney. Under the facts you have presented, you have asked the committee to opine as to whether the attorney can accept employment under the following circumstances:

1. A prospective client, who is a convicted felon, asks the attorney to petition the court for permission to possess a firearm. The prospective client was convicted of a felony prior to the attorney's term as Commonwealth's Attorney and was also convicted of possession of a firearm after a felony conviction during the attorney's term as Commonwealth's Attorney.

2. A prospective client asks the attorney to defend him on a charge of possession of a felony after a felony conviction. The underlying felony conviction occurred during the attorney's term as Commonwealth's Attorney.

3. A client seeks the attorney's representation in defense of driving after having been declared an habitual offender:

   a. The client was declared an habitual offender by court order during the attorney's term as Commonwealth's Attorney;

   b. The client was declared an habitual offender in another jurisdiction, but one of the predicate offenses was a conviction in the jurisdiction where the attorney was serving as Commonwealth's Attorney; or

   c. The client was declared an habitual offender under the law wherein the declaration process was handled exclusively by DMV administrative procedures.

4. A client who is an habitual offender asks the attorney to petition the court to have the client's operator's license restored:

   a. The client was declared an habitual offender by court proceedings in the jurisdiction where the attorney served as Commonwealth's Attorney;

2 In representing a client, a lawyer shall now communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

b. The client was declared an habitual offender by court proceedings in another jurisdiction, but one of the predicate offenses was a conviction in the jurisdiction where the attorney once served as Commonwealth's Attorney; or

c. The client was declared an habitual offender by DMV.

5. a. A client seeks the attorney's representation in defending a charge of DUI, which is a second or subsequent offense, and one or more of the prior convictions occurred in the jurisdiction where the attorney served as Commonwealth's Attorney; and

b. Similarly, a client seeks the attorney's representation in defense of a crime, which is a second or subsequent offense, and one or more of the prior offenses occurred in the jurisdiction where the attorney served as Commonwealth's Attorney.

6. The attorney served as Commonwealth's Attorney until January 1, 2000. A client is charged with a criminal offense alleged to have occurred prior to January 1, 2000, in the jurisdiction where the attorney served as Commonwealth's Attorney, and

a. The alleged crime was reported to and/or investigated by a police agency prior to January 1, 2000, but neither the complainant nor the investigative agency filed a report or consulted with the Commonwealth's Attorney's office during the attorney's tenure; or

b. The alleged crime was neither reported nor investigated until after January 1, 2000.

7. The attorney, while Commonwealth Attorney, prosecuted the defendant for one offense. The same defendant would like the attorney, now in private practice, to represent him in a new, unrelated case. The prior conviction, while not pertinent to the trial, could come in during the sentencing phase of the proceedings.

The appropriate and controlling disciplinary rules relative to your inquiry are Rules 1.6 and 1.9. Those rules state, in pertinent part, as follows:

RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program; or

(5) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3, but only if the client consents after

consultation. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client. Under this paragraph, an attorney is required to request the consent of a client to disclose information necessary to report the misconduct of another attorney.

RULE 1.11 Successive Government and Private Employment

(b) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

In determining whether a former prosecutor may represent a private client free of any conflict of interest, that attorney must resolve two issues: whether the new representation involves a prohibited transition from public to private practice and whether the attorney has received any pertinent information that he is required to keep confidential. Both of these hurdles must be cleared for the attorney to accept the new private representation.

When determining the permissibility of a private representation, the former prosecutor should begin with Rule 1.11(b), which governs the potential conflicts of interest that may arise for an attorney who has moved from public employment to private practice. Specifically, Rule 1.11(b) states, in pertinent part, that, unless otherwise permitted by law, "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation." This rule, effective since January 1, 2000, is similar, but not identical, to its predecessor, DR 9-101(B), which stated that "a lawyer should not accept private employment in a matter in which he had substantial responsibility while he was a public employee unless the public entity by which he was employed consents after full disclosure." Rule 1.11(b) differs from that earlier rule in three ways: 1) it replaced the former, "in which he had substantial responsibility" with "participated in personally and substantially;" 2) it replaced, "in a matter," with "in connection with a matter;" and 3) it changed the curative consent requirement so that rather than requiring it from just the public entity who was the employer, consent is now needed both from the government agency and the new private client.

This committee rendered a number of opinions applying DR 9-101(B) specifically to former Commonwealth's Attorneys with private clients. *See*, LEOs 285, 303, 604, 702, 1012, 1241, 1243 1371, and 1570. For several reasons, those opinions provide little guidance for resolving the application of Rule 1.11(b) to your hypothetical scenarios. First, Rule 1.11(b) expanded the potential for conflicts by moving to the "in connection with a matter" test. Thus, the opinions interpreting the former, narrower, test would not be instructive for resolving your questions. Second, all of those former opinions, except for 1570, rejected the possibility of curing any "public-to-private" conflicts via consent. As the new Rules for Professional Conduct do include a new, precise consent option in Rule 1.11(b), most of the former opinions, again, will not prove instructive for your hypothetical scenarios. This Committee expressly opines, in line with LEO 1570, that consent obtained pursuant to the curative provision of Rule 1.11 (b) will cure any conflict of interest arising under that subsection.

Each of your scenarios involves two proceedings regarding a defendant: one case in the past involving the Commonwealth Attorney's Office followed by a new case with an attorney formerly from that office now representing the private client. To resolve for each scenario whether or not the new, private case creates a conflict of interest under Rule 1.11 (b), two questions must be addressed. First, is the attorney representing the new client "in connection with a matter" from the attorney's work as prosecutor? If so, the second question to resolve is whether the attorney had been "personally and substantially" involved in the prior case.

