

## Legal Ethics Opinion No. 1415

Commonwealth's Attorney--Communication With Adverse Parties--  
Criminal Law: Prosecuting Cross-Warrants When the Victim/Witness  
Called by the Commonwealth is also a Defendant to be Prosecuted  
by the Commonwealth

You have presented a hypothetical situation in which there is a dispute and alleged fight involving four women, three of whom are involved with cross-warrants. Co-defendants #1 and #2 are both victims and defendants. Co-defendants #2 and #3 are both victims and defendants.

You have asked the committee to opine whether, under the facts of the inquiry, a Commonwealth's Attorney can or should prosecute a cross-warrant situation where the victim/witness called by the Commonwealth is also a defendant to be prosecuted by the Commonwealth.

The committee believes that no attorney-client relationship exists either between the victim/witness and the prosecutor or between the defendant and the prosecutor. Thus, the committee further believes that the ethical provisions related to conflicts of interest are inapplicable to the circumstances you describe.

The committee is of the opinion, however, that the applicable Disciplinary Rules related to your inquiry are DR 8-102(A)(1) which states that a prosecutor in criminal litigation shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; DR 8-102(A)(2) which precludes a public prosecutor from inducing an unrepresented defendant to surrender important procedural rights; DR 7-103(A)(1) which precludes a lawyer from communicating with a represented adverse party in that matter without the prior consent of the lawyer representing the party or unless he is authorized by law to so communicate; and DR 7-103(A)(2) and (B) which require an attorney who is dealing with an unrepresented individual to refrain from giving advice to that person and from stating or implying that the attorney is disinterested in the matter at hand.

In addition to the applicable ethical provisions, the committee directs your attention to the Commonwealth's Attorney's statutory powers which afford a fair amount of discretion in the prosecution of Class 1, 2, and 3 misdemeanors. 15.1-8.1(B), Code of Virginia. Thus, assuming the matters in question constitute misdemeanor charges, the decision to prosecute appears to be within the broad discretionary powers granted the Commonwealth's Attorney by statute and the Code of Professional Responsibility.

The committee has earlier opined that where an individual was a defendant in one matter, represented by an attorney, and was simultaneously assisting police in other drug investigations which resulted in charges against a second defendant, it was improper for the second defendant's attorney to communicate with the first defendant without having first received consent from the first defendant's attorney. See LEO #1281.

In the facts you posit, the committee is of the opinion that, if the Commonwealth's Attorney believes that each cross-warrant is

supported by probable cause, he can ethically prosecute each despite the likelihood that he will alternately be supporting and attacking the individual's credibility, since he owes no duty of loyalty to the victim/witness/defendant. Nevertheless, the committee cautions that issues related to the defendants' constitutional rights may be pertinent to the prosecutor's decision to prosecute if the individual's testimony as a victim/witness would impermissibly infringe upon her constitutional protection against self-incrimination.

The committee opines that, where the victim/witness/defendant is represented by counsel, any communication conducted between the prosecutor and the victim/witness who is a defendant in a cross-warrant would be improper and violative of DR 7-103(A)(1) unless the prosecutor had received prior consent from the individual's defense attorney. Where the witness is also an unrepresented defendant in a cross-warrant, the committee is of the opinion that the prosecutor must affirmatively inform the defendant that the prosecutor's interests in that matter are adverse to the defendant's. Furthermore, the committee cautions that the prosecutor must constantly guard against any violation of DR 8-102(A)(2) which prohibits a prosecutor from inducing an unrepresented defendant to Legal surrender important procedural rights in the cross-warrant.

The factual assessment required in order to determine whether or not the Commonwealth's Attorney is required (should) to prosecute the cross-warrants you have described is beyond the purview of this committee.

Committee Opinion  
June 13, 1991