As to the first question regarding "in connection with a matter," Rule 1.11 (e) defines "matter" to include,

> "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and . . . any other matter covered by the conflict of interest rules of the appropriate government agency."

As mentioned above, the new rule does not simply trigger conflicts where the private client is represented in the same matter, but rather "in connection with" the same matter. That phrase is not defined in the rule, nor is its significance specifically addressed in the comments to Rule 1.11. However, Comment 3 to that rule does suggest that in identifying potential conflicts of interest under this rule, two competing interests should be weighed: the risk that the "power or discretion vested in public authority might be used for the special benefit of a private client" versus the need not "to inhibit the transfer of employment to and from the government," (thereby impairing the government's ability to attract qualified attorneys). That careful balance will have to be applied on a case-by-case basis in resolving these "public-to-private" conflicts. This committee opines, as guidance for that balance, that a conflict should be found not only where the same litigation is involved but also

where the same issues of fact involving the same parties and the same situation are involved. *See*, ABA Formal Opinion 342 (1975). Therefore, the Committee finds sufficient factual nexus to trigger Rule 1.11 in scenarios 1-6 because in each situation, the former proceeding and the new proceeding share the same parties and some of the same significant facts, with the latter proceedings dependent upon the prior. In contrast, in scenario 7, the committee does not find sufficient factual nexus to trigger Rule 1.11. While the prior conviction in that scenario may be addressed in the sentencing phase of the new proceeding, that new matter shares no facts with the no proceeding; they are not interrelated.

Where the private attorney's new representation is in connection with a matter from his previous public employment, he then needs to determine whether, during that public employment, he was "personally and substantially" involved in the matter. That determination should lead to fewer conflicts of interest than under the previous DR 9-101 standard, which contained no reference to personal involvement. Thus, under the new standard, the fact that a case was pending during an attorney's public tenure would not alone trigger a conflict. The determination of this issue would rest upon the attorney's degree of involvement. As mentioned above, one purpose of Rule 1.11 is to avoid the risk of abuse of a public position for the benefit of a private client. Thus, in determining whether an attorney was "personally and substantially" involved in the public matter, consideration should be given to whether his involvement was of such a degree as to provide the opportunity for that potential risk. The scenarios as presented lack factual detail regarding the level of involvement of the attorney in each matter. Accordingly, the committee declines to determine whether that involvement was personal and substantial.

If the attorney properly determines that his new private representation is not in connection with a matter in which he had been personally and substantially involved during public employment, then he has no conflict under Rule 1.11 (b). However, if his new employment does have that conflict-triggering connection, he must either decline the representation or seek consent, after consultation, from both the new client and the former employing public entity. Such consent will have the effect of "curing" the conflict, and allowing the representation.

Even where the former prosecutor's private representation does *not* create a conflict under Rule 1.11(b), that attorney should consider one additional potential source of conflict: the receipt of pertinent confidential information. Rule 1.6 establishes a general duty to maintain a client's confidences, even after the end of the representation. Normally, under Rule 1.6, an attorney may seek client consent to use or disclose confidential information. However, in the present context, the former client is the Commonwealth; thus, such consent is not available. *See*, LEOs 1241, 1261, and 1266. The former prosecutor in private practice must also review Rule 1.11(b), which prohibits using confidential government information acquired about a person to the material disadvantage of that person. That provision has no curative consent provision. Thus, the former prosecutor can only accept the private representation if he has no confidential information acquired while in public office that is pertinent to the new matter.

The Committee notes that the scenarios as presented lack detail regarding the content of confidential information received in each instance of public representation. Accordingly, the Committee declines to determine whether the attorney would be prohibited from accepting the new representations due to a prior receipt of pertinent confidential information.

In sum, the former prosecutor in your scenarios must make two determinations before accepting any of these private representations: whether the new representation is in connection with a matter in which he personally and substantially participated while in public office and whether he received any information while in public office that, while pertinent to the present case, must be held confidential. Such determinations are fact-specific and must be made on a case-by-case basis in line with the analysis of Rules 1.6 and 1.11, outlined above.

Committee Opinion
August 30, 2000

LEGAL ETHICS OPINION 1748

REPRESENTATION OF CRIMINAL CLIENT ON A CONTINGENCY FEE BASIS IN A CIVIL FORFEITURE PROCEEDING TO RECOVER PROPERTY SEIZED IN CONNECTION WITH CRIMINAL CHARGE

You have presented a hypothetical situation in which a criminal defendant was charged with possession with intent to distribute controlled substances. During the course of the defendant's arrest certain property was seized that was alleged to bear substantial connection with the illegal sale or distribution of controlled substances and subject to being condemned pursuant to the Code of Virginia.

Under the facts you have presented, you have asked the committee to opine as to whether an attorney is able to represent the criminal defendant on a contingent fee basis in a civil forfeiture proceeding to recover the seized property.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 1.5(c) and Rule 1.5(d)(2) of the Virginia Rules of Professional Conduct, which provide:

> **Rule 1.5 (c):** A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the

client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Rule 1.5 (d): A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(2) for representing a defendant in a criminal case.

The committee has previously opined that contingent fees are generally ethically permissible in any legal matter that generates a res from which the fee can be paid, unless otherwise prohibited. One purpose of a contingent fee arrangement is to encourage a lawyer to accept a case which carries inherent risks of nonpayment of legal fees. LEOs 1461, 1606, 1641, 1705.

In the facts you present, the committee believes a contingent fee agreement would not be ethically improper since: (1) the proceeding is actually a civil forfeiture proceeding not a criminal proceeding; (2) it involves a res out of which a contingent fee could be paid; and (3) there exists an uncertainty as to the outcome of the legal matter.

Committee Opinion
August 28, 2000